

FROM HARVESTER TO WORK CHOICES¹

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ABSTRACT

This paper argues that the theoretical and contractual basis of employment at the Sunshine Harvester Factory in 1907 were very similar to those which motivate and guide the Work Choices Act 2005. Both view employment as private and rely on individual bargaining without concern with the equity of power between parties. This paper provides a detailed insight into wage fixing in the Harvester plant by using the evidence provided by George McKay, brother of H. V. McKay, in the transcript of the Harvester case.

INTRODUCTION

The Work Choices Act is not new, it is post modern; it borrows from the past, reinvents the old and repackages with new hype and linguistic vigour. This paper argues that the philosophic underpinning of Work Choices and its invocation of economic theory are not original; the values and objectives of free market relations upon which it is based are firmly and even crudely located in nineteenth century political economy. The practice of industrial relations which it promises is neither new nor original. Placing the emphasis on the intimate bargaining between employer and individual employee is a thing of the past; and nowhere is this more vivid than in the industrial relations which prevailed in 1907 at the Sunshine Harvester Agricultural Implement Company owned by H. V. McKay and managed by his brother George McKay. In the landmark industrial relations case of the Harvester Living Wage, George McKay gave Justice Higgins a vivid, articulate and detailed account of how workers were paid. In his words, workers were paid ‘according to the value of the work they can do’.¹ There were no complex relativities or comparisons, no legal minimums; it was a simple and highly flexible system for setting wages.

We argue that the rhetoric and values underpinning the justification of Work Choices go to the simple calculations and interactions apparent in George McKay’s

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detailed account of his approach to the setting of wage rates. As in 1907 there are no compulsory or formal processes of negotiation and interaction between employers and employees under Work Choices. While government spokesmen have argued the inherent value in the 'simple and flexible' negotiations between and employer and employee there are no prescriptions as to how these negotiations will actually unfold.² While the Office of the Employment Advocate is meant to scrutinise the content of Australian Workplace Agreements in relation to minimums there is no requirement to establish meaningful interaction between the parties beyond a vague prohibition of coercion.³ This is because Work Choices regards interaction between employer and employee as private. Indeed, even the outcomes of individual bargaining are largely private and hidden from public scrutiny. Privacy, incidentally, was a strong feature of the payment of wages at the Harvester plant in 1907.⁴ Work Choices, like George McKay before it, regards labour simply as a factor of production, a commodity in the process of manufacturing.⁵ In contrast, the most enduring challenge to employers like McKay of the Harvester case and judgement was the contextualisation of labour as a social activity and male workers as living human identities with even quite specific familial responsibilities.⁶ Work Choices, in its reassertion of work as a purely economic transaction, now challenges and attempts to reverse Harvester.

THEORETICAL CONTEXT AND ARGUMENT

The Harvester decision stands at a fork in the road on the path to modernity. Higgins was not merely considering the matters before him as one specific case among many. As the transcripts show, Higgins saw the Harvester case as one from which he would extract principles capable of being extended to other cases and applied with some degree of uniformity and consistency.⁷ It is not surprising that Higgins saw the case in such terms, because the arguments put on behalf of the employer presupposed a trajectory towards modernity entirely at odds with the trajectory implied by Parliament in the Excise and Tariff Act. The issues at stake were not just abstract and intellectual: they also involved matters of power and process.

Considered from this perspective, the English tradition was clearly important. That tradition, however, was shaped by class. In terms of workplace relations, English law was based on the idea of a common law contract. Once the relationship was conceived in this manner, the doctrine of privity of contract came into play. English law, then, saw contracts as agreements between equal and autonomous parties. It is

important, however, to understand in what sense parties were held to be equal. What this concept really meant was that the law would apply equally to all. This idea was crucial to the development of the Rule of Law. The law, then, did not concern itself with the reality of whether or not parties actually did have anything approximating equality of bargaining power. There are more than shades of this logic embedded within Work Choices. Once a formal ‘agreement’ was reached, the common law would only set aside such a contract in fairly extreme circumstances: a party would have to prove a singular act of duress, which effectively amounted to a direct threat to the person in order to induce agreement. It was irrelevant that a party was effectively compelled to agree to terms of a contract because of economic factors or simply an inferior bargaining position. Social or contextual circumstances that would clearly have a bearing on the decision-making capacity of a particular party were excluded from consideration. Here, as in the doctrine of privity of contract itself, the law only addressed the rights and obligations flowing between the parties themselves. Contextual matters were viewed as parameters that any rational party would factor into the bargaining process. Above all else, employment was a private act and not a social act.

From the 1870s, and especially since the publication of Alfred Marshall’s *Principles of Economics* in the 1890s,⁸ the private nature of employment relationship was given new vigour. Within this framework labour was merely a factor of production that was subject, like all other inputs and commodities, to the impersonal forces of supply and demand. Supply and demand, moreover, were structured according to the rational calculation of all individual market participants of their own opportunity cost profile.

It was these two principles — the doctrine of privity of contract and management’s prerogative to exercise its rational economic judgement of each factor’s worth — that informed the testimony of George Mc Kay in the Harvester case. According to the principles of the marginalist revolution in economics, the concept of ‘fair and reasonable’ wages did not arise. What was rational, in the sense of being derived from an estimate of marginal productivity, was fair. How could it be otherwise when the model promised an outcome for the entire economy that was allocatively efficient? Each individual was presumed to be rational, and the overall social outcome was merely the secondary and derivative aggregation of each individual participant’s rationally calculated equilibrium. There was an inbuilt

systemic tendency towards social equilibrium, but this systemic tendency was based on precisely the kind of calculations that McKay repeatedly invoked from the witness stand during the protracted duration of his testimony. George Mc Kay insisted that he, and he alone, was in a position to determine what amounted to appropriate — and by implication fair and reasonable — wages. His invocation of managerial prerogative, however, stood in opposition to the requirement laid down by Parliament in the Excise and Tariff Act that he pay wages that were ‘fair and reasonable’ as determined by an independent Court. It was the judgement of Higgins, driven by his concern for the total lives of the workers and for general social well-being that was to displace the prerogative of McKay. In his search for the meaning of ‘fair and reasonable’, Higgins would look to factors beyond the production process: he would look to patterns of consumption evident in the life of families, and he would balance this against the general cost of living. The stage was set not just for a legal and political struggle, but also for a discursive struggle; the struggle over ideas and values. At stake was the kind of modernity that would come to characterise Australia’s emergence as a nation in the twentieth century. Work Choices however represents a return to the privity of contract and managerial prerogative.

GEORGE MCKAY AND INDUSTRIAL RELATIONS AT THE HARVESTER PLANT

A key aspect of the Harvester case was the evidence provided by George McKay, Factory Superintendent, in examination, cross examination and re-examination. Although the case involved 49 witnesses none provided the detail of wages and wage fixing and labour classification as that offered by George McKay. He was in the witness box for 5 of the 19 days of the hearing and his testimony made up 170 of the 647 pages of transcript. In explaining the manner in which wage bargains were struck for individual workers or for distinct classifications of workers McKay asserted his right to observe and judge. In his evidence the power of the employer, the unregulated and private nature of individual bargaining, is laid bare. The Sunshine Harvester Company avoided where it could any regulation of its employment relations and even went so far as to relocate from Ballarat to Sunshine in order to evade the determinations of a Wages Board.⁹ This was a company that regarded the privity of the employment relationship sacrosanct. There were few minimum standards the company had to abide by while there was no prescription as to how negotiations over the employment contract might unfold. In this unregulated labour market the

employer and employee were free to 'work out the workplace arrangements that [might] best suit them'¹⁰ and McKay is at no pains to disguise how this was done.

Wages at the Sunshine plant were set simply and flexibly. The method of settlement simply involved McKay telling workers what their wage rate would be. This was calculated through his observations.¹¹ In setting wages George McKay stated bluntly, 'I rely on my own judgement'.¹² This judgement was not transparent but was capricious as the following illustrates:

Sutch: I come now to carpenters....[There is] One at 9/6. What is he?

McKay: Carpenter – an ordinary carpenter.

Sutch: Nothing special about him?

McKay: He is rather nice looking.

Sutch: There are 19 others. Are they as nice looking too at 9/- a day?

McKay: According to the average rate.

Sutch: How is [it] they only get 9/- a day if they are as good looking as the man who gets 9/6?

McKay: We do not go by the looks, we go by the work. We consider the man at 9/6 better than the men to whom we pay 9/-.¹³

In another example Sutch identifies a worker paid 8/6 per day and asks; 'What is the matter with him?' In reply McKay states simply that his 'capacity is not as great as the 9/- men'. This difference was not due his being an improver, or elderly or slow and infirm but was simply due to the fact that in McKay's opinion 'He is a man not so much skilled as the others and doing simpler work'.¹⁴ This is indeed the commodification of individual worth.

Wages were set by McKay on the basis of degree of skill, the value of the work, the character of the work (whether it was easy or hard) and the capacities of individual men. McKay asserted that he liked 'to pay him [a worker] what he is worth'¹⁵ and was unabashed in saying; 'In fixing wages I have endeavoured to get labour at the cheapest price I honestly could'.¹⁶ Of course, as Frank Duffy, the main union advocate, pointed out this was no basis for fairness. Cheap wages, however honestly set, may not necessarily be fair and reasonable.¹⁷ Indeed, Duffy went on to argue that the cheap wages paid at Sunshine should be increased if the tariff protection were awarded as part of a share in windfall profits. Higgins rejected this argument.¹⁸

Another way in which the Sunshine Harvester Company was able to justify wage differentials was through a highly complex system of classifying workers. In this factory the skilled tradesmen were divided into journeymen and improvers, the less skilled into helpers, assistants and strikers and the apprentices into bound and unbound. The unskilled were generally referred to as labourers. There are a number of vague definitions of these classes of workers given in the transcript as the union advocates and even Higgins endeavoured to clarify the underlying principles in such fine differentials. In the case of the skilled tradesmen, journeymen were those at the peak of their skill while improvers were men who had recently finished their trade but were less experienced.¹⁹ This, however, was a loose definition for there were often men of mature ages who were still classified as improvers. This concerned Higgins and led the unions to argue that this was simply a convenient way in which to lower the wages of tradesmen.²⁰ There were even more problems with the terms helpers, assistants and strikers.²¹ In addition to the apprentices there were also 'boys' employed as unskilled juniors whose work and wages varied considerably. McKay even went so far as to say 'a man was an animal and a boy was an animal but a boy was not a man'.²² Here the language, used amusingly, nevertheless conveys an unfortunate but perhaps implicit regard for labour.

A further measure of difference between workers was the actual nature of the tasks upon which individual workers were employed. In this way a difference between skilled workers of the same trade or unskilled labourers employed at similar or even the same activities could be made. Was the work easy or hard, was it light or heavy, was it repetitious or did it require judgement or dexterity? McKay had again a vast lexicon of ways of threading differences between workers. McKay was able to argue a difference in the nature of the work of individual workers could be graded according to size of the saws they used, the size of the engines they supervised and even the weight of the hammers they wielded.²³

These distinctions were also vital in negating any suggestion that wages at the Sunshine plant should be compared to those paid at other agriculture implement, woodworking or engineering enterprises. The work at McKay's was unique; it was simplified, standardised, templated, repetitious and could, as often as not, be done by boys. In fact, in some cases the machines the men minded were almost more capable than the men who operated them.²⁴

The significance of this dismissive view toward labour is that the labour market and going rates for tradesmen, improvers or labourers could be ignored. So too could the so-called union rates. McKay refused to recognise them even when he was sometimes paying them.²⁵ In the setting of wages George McKay was trying to quarantine the Sunshine plant from the broader labour or industry market. His was truly an enterprise specific approach to wage fixing. In his view, wages could only be set at the workplace level, they could only be set in reference to individual worker characteristics and capabilities and the only person able to see this level of detail, who could appreciate the value of worker effort, who had mechanisms for measuring such worth and who was in a position to compare the effort of one human being over that of another was the manager. Implicit in the McKay perspective is the notion that only management had the capacity and the power and therefore right to set wages.²⁶

Finally, it is also more than apparent that the McKay case was not comfortable with or interested in the issue of cost of living calculations. At first William Schutt, the employer advocate, prevaricated over requests by Higgins to address the issue of cost of living²⁷, later he tried to ignore the significance of this evidence.²⁸ Even when he cross examined witnesses giving evidence about their costs of living he focused on wage rates, union rates and Wages Board determinations; anything but the detail of the cost of daily life. He did not contest any of the cost of living evidence brought to the hearing.²⁹ This was not an unreasonable strategy. The unions were also ambivalent toward producing this type of evidence. Initially the unions argued for a share of profits and explicitly rejected the notion of a living wage. Cost of living evidence was canvassed and insisted upon by Higgins.³⁰ The employer reluctance to address cost of living, however, has a deeper significance. The employer argument against cost of living was essentially that a consideration of this changed the nature of the employment relationship.³¹ Acknowledging cost of living as a basis of wage setting meant the employer would have to view the employment relationship not simply as an economic factor of production but as also having a broader social dimension. McKay's advocate did not go anywhere near such an admission because this would force the employer to extend his responsibility. In terms of the McKay argument it would have been impossible to employ men at the 'cheapest' rates if wage fixing needed to take social need into account.

WORK CHOICES AND INDIVIDUAL BARGAINING

Ostensibly the purpose of Work Choices is to put power back into the hands of the 'employer and employee'.³² Implicit in this is a desire to take power away from trade unions and the Australian Industrial Relations Commission (AIRC); institutions which stand outside the employment relationship but which try to control it. In introducing the Work Choices Bill, Kevin Andrews asked 'what's wrong with ordinary Australians being able to enter into agreements with their employees and having the flexibility to do that?'³³ In asserting the right of individuals to bargain reflects two basic assumptions; firstly that there is equity between the parties in the employment relationship to negotiate and, secondly that there is equity in a wide range of non-standardised and diverse wages outcomes and employment relationships. Both are based on the awkward logic of the privity of contract. The notion that individuals should have the right 'to negotiate their own working arrangements at the workplace level'³⁴ certainly sounds 'simple' but is it likely to produce fair outcomes? The problem is Work Choices does not concern itself with the reality of the distribution of power in an employment relationship. The Act is predicated on the assumption that all parties have the same degree of influence in the relationship, the same skills, the same clarity of purpose. Indeed it is based on the assumption that a real employee will negotiate with a real employer and not a corporate organisation.

The selling of this as reality was based on assurances of protections of basic wages and conditions, that these reforms were modern and the award system rigid, and that the nation needed flexibility in its workplace relations to grow.³⁵ Indeed flexibility was one of the most vague but oft repeated mantras of this reform; flexibility was a two-way street in that it would provide benefits to both employers and employees at the same time.³⁶ Flexibility was in itself fair because it allowed diversity of outcome. Andrews even went so far as to argue 'Australians should be trusted to have the maturity to reach their own mutually beneficial working arrangements.'³⁷ To question the fairness of the process and outcomes established by Work Choices was to question the very capacity and judgement of working Australians. More importantly, the AIRC system's powers of conciliation and arbitration could also be dismissed as interventionist and unnecessary rather than as an attempt to impose complex concerns about equity. For this reason, although fragments of AIRC processes continue to exist under Work Choices, these are so truncated as to be almost un-useable.³⁸ In their place Work Choices has created a new raft of complex and strangely unreal processes of private mediation, conciliation and

even arbitration³⁹. But the matter of choice remains; the use of these dispute resolution processes must be 'agreed' by the parties and in this way the processes themselves are potential issues of conflict. In addition the new Act also encourages the use of civil courts to resolve disputes between employers and employees⁴⁰ although the timeliness and cost of such an avenue must surely make this unlikely.

In a sense Work Choices has returned the fixation of the terms and conditions of employment to individuals in terms of the content of agreements and in terms of process. In practice neither the content nor the processes of individual bargaining have turned out to be uniformly positive for employees.⁴¹ Work Choices may make possible real interactions between some employees and employers but it is more likely to re-introduce the prerogatives so plainly enjoyed by George McKay. Work Choices has created the danger that employers will not feel the need to negotiate with their employees any more than McKay felt he had to.

CONCLUSION

Even though the Work Choices Act did not create individual bargaining it allows and encourages this on a scale unprecedented since before 1907. Such bargaining is based on a highly limited and specific sense of fairness; employment is simply a contractual transaction for which each individual is equally responsible. However, in the selling of Work Choices there is no admission of the reality of power in bargaining that George McKay made so very apparent in his testimony. Under Work Choices the fiction of individual bargaining goes so far as to ignore the reality that, for a growing number of workers, bargaining will be with organisations possessing expertise, experience and resources in the art of negotiation and dispute settlement. More alarming is the fact that the Work Choices Act increases inequity but hides this behind the semiotic façade of words like choice, flexibility and simplicity as though these were neutral or were terms of natural fairness. On the other hand, when George McKay boasted that 'I rely on my own judgement' in the setting of wages he was not pretending there were any niceties like equity of bargaining or indeed any negotiations at all.⁴² McKay had no pretence of anything nobler than economic self interest.

We argue the reality of the bargaining that is preferred by Work Choices is akin to that which was apparent in the Sunshine Harvester plant in 1907. In this factory wages were highly individualised through the complex classification and

categorisation of every worker. Individual bargaining allows diversity. In addition, there is no evidence of any meaningful interaction between the employer and employee in settling those wages. The wages of individuals were set by the employer. Work Choices makes the mistake of claiming an emphasis on individual workplace relations will be fair without creating any imperative to fairness. Instead, Work Choices will empower another generation of George McKays and will remove the procedures and the protections begun by Higgins in his landmark Harvester judgment a century ago.

¹ *Ex parte H. V. McKay* Transcript of Proceedings in an Application to the Commonwealth Court of Conciliation & Arbitration, Melbourne, October 1907. National Archives of Australia Series C2274P1 (hereafter referred to as Transcript) p. 86.

² K. Andrews, 'Work Choices a New Workplace Relations System' in J. Teicher, R. Lambert & A. O'Rourke (eds) *The New Industrial Relations Agenda*. Pearson. Sydney 2006.

³ See R. Alexander & J. Lewer *Work Choices Update*. Thomson. Melbourne, 2006. p. 17.

⁴ Transcript: p. 194.

⁵ S. Burrow 'Work Choices: the re-commodification of labour' in Teicher *et al* p. 19-27.

⁶ *Ex parte H. V. McKay* Decision. Commonwealth Arbitration Reports Vol. 2 1907 pp 1-38.

⁷ Transcript, p. 50.

⁸ A. Marshall, *Principles of Economics*. Macmillan, London 1920.

⁹ Transcript: pp 58; 132-133.

¹⁰ Andrews Work Choices, 2006 p. 11.

¹¹ Transcript, p.195

¹² Transcript, p.189.

¹³ Transcript, p.214.

¹⁴ Transcript, p. 215.

¹⁵ Transcript, p. 213.

¹⁶ Transcript, p. 133.

¹⁷ Transcript, p. 134.

¹⁸ W. M. Robbins & I. Harriss 'A Theatre of Words and Wages: reading the script of the Harvester hearing' forthcoming in *Labour History* November 2007.

¹⁹ Transcript, p. 62-63.

²⁰ Transcript, pp. 63; 71; 109.

²¹ Transcript, p 222.

²² *Ibid*.

²³ Transcript, pp. 79-82; 90-92; 95.

²⁴ Transcript, p. 35.

²⁵ Transcript, p. 217.

²⁶ Transcript, pp. 609; 613.

²⁷ Transcript, pp. 49; 256; 490.

²⁸ Transcript, p. 517.

²⁹ Transcript, pp. 501-517.

³⁰ Transcript, pp. 2-9; 333.

³¹ Transcript, pp. 193; 213; 593; 624.

³² Andrews, Work Choices, 2006. p.11.

³³ Hon. K. Andrews. *Hansard*. House of Representatives, 10 Oct 2005. p 54.

³⁴ Hon. K. Andrews. *Hansard*. House of Representatives, 10 Nov 2005, p 5

³⁵ Andrews, *Hansard* 10 Oct 2005, pp 53-54.

³⁶ Hon. Mr Truss. *Hansard* 10 Oct 2005, p 45.

³⁷ Andrews, *Hansard* 10 Nov 2005. p 5.

³⁸ Workplace Relations Amendment (Work Choices) Act 2005 Division 4 of Part 13.

³⁹ Work Choices, S 696; Division 2 of Part 13.

⁴⁰ Work Choices, S 693.

⁴¹ R. Price 'Regulatory Complexity in Australian Retail Industry Australian Workplace Agreements' in Proceedings ACREW/KCL Conference, H. De Cieri, A. Bardoel, R. Barrett, D. Buttigieg, A. Rainnie, K. McLean (eds) 'Socially Responsive, socially responsible approaches to employment and work. July 1- 4 2006, Monash University.

⁴² Transcript, p. 199.