The Legacy of Justice Higgins: Seeking a True New Start for all Job Seekers and workers

2017 *Rerum Novarum* Oration

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I join with you in acknowledging the traditional owners of the land on which we meet. Tonight, we come to honour and learn from two of the greats in our intellectual tradition – one from the Church and one from the law: Pope Leo XIII who authored or at least caused to be authored the great social encyclical of the Catholic Church – *Rerum Novarum* which was published in 1891; and Henry Bournes Higgins, the Australian judge who decided the *Harvester* case on this day 110 years ago. Judgment was delivered on this day in the Supreme Court building here in William Street Melbourne.

Just to remind you how far we have come: Justice Higgins whom we rightly honour tonight once wrote to an American colleague telling him: 'I have been asked by the Minister for External Affairs and Territories to go up to the Northern Territory and put labour matters straight. The place is in the tropics; and most of the people are Chinese, Japanese and Malays. It is a great problem for Australia; can the place be developed by white labour?'[1] We are now citizens of a proudly multi-cultural, multi-coloured nation which recognises the First Australians and their relationship with the land – a relationship which has often been maintained unbroken especially in the north of Australia despite generations of oppression driven by the *terra nullius* mind-set.

Higgins was not a Catholic. In fact, he was a Northern Irishman, a Protestant whose father was a clergyman in the Church of Ireland. Henry was 19 years old when the family migrated to Australia. He was one of our Founding Fathers. He remained a strong advocate for Home Rule in Ireland. It was probably that advocacy which commended him to some of the Catholic leaders in Victoria and which established his good relations with Archbishop Carr. He attended the 1891 Federal Convention in Sydney which rejected the proposal that the Commonwealth Parliament exercise any power in relation to industrial disputes. Delegates thought these disputes should remain within the exclusive purview of the states. Shortly after the Sydney Convention, Pope Leo XIII published the encyclical *Rerum Novarum*. Some including Bob Hawke and Michael Kirby in recent years have suggested that *Rerum Novarum* had a major influence on the thinking of Higgins. Higgins was later one of the Victorian delegates at the 1897-8 Federal Convention. He proposed that the Commonwealth

[1] Letter of Henry Bournes Higgins to Felix Frankfurter, 16 September 1918

Parliament should have power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. This proposal was carried narrowly by 22-19. Bob Hawke claimed in a 2010 lecture that the 'ground-breaking philosophy of *Rerum Novarum* deeply influenced the thinking and arguments of Higgins who (with Kingston from South Australia) finally won the day.' When the High Court of Australia bench was increased in size from three to five in 1906, Higgins was appointed together with Sir Isaac Isaacs. It was not until 1920 that they would win the day overturning the views of the first High Court judges who had clung to the idea that the new Commonwealth of Australia could operate only if the states maintained their supposed reserve powers and were spared interference by the Commonwealth in the exercise of their governmental functions.

As well as being a justice of the High Court, Higgins was also the President of the Court of Conciliation and Arbitration from 1907-1921. His first case on that court was the decision we celebrate today. It was the case *Ex Parte H V McKay*. The case arose when excises and tariffs were more significant than what they are today. There was an excise imposed on agricultural implements such as the harvesters manufactured by Mr McKay. Under the *Excise Tariff Act 1906*, the excise would not apply to goods manufactured in Australia under labour conditions declared by the court to be 'fair and reasonable'. Higgins had received 112 applications for exemptions from various Victorian manufacturers. He decided to treat McKay as a test case because his 'factory was one of the largest, and had the greatest number and variety of employees; and because his application was to be keenly fought'. Higgins was one of those Irishmen who didn't mind a fight. He was a very single-minded judge. On the High Court, he would often write alone even when he agreed broadly with the decision and reasoning of his fellow judges. Higgins spent 20 days of court time investigating the fairness and reasonableness of the labour conditions for McKay's employees. His inquiry focused on the level of wages paid. He lamented that the Parliament had not given any guidance as to how a judge would determine what was fair and reasonable. Having been a member of the House of Representatives and the Attorney General in the nation's first Labor government, he felt justified in stating his views on the Parliament's failure to be sufficiently precise in formulating legislation since his departure to the bench. He wrote, 'It is to be regretted that the Legislature has not given a definition of the words. It is the function of the Legislature, not of the Judiciary, to deal with social and economic problems; it is for the Judiciary to apply, and, when necessary, to interpret the enactments of the Legislature.'[2] He thought he was being placed in 'a false position', lamenting: 'The strength of the Judiciary in the public confidence is largely owing to the fact that the Judge has not to devise great principles of action as between great classes, or to lay down what is fair and reasonable as between contending interests in the community; but has to carry out mandates of the Legislature, evolved out of the conflict of public opinion after debate in the Parliament.' He saw the risk of being brought 'within the range of political fire'.

[2] (1907) 2 CAR 1 at 3

Having stated his political reservations, he stepped right into the fire. Over the next 14 years he relished the task, though it ended in tears with his resignation as President of the Court of Conciliation and Arbitration. By then, he thought that Prime Minister Billy Hughes had undermined the authority of his court by creating specialist tribunals to deal with particular disputes in particular industries like the coal industry.

In the *Harvester* case, Higgins ruled out from the beginning the spurious argument that a fair and reasonable wage was what the market would bear. Not for him any neo-liberal nostrum such as 'Let the market decide'. He observed, 'The remuneration could safely have been left to the usual, but unequal, contest, the "higgling of the market" for labour, with the pressure for bread on one side, and the pressure for profits on the other.' He said, 'Fair and reasonable remuneration is a condition precedent to exemption from the duty; and the remuneration of the employee is not made to depend on the profits of the employer. If the profits are nil, the fair and reasonable remuneration must be paid; and if the profits are 100%, it must be paid.'

This was his truly revolutionary insight: 'The standard of "fair and reasonable" must, therefore, be something else (than what the market will bear); and I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilized community.' He had invited the barristers at the bar table to propose any alternatives, and they could not offer one. The barristers for the employers were keeping their powder dry. What is often forgotten by the modern advocates of the *Harvester* judgment is that the High Court within the year struck down the decision on the grounds that the *Excise Act* 'was not really a taxation Act at all, but an Act to regulate labour conditions, and as such beyond the competence of the Federal Parliament'.[3] Higgins saw fit to sit on the appeal, and was in the minority with his usual dissenting colleague Isaac Isaacs.

Determining what was fair and reasonable, Higgins had decided to view the task as formulating an agreement not just between one employer and his employees but as a collective agreement – 'an agreement between all the employers in a given trade on the one side, and all the employees on the other'. The first and dominant factor would then be 'the cost of living as a civilised being'. Now remember, these were the days before uniform Commonwealth income tax and before the days of income transfer through the tax system and well before the days of comprehensive welfare payments. There was no social welfare safety net such as exists today, frayed and stretched though it be. Higgins decided that when determining free and reasonable remuneration for the unskilled labourer, he would need to assess the cost of proper food and water, necessary shelter and rest, clothing, 'and a condition of frugal comfort estimated by current human standards'.

The unskilled workers working an 8-hour day were receiving at most 36s. per week (6s. per day and working a six-day week). Higgins set about ascertaining 'the cost of living' for an average male worker with a wife and three children – 'the amount which has to be paid for

[3] Henry Bournes Higgins, 'A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration', *Harvard Law Review*, Vol. 29, No. 1 (Nov., 1915) 13 at 15

food, shelter, clothing, for an average labourer with normal wants, and under normal conditions'[4] He received a lot of evidence from working men's wives which was 'absolutely undisputed'. He noted the rapid rise in rents and meat prices. Explaining the decision eight years later in the *Harvard Law Review*, he wrote: 'Treating marriage as the usual fate of adult men, a wage which does not allow of the matrimonial condition and the maintenance of about five persons in a home, would not be treated as a living wage.'[5] He conceded that the basic wage would then be the same for the employee with no family as for the employee with a large family but that 'It rests on Walt Whitman's "divine average", and the employer need not concern himself with the employee's domestic affairs'.[6]

Even accepting the primary principle enunciated by Higgins, we would all have some difficulty in applying it in the same way today. For example, he explained to his American readers in 1915: 'The principle of the living wage has been applied to women, but with a difference, as women are not usually legally responsible for the maintenance of a family. A woman's minimum is based on the average cost of her own living to one who supports herself by her own exertions.'[7] Concluding his 1915 *Harvard Law Review* article with a fine moral peroration, he enunciated the key principle: 'Each worker must have, at the least, his essential human needs satisfied, and that among the human needs there must be included the needs of the family. Sobriety, health, efficiency, the proper rearing of the young, morality, humanity, all depend greatly on family life, and family life cannot be maintained without suitable economic conditions.'[8]

He was unimpressed with the one-sided nature of employers' valuation of employees. Mr McKay in evidence had stated, 'I pay the men what I consider them to be honestly worth. In fixing the wages I have endeavoured to get labour at the cheapest price that I honestly could.' Higgins observed, 'I can only say that I am not going to accept as final the employer's unchecked opinion as to an employee's worth in wages, any more than I should accept the value of a horse on the word of an intending vendor.'[9] He noted that the agricultural manufacturing industry was not a parasitic industry which could not exist 'except at the expense of the employees, by drawing the life blood from them'. The effect of his decision to increase the daily rate for the unskilled worker from 6s to 7s would 'probably be merely that (the employer) must elect between paying wages according to the Excise standard and paying the Excise duties'.[10] He was later to claim that the increase for most workers was from 5s.6d to 7s, a wage rise of 27%. Nowadays his critics claim that such a steep wage rise, if it had succeeded the High Court challenge which it did not, would have simply placed large numbers of unskilled workers on the dole queue.

[4] (1907) 2 CAR 1 at 5
[5] Henry Bournes Higgins, 'A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration', *Harvard Law Review*, Vol. 29, No. 1 (Nov., 1915) 13 at 16
[6] Ibid
[7] ibid, 20
[8] Ibid, 38-9
[9] (1907) 2 CAR 1 at 14
[10] (1907) 2 CAR 1 at 18

Even though the High Court struck down the *Excise Act* the following year with Mr McKay refusing to pay the excise duty and defending the action to recover the excise on the basis that the Act was invalid, Justice Higgins still felt vindicated and wrote in the *Harvard Law Review* eight years later that 'the principles adopted in the case for ascertaining a "fair and reasonable" minimum wage have survived and are substantially accepted, I believe universally, in the industrial life of Australia'.[11] Higgins' reasoning on what was a fair and reasonable wage for unskilled workers came to be regarded as a living wage and the basis upon which the Court would arbitrate the settlement of industrial disputes. The living wage became the Basic Wage in Commonwealth and State industrial awards. The Basic Wage was absorbed into total award wage rates in 1965, but re-emerged in awards in 1997 as the Federal Minimum Wage, albeit at a level that called out for the *Harvester* standard to be applied afresh. The *Fair Work Act 2009* renamed that wage as the National Minimum Wage (NMW) and made it the general minimum wage entitlement across Australia. The terms of this current legislation are very much informed by *Harvester*, but the enduring principles of *Harvester*, the living wage principle and our modern understanding of human rights, have not been applied in the decisions made under it.

Throughout his judicial life, Higgins maintained a regular correspondence with Felix Frankfurter law professor at Harvard, and later a long serving justice of the US Supreme Court. Higgins wrote three lengthy articles for the *Harvard law Review* in 1915, 1919, and 1920. They were entitled 'A new Province for Law and Order'. The Americans were still infected with the belief that the untrammelled market could best decide wages, like the price of any other commodity. Frankfurter was enamoured of Australia's novel system of conciliation and arbitration. When soliciting the first article for the *Harvard Law Review* in 1915, the editor wrote to Higgins saying, 'Especially on such a topic as Labor Law, we in America have much to learn from foreigners. Your realistic and sensible treatment of this branch of the law in your conduct of arbitration proceedings in Australia contrasts so favourably with the artificial and fruitless discussions of natural rights and liberty of contract in which American lawyers indulge, that the discussion of it from a lawyer's point of view from your pen would be a real service to the Bench and Bar of this country.'[12] Higgins admitted to Frankfurter, 'The name that I chose for the article was influenced, I confess, by the desire to placate any old-fashioned subscribers to the *Harvard Law Review*.'[13] On receipt of the first article, the editor wrote expressing Frankfurter's gratitude and conceding, 'Many lawyers here will say that it doesn't deal with a legal topic. To me the principles and precedents that you have worked out seem to be of the essence of law – a new branch of jurisprudence that must be scientifically studied and developed.'[14] When the new editor was commissioning the second article in 1918, he wrote, 'Your first article we have always considered to be one of the best that ever appeared in our Review.'[15]

[11] Henry Bournes Higgins, 'A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration', *Harvard Law Review*, Vol. 29, No. 1 (Nov., 1915) 13 at 15

[12] Letter from Gerard C Henderson, Editor of *Harvard Law Review* to Higgins seeking an article, 13 April 1915

[13] Letter of Higgins to Frankfurter, 14 December 1915

[14] Gerard C Henderson, Editor of *Harvard Law Review* wrote a very personal note to Higgins on 26 August 1915

[15] Letter from George Osborne, editor of *Harvard Law Review* to Higgins, 30 September 1918, acknowledging receipt of second article on 'A new province for law and order'.

The poet Mary Gilmore had written to Higgins at some length on 17 September 1909. By this time Gilmore was a regular contributor to the *Australian Worker*. She used to edit and often write the 'Women's Page'. She wrote:

'In regard to the minimum wage and what it includes, it seems to me that to take the family as the unit is scarcely just.'

'The just state does not delegate to any section of the community the maintenance of the family and would not therefore countenance the payment of a family wage by any but everyone, ie the whole.'

'But the whole thing seems to me thus: - that the state has a perpetual covenant with the family (which reproduces itself to create and maintain the state and therefore has a claim against the state), and that the brief labour covenants are a matter of individual unit to individual unit and that the two are separate and certainly should not but cannot be successfully covered by any law made to cover both.'

'This of course does not in any way mean there should be no regulation of wages. It only means that the wage and the family are separate entities.'

Higgins replied:[16]

Dear Madam

I have read, and re-read, your thoughtful letter. I understand that you form the view which was held by Plato and others that families should be supported by the State; and that you think I should ignore the needs of the family in fixing wages. My duty is merely to carry out the will of Parliament as expressed in the Acts which I have to administer; and I have no right to assume that Plato's theories with regard to the State and children will be adopted. In the Harvester case, I had to find what was 'fair and reasonable remuneration' for certain classes of employees. I considered that no remuneration could be treated as fair and reasonable which did not, at the least, allow for the satisfaction of the 'normal wants of an average employee regarded as a human being living in a civilised community'. Among the normal wants, I include food, shelter, clothing – and family life. This family life cannot be had, under existing conditions, without money wherewith to maintain a wife and children. I do not take the family as the unit as you think. I take the employee as the unit, with normal wants. The principle which I adopted in the Harvester Case I have applied in my awards; for in awards, for settling disputes, the essential condition of peace is that the employee receive a fair and reasonable remuneration.

I do not say anything with regard to the merits or faults of large schemes for social betterment.

Gilmore wrote again on 30 July 1909: 'It never occurred to me till I read it that (though you made no mention of it) I had asked you to criticise the law you have to administer. I was so anxious to find "the wise man".' Writing to Frankfurter on 15 October 1916, Higgins said, 'My view is that there is no subject of dispute which should be treated as, ultimately, non-justiciable. They told us that labour disputes were non-justiciable as there were no principles of right to guide us; but we found principles – invented principles, if you like – drew them from the storehouse of justice and humanity.'[17]

[16] This is marked as the draft reply from Higgins to Gilmore, 26 July 1909: 1057/158, 158a

[17] Letter of Higgins to Frankfurter, 15 October 1916

Higgins and his wife Mary Alice had only one child, a son Mervyn who was educated at Melbourne Grammar, Melbourne University and Oxford. Mervyn went to the war (World War I) and was killed on 23 December 1916. After Mervyn's death, Higgins applied himself even more earnestly to his work for conciliation and arbitration. He wrote to Frankfurter on 16 September 1918 saying, 'Sometimes however I am weighed down by the grief which you know of: but it cheers me to fancy that I am doing just what my boy would like me to do. What, after all, am I among so many who suffer? There are many homes suffering here; we have lost about 52,000 men (deaths alone).' Just six months after Mervyn's death, he had given a fairly philosophical address to the Millions Club in Sydney, telling them:

'What, after all, gentlemen, is that to which we direct all our legislation, all our administration, all our public institutions? It is the service and benefit of human beings. When we talk of benefits to a country, we mean benefits to the people of that country; when we talk of benefits to a city we mean to the people of that city. There is no asset so valuable as well-nourished, healthy, sane, moral intelligent men, women and children. The best country is the country with the largest proportion of such persons. Members of this Club want, I suppose, millions of white people for the ample territory of this continent, and they are right; but they also want, I presume, full civilised conditions for these people. If we want to see more spirituality of life, we must support life first.' Quoting Hooker, Ecclesiastical Polity: 'the first impediment which naturally we endeavour to remove is penury and want of things without which we cannot live.'

Musing on the effects of war, he proposed solidarity between the rich and poor as one of the fruits of war:

'The war is tending to the solidarity of people, rich and poor. Men come back from the trenches, sons of the wealthy, sons of the humble – duke's son and cook's son – after being reduced to the elementary needs of life, after facing the damp and the dirt and the cold, after facing the horrors of the battlefield, and they come back with a vivid sense of their common humanity.' After war, the problems of peace. 'Shall we realise the paradox that a dividend out of public prosperity is greater and better than private gain? Shall we realise that each man gets more out of life by giving than by getting – that in the old words "it is more blessed to give than to receive"?'

Higgins never abandoned his interest in politics, and he was fascinated by American politics after the First War. On 14 October 1917, he wrote to Frankfurter saying, 'Even if the Germans were all criminals, we have to live in the world with them. Vengeance is a fruitless thing. I feel that the best vengeance my dead boy could hope for would be an integrated world, an organised humanity.' On 25 September 1920, Higgins resigned from the Court of Conciliation and Arbitration. From the bench, he delivered an impassioned indictment of the temporary specialist tribunals being set up by government:

'From the nature of the case, any such temporary tribunal must be merely opportunist, seeking to get the work of the particular industry carried on at all costs, even the cost of concessions to unjust demands, and or encouraging similar demands from other quarters. On the other hand, a permanent court of a judicial character tends to reduce conditions to system, to standardise them, to prevent irritating contrast.'[18]

[18] Henry Bournes Higgins, *A New Province for Law and Order*, Sydney: Workers' Educational Association of N.S.W., 1922, at 173

'The objectives of the permanent court and of the temporary tribunal are, in truth, quite different – one seeks to provide a just and balanced system which shall tend to continuity of work in industries generally, whereas the other seeks to prevent or to end a present strike in one industry.'

He asserted, 'A tribunal of reason cannot do its work side by side with executive tribunals of panic.' Having detailed his differences with Prime Minister Hughes over long period of time, he concluded, 'Yet I do not think that even such treatment would justify my resignation; my resignation is due to my opinion that the public usefulness of the Court has been fatally injured.'[19] This must go down as one of the all-time great judicial dummy spits in Australian history.

After his resignation, he wrote to Frankfurter, 'I could not do anything else. Hughes has recklessly ruined a most promising experiment; he seems to have no knowledge of the psychology of the workers.'[20] Higgins was convinced that it was the bigger employers who had got to Hughes. He took great heart from the resolution of the Trades Hall Council carried on 24 February 1921: 'That this council views with profound regret the pending resignation of Mr Justice Higgins from the presidency of the Commonwealth Court of Conciliation and Arbitration, and expresses the hope that his services may be retained in the interests of social justice and industrial peace.' He told Frankfurter: 'Yes – I remain on the High Court; but important though the work there is, it is not from the true perspective, one-tenth as important as the other work. Too much "word chopping". In the Court of Conciliation, I dealt with life. The work was constructive.'[21] That's quite a statement, given that it was made just eight months after he and Isaacs had the big win in the *Engineers Case* holding that the Parliament had power to make laws with respect to industrial disputes across state boundaries even if the State or an instrumentality of the State was a party to the dispute.[22]

In 1922, Higgins brought together his three Harvard articles and expanded them into a book of the same title *A New Province for Law and Order*. In the preface, he wrote: 'I had to learn the business, with no book of instructions, no teacher other than experience, no kindly light except from the pole star of justice.' Looking ahead to the future of industrial tribunals, he opined:

'Learned men said that navigation by steam was impossible, that air-flying was beyond human powers; and they were wrong. They told us that a law for minimum wages was absurd, that the wage fund was fixed by irreversible economic laws, that the laws so-called of demand and supply were inexorable, that industrial tribunals were impracticable; and they were wrong. We all make mistakes, and we have to learn by our mistakes. The man who makes no mistakes, it is said, generally makes nothing. Industrial tribunals are doing their best for human life, the only wealth. It is the noblest objective. We work and learn.'[23]

[19] ibid, 176
[20] Letter of Higgins to Frankfurter, 21 December 1920
[21] Letter of Higgins to Frankfurter, 1 May 1921
[22] *The Amalgamated Society of Engineers* v *Adelaide Steamship Co* (1920) 28 CLR 129
[23] Henry Bournes Higgins, *A New Province for Law and Order*, Sydney: Workers' Educational Association of N.S.W., 1922, at 168

In 1924, Higgins travelled to Oxford and delivered an address on the Conciliation and Arbitration Court. He told his audience: 'On this side of the world, in France as well as in England and America, there seems to be a disposition to look on Australia as a kind of experimental farm for social enterprise.' He took pride in listing achievements such as the Torrens system for registration of land titles, the compulsory ballot at elections, and women's suffrage. He mused that 'the goal of all legislatures is the good of men, women and children. There is no asset of any State so valuable as its human life.' He expressed his pride in the Conciliation Court which was charged with trying to avoid strikes in disputes which extended beyond state boundaries. He boasted, 'From 1905 to the closing months of 1916 there were no such strikes at all.' He explained the key idea of the 'basic wage':

> It refers to that part of the wages which is necessary for the man's manhood, apart from any special or distinctive skill or qualifications required for his particular occupation. The basic wage, as defined by the court, is founded on "the normal needs of the average employee regarded as a human being living in a civilised community". The extra wage for skill or for special qualifications necessary we call "the secondary wage". In finding the basic wage, we try to ascertain what is necessary remuneration for an unskilled labourer, necessary for food, shelter, clothing, and something to come and go on, so that he may have civilised conditions of life for himself and a small family, on a frugal scale. In finding this basic or living wage, we treat marriage as the normal fate of a normal man.

After Higgins' death, his widow wrote to Frankfurter on 8 October 1929 saying: 'I feel that my husband has been (spared) much disappointment. The Federal Arbitration Court to which he gave the best of his brain and heart for so many years is tottering and in a few days may be abolished. Hughes wrecked it in his time when Prime Minister and now is its champion.'

110 years on, we all know that even if the principles enunciated originally by Higgins be accepted, they could never be applied in the way that Higgins applied them. The world is now a very different place. The stereotypical unskilled worker is not a married man with a wife and three children at home. Most unskilled workers never were. At the time of the *Harvester* centenary in 2007, Gerard Henderson observed, 'The economic historian W.K. Hancock, in his book *Australia*, maintained that - due to the *Harvester* Judgment - in 1920 Australian businesses were being forced to support 450,000 non-existent wives and over 2 million non-existent children.' Just as the living situation and domestic circumstances of workers are more diverse nowadays, so too is the range of options available to the state for ensuring that working individuals are able to live frugally and with dignity. There is a need to consider wages, tax transfers, the superannuation guarantee levy, social security payments, and the suasive effect of international human rights and other international legal instruments such as Article 23(3) of the *UN Declaration Human Rights* which provides: 'Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.' This provision of the UNDHR has been buttressed by Article 7 of the 1966 *International Covenant on Economic Social and Cultural Rights* which provides:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant.

Anyone tempted simply to replicate *Harvester* in both principle and application would need to call to mind Paul Keating's great boast in 2007 when he had John Howard's *Workchoices* in the gun. Keating boldly claimed, 'There have been two seminal events in wage fixing in Australia over the past century. The first was the movement to a national or centralised wage fixing system that came with the *Harvester* Industrial Court judgement of 1907. The second was the dismantlement of that centralised wage fixing system by the Keating government in 1993. That change created a decentralised wages system built around enterprise bargaining with an arbitrated safety net for the low paid.'[24] But that shouldn't stop us from re-asserting the basic principles of *Harvester*, nor from seeking new ways to apply the principles to new circumstances. At the centenary of *Harvester* in 2007, Julia Gillard rightly lauded Higgins' approach as embodying 'the idea that Australia should be a country where the obligation to work should be met by the right to decent treatment at work'.

It has become fashionable to link Higgins' *Harvester* judgment with *Rerum Novarum*. Marking the centenary of the *Conciliation and Arbitration Act* in 2004, Michael Kirby proud of his own Northern Ireland Protestant roots declared in a paper entitled *Industrial Conciliation and Arbitration in Australia – A Centenary Reflection*, 'In the 1890s Higgins embraced ideas that had been propounded in 1891 by Pope Leo XIII in his encyclical *Rerum Novarum*. As you will understand, it is no small thing for a person with such an Ulster background to adopt papal ideas'. It may well be that Higgins' connection with Catholic circles of thought was fostered by his natural attraction to and with those who favoured Home Rule for Ireland. When he was appointed to the High Court, Archbishop Carr wrote to him enthusiastically: 'No man can afford to enjoy his promotion so much as the man who has consistently acted on principle when principle seemed to be a bar to promotion. To no section of the community will your appointment give greater pleasure than to Irish Catholics.'[25] A year later Higgins wrote to Carr congratulating him on an anniversary of episcopal ordination. Carr responded, 'I value very much the good opinion of one who is a disinterested spectator of passing events.' Higgins' great political ally had always been Alfred Deakin who had then appointed Higgins to the High Court. At the time of his appointment, Higgins was corresponding with the Anglican bishop in Ballart. The bishop reported that his diocesan administrator Fr Guilfoyle 'has had conversations with not a few Catholics of Ballarat all of whom view with disfavour the opposition to Mr Deakin and he gives it as his opinion that Mr Deakin's return is a fair certainty – I can do very little; as my intercourse with the Catholic electors is necessarily limited. But what little shall be done. We

[24] Paul Keating, 'PM a slave to ideology', *The Age*, 13 November 2007
[25] Letter of Archbishop Carr to Higgins, 13 October 1906

must move however very cautiously, as I believe that owing to the present state of public sectarian feeling our open advocacy of his candidature would be highly injurious to him.'[26] I have my doubts that Higgins would have been directly influenced all that much by Pope Leo's writing in *Rerum Novarum* except in so far as the papal utterances reflected the thinking of many fair-minded people at that time, regardless of their religious affiliations.

In the wake of the political and economic revolutions sweeping through Europe, Pope Leo XIII published his encyclical *Rerum Novarum* on capital and labour in 1891. He espoused the right to ownership of private property and the right of persons to associate freely, including the right of workers to form unions. He rejected socialism and identified the purpose of work being the ownership of property. He lamented the conflicts in the world arising in part because of 'the enormous fortunes of some few individuals, and the utter poverty of the masses'. Thus the need to speak on 'the condition of the working classes'. He saw a need to outline the 'relative rights and mutual duties of the rich and of the poor, of capital and of labour': 'Public institutions and the laws set aside the ancient religion. Hence, by degrees it has come to pass that working men have been surrendered, isolated and helpless, to the hardheartedness of employers and the greed of unchecked competition.'

Leo thought that the right to property was a natural right, and 'the fact that God has given the earth for the use and enjoyment of the whole human race can in no way be a bar to the owning of private property.'[27] He postulated that the family is a true society 'and one older than any State' having 'rights and duties peculiar to itself which are quite independent of the State':

> That right to property, therefore, which has been proved to belong naturally to individual persons, must in likewise belong to a man in his capacity of head of a family; nay, that right is all the stronger in proportion as the human person receives a wider extension in the family group. It is a most sacred law of nature that a father should provide food and all necessaries for those whom he has begotten; and, similarly, it is natural that he should wish that his children, who carry on, so to speak, and continue his personality, should be by him provided with all that is needful to enable them to keep themselves decently from want and misery amid the uncertainties of this mortal life. Now, in no other way can a father effect this except by the ownership of productive property, which he can transmit to his children by inheritance.[28]

Leo was all in favour of freedom of contract and encouraged harmony and agreement between capital and labour. But he was insistent that there was 'a dictate of natural justice more imperious and ancient than any bargain between man and man, namely, that wages ought not to be insufficient to support a frugal and well-behaved wage-earner'.[29] Hinging this part of his argument on the right and capacity to own property, Leo observed:

> If a workman's wages be sufficient to enable him comfortably to support himself, his wife, and his children, he will find it easy, if he be a sensible man, to practice thrift, and he will not fail, by cutting down expenses, to put by some little savings and thus secure a modest source of income. Nature itself would urge him to this. We have

[26] Letter of Anglican Bishop to Higgins, 12 October 1906
[27] *Rerum Novarum* #8
[28] *Rerum Novarum* #13
[29] *Rerum Novarum* #45

seen that this great labour question cannot be solved save by assuming as a principle that private ownership must be held sacred and inviolable. The law, therefore, should favour ownership, and its policy should be to induce as many as possible of the people to become owners.[30]

He saw three advantages flowing from this: property would become more equitably divided, the gulf between rich and poor would be narrowed, and people would cling to the country in which they were born, 'for no one would exchange his country for a foreign land if his own afforded him the means of living a decent and happy life'.[31]

I have no doubt that these sentiments would have resonated with Higgins had he read them. I am not quite so convinced that the son of a nineteenth century Church of Ireland Minister would have been swayed to change his views. One can make the case for a correlation of views. Call me a doubting Thomas or a suspicious Jesuit, but I would need more evidence to establish causation.

It is of course a good thing to have an historical sense of the origins and the impact of the *Harvester* decision and Leo's *Rerum Novarum* more than a century ago. The challenge is to apply the new insights gained to our current circumstances so that we might contribute to a just and flourishing society for all in another period of great social and economic change.

Rerum Novarum was written at a time of great social change brought about by the industrial revolution. This century will be marked by equally significant change through technological advances and digital disruption. Realising the fruits of the *Harvester* judgement in these times of great change will require the articulation of and commitment to a new accord between government, business and civil society. Implicit in this accord would be the sharing of responsibility to achieve the common good. Such an accord would need to temper the power and expectations of capital and offer business support to pursue patient capital. In return businesses must not be so burdened by unnecessary regulation as to undermine their capability to generate profits and employment opportunities especially for our young or low skilled. Governments also can no longer argue that they are mere stewards of the economy. They must play an active role in both the architecture of a new industrial paradigm and the creation and provision of opportunities for dignified employment, especially for those who have been excluded by the employment market.

Trickledown economics, by its very title is a top down approach to wealth distribution. It has failed those at the bottom of the pyramid. For our 21st century world we need to develop a 'bottom up' approach to distribution, first ensuring that we have an adequate safety net for those who cannot participate in the workforce. We need to remove this from government and create an independent commission to develop evidence-based benchmarks to ensure that income support payments and pensions are adequate for people to live a frugal yet dignified life. The other great challenge for us is how we determine what are fair and just wages for those in low paid and insecure work. The digital economy brings with it different

[30] *Rerum Novarum* #46
[31] *Rerum Novarum* #47

requirements and expectations of work and the workplace. Nonetheless, we cannot allow this to undermine important employment protections such as sick and recreation leave and other hard-fought benefits such as maternity leave. These benefits give practical meaning to humanity and more importantly reinforce that people are more than a means of production and mere inputs into the economy.

The intersection between being in work and out of work is much more complex than it was at the time of the *Harvester* judgement. Our labour market is one of growing casualisation and insecure employment often forced upon employers who are no longer able to carry the costs and long term liabilities of permanent employment. Economic risk is being shifted from government to employer and then finally to the employee, particularly through the marketization of social services. This is unacceptable. Our industrial relations framework must place a new premium on those roles so as to drive the risk back to those best able to manage it. The incentive must be to create secure and full-time employment. The question of income adequacy is a vexed one for government and business alike. While governments rightly invest significant resources in the provision of free and subsidised education, health and childcare, the cost of raising a family, all too often, extends beyond the means of low income households. Indeed, research recently commissioned by Catholic Social Services Australia found that a low-income family with two children requires an additional $88.74 per week to meet a relatively basic standard of living. We need reliable, independent means for determining what is sufficient to live in a civilised community. It's time to reflect on how the minimum wage is set and in particular what information is required for that determination.

The Fair Work Commission in its annual wage review this year acknowledged that the modest increase proposed would not 'not lift all award-reliant employees out of poverty (measured by household disposable income below a 60 per cent median income poverty line), particularly those households with dependent children and a single-wage earner'. But to do so was 'likely to have adverse employment effects on those groups who are already marginalised in the labour market with a corresponding impact on the vulnerability of households to poverty due to loss of employment or hours'[32]. The Government for its part submitted that the tax-transfer system was more efficient 'in equalising the distribution of income among Australian households'. The Commission conceded that 'the changes to the tax-transfer system in the past 2 budgets have reduced the financial assistance that is provided for low-income families with children'.[33] Having acknowledged the problem and the shortfall, the Commission handballed both back to society generally with the handwashing observation: 'The high and continuing levels of child poverty indicate that the combination of wages and social welfare assistance, are not sufficient to ensure that the needs of all low-wage families are met. We view this as a serious matter for society. This conclusion is supported by the evidence that about one-third of people in poverty lived in

[32] [98]
[33] [486]

households for which wages were the main source of income; and that about half of these families had children.'[34]

The Commission has decided that family poverty is the Commonwealth Government's responsibility to be addressed through the welfare system. But the Commission knows that the Government's budgetary strategy is to reduce the financial support for families, not increase it. There is now a standoff between the institutions setting the wages safety net and the social safety net, with a devastating effect on the lives of the working poor and their families.

In *Harvester*, Higgins ensured protection for the stereotypical family of a single breadwinner in full time employment supporting the couple with their average number of children. Our task today is so much more complex. For example, we need to consider the position of the working sole parent who is not in full time employment. What is the demarcation line between the wages safety net and the social safety net? At what point can the wage setting tribunal leave the alleviation of poverty in wage-dependent families to governments? At what point can the Fair Work Commission legitimately say the job is with government? jjIdeally, and consistent with principle, as much as possible of the disposable income of individuals and families should come through the wage packet. If governments want to keep wages low, they need to improve the social safety net.

Sally McManus, Secretary of the ACTU, was right when she said last week, 'The promise of *Harvester* was financial security for working people, not barely keeping from starving and making endless sacrifices to keep the lights on.' She warned, 'We are rapidly moving towards the creation of an American-style working poor. A class of people who barely keep their heads above water, despite working full time, sometimes in multiple jobs. Corporate profits rose 40% last year, and full time workers can't afford to feed and clothe a family. The system is broken.'

We are all on notice. The Fair Work Commission alone cannot or will not set the national minimum wage so as to ensure that even working Australians are not living in poverty. We need to consider also the tax transfer system and the social security system. Just as Higgins saw a new province for law and order with the conciliation and arbitration of disputes setting an income standard for the average family to live with dignity and frugality, so too we should see a new province for law and order in the twenty-first century with the setting of appropriate levels of social security (including the Newstart allowance) and tax transfer arrangements permitting all persons to live with dignity and frugality regardless of their prospects of finding full time employment and regardless of their domestic living arrangements.

Pope Francis says: 'Today everything comes under the laws of competition and the survival of the fittest, where the powerful feed upon the powerless. As a consequence, masses of people find themselves excluded and marginalized: without work, without possibilities,

[34] [487]

without any means of escape.' In the 2017 Catholic Social Justice Statement entitled *Everyone's Business: Developing an Inclusive and Sustainable Economy*, the Australian Catholic Bishops set out 'five fundamental criticisms of the current economic system as well as some key principles or criteria of Catholic social teaching that would be central to the development of an inclusive and sustainable economy':

1. People and nature are not mere tools of production.
2. Economic growth alone cannot ensure inclusive and sustainable development
3. Social equity must be built into the heart of the economy
4. Business must benefit all society, not just shareholders
5. The excluded and vulnerable must be included in decision making

These principles point to the need for greater attention to the needs and entitlements of those who are dependent on social security payments for their survival and access to the labour market. It is legitimate for government to provide incentives for people to access the labour market, including social security payments lower than those payable to persons who have no prospect of accessing the labour market whether because of age or disability. But it is just wrong for governments to keep payments such as Newstart and the Youth Allowance at abysmally low levels, in the name of 'Budget repair' when there are insufficient jobs available and no realistic prospect of employment, training or education. It's now five years since the Business Council of Australia told the Parliament: 'The rate of the Newstart Allowance for jobseekers no longer meets a reasonable community standard of adequacy and may now be so low as to represent a barrier to employment.' It's time for our major political parties to commit to the establishment of an independent commission to set evidence-based benchmarks ensuring adequate income support payments for those Australians unable to get full time employment through no fault of their own. This is a key plank for the new province of law and order.

Many of us in church agencies have come out strongly opposing compulsory drug testing of welfare recipients in three locations chosen without any consultation with the local communities, and with no consultation with health professionals expert in dealing with substance abuse. The Turnbull government could not produce one health professional in support of the trial announced in the 2017 Budget. A string of experts came forward saying that compulsory drug testing would not work. As I told the Senate Community Affairs Legislation Committee on the *Social Services Legislation Amendment (Welfare Reform) Bill 2017*: 'To have a trial where you do not seek the consent or guidance of the health professionals, nor of the local communities, it is no trial, it is simply a political showpiece.' Compare this with the government's announcement on extending the trial of the cashless basics card. They say they do it in co-operation with the local community. They do it when the local community gets aboard committing to the delivery of the wrap around services needed if you are to achieve the desired results.

We Australians need to focus more on how our unprecedented wealth gives us a one off and unprecedented opportunity to break the cycle of poverty, through education and lifelong

support, which we must take, not only in justice but also because we cannot afford to leave anyone behind who is able and willing to contribute. We need economic policies which are based on, and which build on, the aspirations of the marginalised and excluded who yearn for the opportunity to access the market, sharing the fruits of Australia's prosperity.

We Australian Catholics need to apply Pope Francis' insight in *Evangelii Gaudium* to our own political and economic context:

> As long as the problems of the poor are not radically resolved by rejecting the absolute autonomy of markets and financial speculation and by attacking the structural causes of inequality, no solution will be found for the world's problems or, for that matter, to any problems. Inequality is the root of social ills. The dignity of each human person and the pursuit of the common good are concerns which ought to shape all economic policies.[35]

The IMF has identified widening income inequality as 'the defining challenge of our time'. We need to develop a new province for law and order true to the principles enunciated by Justice Higgins in *Harvester* and by Pope Leo XIII in *Rerum Novarum*. Just as Higgins and Leo were writing at a time of economic and social revolution, so too we are thinking and acting in the midst of a revolutionary cycle. It's well expressed by Pope Francis in his encyclical *Laudato Si'*:

> We were created with a vocation to work. The goal should not be that technological progress increasingly replace human work, for this would be detrimental to humanity. Work is a necessity, part of the meaning of life on this earth, a path to growth, human development and personal fulfilment. Helping the poor financially must always be a provisional solution in the face of pressing needs. The broader objective should always be to allow them a dignified life through work. Yet the orientation of the economy has favoured a kind of technological progress in which the costs of production are reduced by laying off workers and replacing them with machines. This is yet another way in which we can end up working against ourselves. The loss of jobs also has a negative impact on the economy "through the progressive erosion of social capital: the network of relationships of trust, dependability, and respect for rules, all of which are indispensable for any form of civil coexistence". In other words, "human costs always include economic costs, and economic dysfunctions always involve human costs". To stop investing in people, in order to gain greater short-term financial gain, is bad business for society.[36]

There can be no sustainable 'Budget repair' without ensuring a robust safety net and an assured leg up for those missing out through no fault of their own. We need to recommit to work for all those who are able and willing. We need to recommit to social assistance for all those who are not able. We need to ensure that a life of frugal dignity is within the grasp of all citizens. Deliberately placing some citizens beyond the reach of a dignified life of frugal dimensions is not a legitimate option. And we can no longer leave it to the Fair Work Commission and our politicians on Budget night. The Fair Work Commission has put us on notice: they don't think it's their job. And our politicians have shown that they are no more equipped to set the needy person's appropriate welfare payments than they are to set your wages. Pope Francis is articulating the concerns of many about the social and environmental impacts of the dominant economic system. He has called for a change in the attitudes and

[35] Pope Francis, *Evangelii Gaudium*, #202
[36] *Laudato Si'*, #128

practices of all of us, but placed particular responsibility on those with the power to change the economic environment through laws that are capable of protecting the common good. We need men and women to commit to this task, guided by the pole star of justice as was Justice Higgins. We need a new province for law and order.