

# **THE COVID-19 CRISIS, LABOUR RIGHTS AND THE ROLE OF THE STATE**

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This article assesses the impact of the COVID-19 crisis on labour rights in Australia. It considers this impact according to three labour rights (the right to work; the right to social protection; the right to safe and healthy working conditions) and three cross currents (the forces of inequality; the increase in employer power; social dialogue).

Threading through this analysis are the relevant international labour standards, particularly the standards set by International Labour Organisation (ILO). These standards are normative standards – they point to what is morally significant.

They also assist in considering how the COVID-19 crisis has altered the role of the state in relation to labour rights. Before the crisis, this role corresponded with neoliberal understandings of a market-friendly and minimal state. By comparison, international labour standards offer a different understanding of the role of the state - a social democratic understanding where the state performs an active role in regulating the market in the interest of promoting decent work. What seems to be emerging from the crisis is, however, a state that is neither fully neoliberal nor social democratic – a ‘JobMaker’ state.

## **A brief rewind**

If one went back in time to February 2020, seemingly a lifetime ago, and nominated the key issues concerning labour rights in Australia, one would include the epidemic of wage theft, which witnessed regular, at times daily, reports of employers failing to comply with requirements under the *Fair*

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*Work Act 2009* (Cth) (*Fair Work Act*) (Hardy 2020). Bound up with this epidemic is the persistent problem of precarious work – work with inadequate labour security – with casual workers and those on temporary visas most commonly experiencing wage theft (Australian Government 2019).

Also prominent was the federal Coalition government's continuing attacks on the union movement. The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (Cth) (*Ensuring Integrity Bill*), in particular, sought to expand the circumstances in which trade unions could be deregistered and their officials disqualified. For the Coalition government, this Bill was aimed at restoring integrity to trade unions (Porter 2019). Its critics and the union movement saw it as a union-busting measure, in clear violation of the international conventions on freedom of association (AIER 2019).

The epidemic of wage theft and precarious work, together with the *Ensuring Integrity Bill*, corresponded to neoliberal understandings of a market-friendly, union hostile state sanctioning low labour standards. Yet, it will be a mistake to characterise the situation as one of unadulterated neoliberalism. As Peck recognised, neoliberalism have never existed in such a 'pure' form – it 'has only ever existed in "impure" form, indeed *can* only exist in messy hybrids' (Peck 2010).

Under the *Fair Work Act*, for instance, there is a safety net comprising National Employment Standards (NES) and industry awards that, if properly enforced, provided reasonable levels of protection for employees (other than casual employees). The wage theft epidemic also saw the Coalition government seeking to address such theft including through its criminalisation (Attorney-General's Department 2019).

More significantly, the effect of climate change was beginning to be felt in the world of work. 2019 was Australia's driest and hottest year since records began being collected in 1900 (CSIRO 2020). This contributed to Australia experiencing one of its worst bushfire seasons in the summer of 2019/2020 (Richards, Brew and Smith 2020). In February 2020, there was growing public sentiment in favour of strong action to address climate change (Blau 2020). Such action would require a significant expansion of the role of the state, including to ensure a just transition for affected workers (see ILO 2015).

## The right to work

The COVID-19 public health restrictions have affected the right to work (Universal Declaration of Human Rights, Article 23(1); International Covenant on Economic, Social and Cultural Rights, Article 6).

Public health restrictions imposed in March 2020 produced a dramatic increase in unemployment, with the long lines at Centrelink telling a vivid story. In April, 594,300 people lost their jobs; 489,800 people left the labour force; and the unemployment rate increased by one per cent to 6.2 per cent (ABS 2020a).

The prognosis is even grimmer. A Grattan Institute report estimated between 14 and 26 per cent of Australian workers being out of work due to the COVID-19 shutdown. Particular industries would be badly hit: more than half of all workers in hospitality industry were predicted to lose their jobs; the retail, arts and education industry would also be suffer significant job losses (Coates *et al.* 2020).

Taking a cue from former Prime Minister, John Howard's advice that 'during times of economic crisis, there are no ideological constraints' (Frydenberg 2020), the government introduced unprecedented measures: the \$130 billion JobKeeper wage subsidy scheme (Prime Minister 2020c) and free child care (Prime Minister 2020d), both of which enabled continued employment during the crisis.

These responses are one with the ILO approach to tackling the COVID-19 crisis (which includes employment retention measures) (ILO 2020c). This approach speaks of a social democratic understanding of the role of the state in relation to labour rights. The right to work is understood as one that entails positive obligations on the part of the state, as reflected in the goal of full employment foregrounded in the ILO's 1944 Declaration of Philadelphia.

In this understanding, the state is not merely seeking employment in a purely numerical sense – it seeks 'full, productive and freely chosen employment and decent work for all' (ILO 2019). It is also emphatically committed to equality ('all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development') and tripartism ('representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision') (ILO 1944).

### **The right to social protection**

The increase in unemployment implicates the right to social protection (Universal Declaration of Human Rights, Article 23(3)), one of the four pillars of the ILO's decent work agenda (ILO 2020a). Under Australia's residual system of social security, this right would have been placed under serious pressure, especially as analysis showed that unemployment income support covered only 75% of basic living needs (Henriques-Gomes 2020b).

This pressure was substantially alleviated by the dramatic expansion of state support for the unemployed. Emphasising how '(e)xtordinary times call(ed) for extraordinary measures' (Morrison 2020b), the government introduced the coronavirus supplement which, in the Prime Minister's words, 'supercharged' the safety net – effectively doubling the payment rate of the JobSeeker allowance (Morrison 2020a).

The government's response to social protection for those who remain employed was, however, less robust – particularly the protection available should workers fall ill because of COVID-19, have to care for a family member who becomes ill because of the virus, or have to self-isolate due to public health requirements.

Under the *Fair Work Act*, the NES provides for 10 days of paid personal/carer's leave. It became clear early on that this provision was inadequate to meet the exigencies of the COVID-19 crisis. Casual employees are excluded from this entitlement - that is 2.6 million workers, around a quarter of all employees (ABS 2019). The entitlement also did not cover periods where a worker is required to self-isolate.

The federal government has, however, rebuffed calls from the union movement for paid pandemic leave for all employees (including casual employees) (Workplace Express 2020a). The Fair Work Commission, on the other hand, has amended awards to provide for unpaid pandemic leave of two weeks to all employees (until 30 June 2020) (FWC 2020).

### **The right to safe and healthy working conditions**

This right is considered by the ILO as 'fundamental to decent work' (ILO 2019) (International Covenant on Economic, Social and Cultural Rights, Article 7(b)). It is also central to efforts to effectively suppress the virus.

Proper respect of this right turns less on the substance of the laws as Australia has reasonably robust workplace, health and safety legislation. The issue is rather applying such laws to the complex challenges thrown up by the COVID-19 crisis and ensuring that they are effectively enforced. These challenges arise in various contexts. They arise with healthcare workers (those working in hospitals and other medical services) who experience a higher risk of exposure to the virus. They also arise in industries and occupations where there is close proximity in working. For instance, the largest cluster of COVID-19 infections in Victoria comes from Cedar Meats (DHHS 2020). Workers at this Melbourne abattoir considered physical distancing rules impossible to comply with (Baker, Fowler and Dow 2020). Remote working, the result of the ‘stay at home’ direction, also poses difficult issues, including the provision of a safe working environment.

All these challenges will persist as the restrictions are gradually relaxed from May 2020. Added to them will be the challenge of returning to work at employers’ premises in the context where there is still a risk of infection.

### **The forces of inequality**

This implicates a fundamental principle and right at work as recognised by the International Labour Organisation, protection against discrimination in respect of employment and occupation (ILO 1998: Art. 2(d)).

Those in precarious work, workers specifically noted in the United Nations 2030 Agenda for Sustainable Development (UN 2015: para 8.3), will be significantly affected. Casual employees, in particular, will suffer in terms of their labour rights. Their job losses will be higher than non-casual employees, given the sectors that are more impacted. Notably, casual employees constitute 40% of workers in the hospitality sector where it is estimated two thirds of the workforce will be unemployed (Coates *et al.* 2020). In terms of the right to social protection, entitlements to paid personal/carer’s leave under the *Fair Work Act* do not extend to casual employees (see above). Moreover, the JobKeeper scheme does not extend to casual employees engaged on an irregular basis and those employed for less than 12 months (ATO 2020). There is also an age dimension to the impact on casual employees, with younger (15 to 24 years old) and older workers (65 years and older) over-represented amongst these workers. (Blackham 2020).

Workers on temporary visas are another group that will be particularly affected. They make up one fifth of the food sector workforce (Tham and Fudge 2018). In terms of social protection, they are generally denied access to coronavirus supplement (Whiteford 2020); except for New Zealanders, they have no access to JobKeeper; both of which are contrary to the principle of equality for migrant workers under international conventions (Tham 2020). Added to this is the reported increase in racism and discrimination against people of Chinese and Asian backgrounds (AHRC 2020).

Women are more likely than men to be affected by job losses as they work in occupations and industries most affected by the public health restrictions (Coates *et al.* 2020). Whilst free child care has alleviated the burden of those with pre-school age children, remote learning has seen women bearing the lion's share of the care load (ABS 2020b). As to the right to safe and healthy working conditions, many of 'frontline' sectors, specifically hospitals, medical services and schools are feminised industries with majority women workers (Australian Government 2020).

The federal government's response to these questions of inequality has been mixed. It has condemned COVID-19 racism (Morrison 2020d) and acknowledged how women workers have been particularly affected by the crisis (Morrison 2020c). At the same time, it has been largely indifferent to the fate of casual employees and has said that temporary visa-holders facing hardship should 'return home' (Arora 2020).

### **Expansion of employer power**

Obviously affecting labour rights is the relative power of the employer. In an economic recession, the balance of power between employers and workers will invariably shift towards the former. A neoliberal perspective would tend to see this as the market working. A social democratic perspective would view it as exacerbating what Justice Higgins characterised in the *Harvester* decision as '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' (*Ex parte H v McKay*: 7).

This increase in employer power has also been facilitated by changes to formal regulation. At the government's initiative, the *Fair Work Act* has been amended to confer upon employers who qualify for the JobKeeper scheme broader ability to direct their employees in relation to their

working hours; duties; and location of work (*Fair Work Act 2009*: pt 6-4C).<sup>1</sup> The Fair Work Commission has also varied by consent a whole range of awards to allow greater scope for employers to vary the duties of employees, their working hours and also to be able to direct them to take annual leave (FWC 2020: [36]–[42]).

### Social dialogue

For the ILO, the principle of tripartism is given effect by ‘social dialogue’, which it defines as ‘all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy’ (ILO 2020b).

Surprisingly, given the traditional hostility between the government and trade unions, social dialogue has taken on a life at the senior levels of the federal government. From early March, there were regular, often daily, meetings between the Minister for Industrial Relations, Christian Porter and the Australian Council of Trade Unions Secretary, Sally McManus (Grattan 2020). The Prime Minister, Scott Morrison, has gone on to declare that because of the COVID-19 crisis, there are ‘no more unions or bosses’ (Workplace Express 2020c). He followed by announcing a JobMaker agenda which includes setting up a process to develop an industrial relations reform agenda through working groups comprising representatives from government, employers and trade unions. In order to facilitate this process, the government will not be putting the Ensuring Integrity Bill to another vote in the Senate (Morrison 2020c).

By comparison to social dialogue in government, social dialogue through collective bargaining, one of the fundamental principles and rights at work recognised by the ILO (ILO 1998: Art. 2(a)), faces a grim future. As it stands, the provisions of *Fair Work Act* relating to collective bargaining and industrial action are in breach of the ILO’s conventions on freedom of association (International Labour Office 2010: 165-229). These breaches are compounded by the reduction of notice of proposed variation of enterprise agreements from seven days to a single day (*Fair Work Amendment (Variation of Enterprise Agreements) Regulations*), a measure

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<sup>1</sup> These provisions cease to have effect on 28 September 2020.

that will help some employers to extract more in a context where unions will inevitably be engaged in concessional bargaining and are constrained in their ability to organise by public health restrictions (such as ‘work from home’ directions and limits on the size of gatherings).

### **The future: A ‘JobMaker’ State?**

Through its economic recovery plans, the government is seeking to configure a ‘JobMaker’ State – a state whose principal function is the creation of jobs. In this vision, there are evident departures from neoliberal understandings: a significant role for the state is contemplated and a preparedness to enlist the support of trade unions. There is also correspondence with social democratic understandings: the right to work is viewed as a positive right entailing government obligations; the right to safe and healthy working conditions is respected, not least to avoid another wave of infection; and there are beginnings of a social dialogue in government with trade unions.

A ‘JobMaker’ State, as envisioned by the federal government, is not, however, a social democratic state. In key respects, it is consonant with neoliberal understandings. It is friendly to employer power with its preferred regulatory tools, financial support for businesses rather than regulation of their activities. For the Prime Minister, the goal of the ‘JobMaker’ agenda is to ‘enable our businesses to earn Australia’s way out of this crisis’ (Morrison 2020c). Its commitment to equality is qualified: gender and racial equality is in view but not so equality for precarious workers and those on temporary visas. There is no attempt to foster social dialogue through collective bargaining, which is under severe stress. And social dialogue in government is confined to the agenda of job-creation, creating a risk that other vital issues concerning labour rights will be sidelined (including the ACTU’s call for more secure jobs) (ACTU 2020).

The final issue, to conclude with, is whether this will be a green or black ‘JobMaker’ State: will the economic recovery measures address or exacerbate the climate crisis? This is shaping up to be a central policy contest with the ACTU (ACTU 2020) and the Australian Industry Group (Willox 2020) calling for recovery measures to reduce greenhouse emissions, whilst key members of the National COVID-19 Coordination Commission with strong links with the fossil fuel industry are arguing for



a gas-led recovery (Morgan and Long 2020). Time – and the coming bushfire season – will tell as to the colour of the ‘JobMaker’ State.

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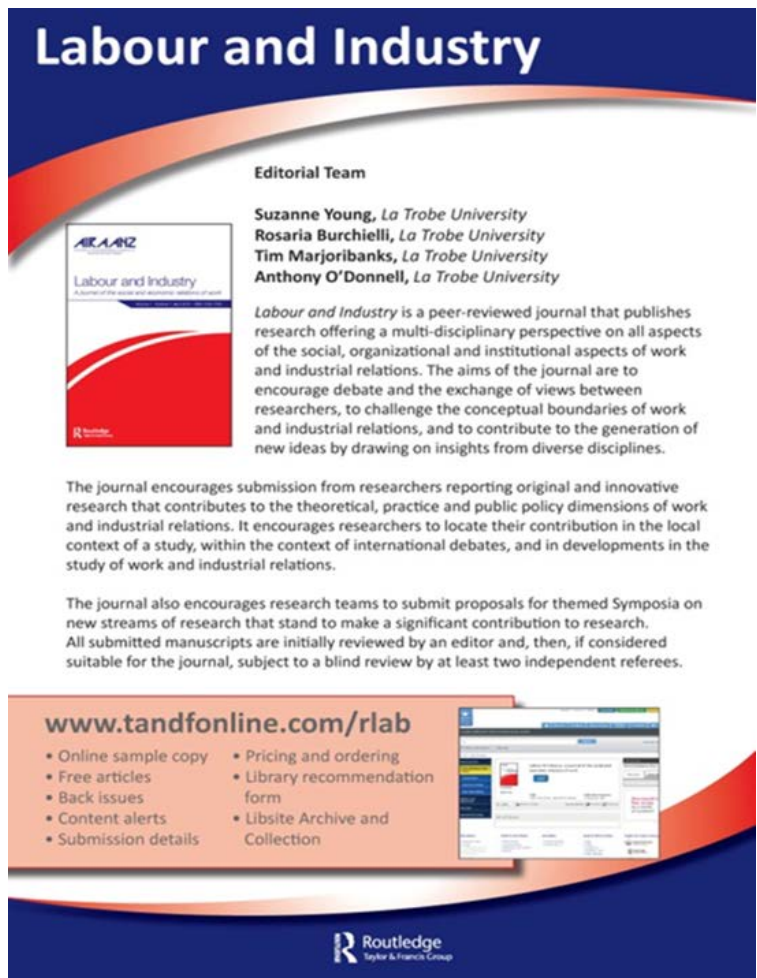
## Legislation

*Fair Work Act 2009* (Cth)

*Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* (Cth)

**Cases**

*Ex parte H v McKay* (1907) 2 CAR 1 (*Harvester case*)



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- Pricing and ordering
- Library recommendation form
- Libsite Archive and Collection

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