

WORKPLACE RESEARCH CENTRE ANNUAL LABOUR LAW CONFERENCE 2013

IS THERE LIFE AFTER THE IR WARS?

Australia has recently celebrated the 30th anniversary of the Prices and Income Accord (“the Accord”). In 1983, inflation exceeded 10% and the unemployment rate hovered around the double figures. The standard variable interest rate was 12.5%. In this context, the ACTU entered into an agreement with the then Federal Government agreeing on behalf of affiliated unions to reduce claims for increased wages. The government pledged to minimise inflation and to strengthen the social wage. There were and remain many critics of the Accord within the union movement. Notwithstanding such criticism, the ACTU had sufficient authority and goodwill to ensure that unions acted consistently with the terms of the Accord. Union leaders in turn were required to persuade their members of the need for wage restraint in the interests of the economy.

The notion of an industrial relations settlement, including a détente about labour laws, is arguably far more inviting now. During the life of the Fair Work Act, Australia has experienced an economic miracle. Since 2009, the Australian economy has achieved spectacular macroeconomic outcomes: low unemployment, low inflation, low interest rates, a AAA credit rating, increasing labour productivity, low debt and solid growth. In addition, the Australian economy has enjoyed 21 consecutive years of economic growth and is one of the lowest taxed in the OECD¹. Industrial action remains at historically low levels.

So, what’s not to like?

Or, as Paul Keating might have said: “This is a beautiful set of numbers.”

To answer whether a new settlement can be forged, I need to pose further questions: is it conceivable that in 2013, the Business Council of Australia would enter into an Accord with government that involved commensurate sacrifice by the private sector? Would the BCA agree that company tax, for example, should be increased to assist the funding of improved education in the form of the Gonski education reforms? Alternatively, would it support an end to tax breaks of the same magnitude? Would the BCA be able to exercise the same sort of authority as that exercised by the ACTU during the Accord? Would the private sector get on board?

THE IR WARS

There are reasons peculiar to industrial relations that help explain the seeming ongoing debate and campaigns for legislative change; not the least the need for interest groups to appear relevant to their constituencies.

However, there are broader, global forces at play. For example, there are parallels that can be drawn in the media reporting and political debate in recent years about climate change and industrial relations laws. At times, both have involved an assault on rationality, facts, data and science. Private interests have invariably driven the assault with prominent business leaders, think tanks and media outlets all playing a part. Each new day can feel like a struggle for the values of the Enlightenment.

No more has this been evident than the debate in recent years about the productivity of the Australian economy.

It is important to acknowledge that productivity is a key driver of economic growth and a critical determinant of higher living standards. Productivity is a complex phenomenon and the factors that affect it can be both structural and cyclical.

The Productivity Commission has recently published the first edition of PC Productivity Update in order to promote better public understanding of the issue².

Critically, it observes that “what drives changes in the proximate causes, and ultimately to productivity, is highly complex”.³ It reveals that there is no reliable measure of productivity in a substantial part of the economy including aged care, education, training, healthcare and social assistance. Reliably measuring efficiency in the electricity industry is also difficult.⁴

THE PRODUCTIVITY “CRISIS”

Until recently, productivity within Australia and in many other developed countries has been lagging since the late 90’s. Productivity declined under the Workplace Relations Act, the WorkChoices era and in the first year or so of the Fair Work Act.

However, poor productivity performance did not develop into a “crisis” until a concerted political campaign emerged after the 2010 federal election. Further, the campaign asserted that the key to resolving the crisis was urgent reform of the Fair Work Act. The campaign was vigorously pursued, primarily by business and industry groups with the support of Australia’s only 2 national newspapers, ‘The Australian’ and ‘The Australian Financial Review’.

In October 2012 I addressed a conference held by the Australian Industry Group in Canberra.⁵ My speech complained about the abysmal standard of the debate about industrial relations throughout my 20 career; its lack of rigour, facts, data, integrity and science.

I argued that the productivity crisis campaign was baseless because the current IR laws were a bit player in the productivity debate. I argued that there were far more important issues that affected productivity including infrastructure, skills and training. I argued that the mining investment cycle was a strong factor in impairing productivity.

I criticised the leaders of the productivity crisis campaign; Tony Shepherd of the BCA, Don Argus, Michael Chaney of NAB, Heather Ridout, ex-AIG and now a member of the Reserve Bank board and Paul Kelly of The Australian. Kelly, for example, had written:

“While Labor is fixated on resurrecting a scare over WorkChoices the entire economic debate is shifting against the productivity deadening system it has installed....”⁶

Tony Shepherd told the Australian Financial Review: “Industrial relations laws are limiting the capacity of companies to lift their productivity by making it harder for them to allocate their labour in the most productive ways.”⁷

Ridout echoed these claims when she said: “The evidence so far is that the Fair Work Act is impeding productivity, not contributing to it.”⁸

I contrasted these statements with economic research conducted by a number of organisations, including a report from NAB’s senior economist, Rob Brooker who wrote:

“A plausible case can be mounted that much of the decline in productivity performance in Australia since the middle of the last decade is attributable to special and cyclical factors. These include high levels of investment in the mining and utilities industries that have not yet come on stream, the impact of slower GDP growth during the GFC and an apparent stalling in the growth of real wages faced by producers, even outside the booming mining sector.”⁹

Brooker’s report has since found support to varying degrees in those of the Grattan Institute¹⁰, Price Waterhouse Coopers¹¹ and Ernst and Young¹².

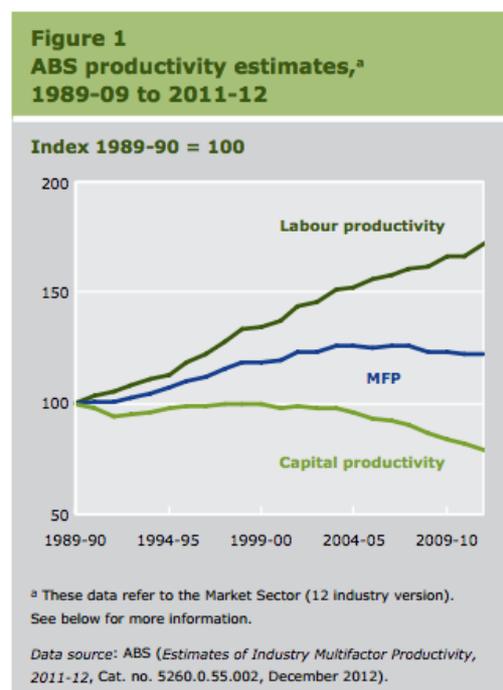
I lamented the tendency of the IR debate to revolve around the propagation of misleading “key messages”, observing that “Unfortunately, those perpetrating the malaise have considerable success in using such strategies to further their commercial or other political objectives.”¹³

The response of the The Australian newspaper was immediate and predictable. In the days that followed, I was vigorously criticised in no fewer than 5 articles and 3000 words in the newspaper. At times, so was my argument.

One article was dramatically headed “Lawyers savage Bornstein speech”.¹⁴ It briefly quoted a solitary Sydney IR lawyer, Gerard Phillips and the President of the HR Nicholls Society, a far right fringe group, both of whom expressed their disagreement with my speech. That was it. I was “savaged” but am otherwise unbowed.

THE SCIENCE

Shortly after these events, the Australian Bureau of Statistics released data showing that labour productivity had in fact substantially increased since late 2010. Indeed, the data has since established that labour productivity has increased for seven consecutive quarters. In 2011- 2012, it rose at an unsustainably high 3.4% (exceeding the long term average of 2.0%).¹⁵ The most recent ABS data is even more impressive: 3.6% over the last 12 months and 5.2% over the last 2 years. Multi-factor productivity remains flat.



This largest increase in labour productivity in a decade has occurred under the watch of the Fair Work Act. It stands in strong contrast to the decline in productivity in the WorkChoices era.

That said, I want to make clear once again that it is not the Act that is driving such an increase. In my view, labour laws remain largely irrelevant.

In March 2013, Reserve Bank deputy Governor, Philip Lowe stated “Productivity growth in 2012 was better than it has been for quite some time”.¹⁶ Alan Kohler noted that no one in business including the AIG wanted to acknowledge the sharp improvement in productivity.¹⁷ Economics writer, Ross Gittins wryly referred to the “mystery of the disappearing productivity crisis”.¹⁸

Several months later in May 2013, the RBA stated: “..growth in unit labour costs remained relatively slow over 2012 reflecting continued strong growth in labour productivity. Measured non-farm labour productivity growth over 2012 was well above its average of the past 20 years.”¹⁹

And so, how is it that the Fair Work Act has impeded productivity when the economy has experienced strong labour productivity growth over 2 years?

The answer is simple. It hasn't. IR laws have not been a determinative factor in our productivity performance for many years. There are numerous far more powerful influences at play.

This minor technicality did not inhibit a disingenuous campaign against the Fair Work Act, trade unions and the Federal Government. The campaign featured many respected business leaders and organisations. The campaign was bereft of reason, fact or integrity, prompting economics writer Ross Gittins to "suspect [that] all the tears shed over productivity were little more than cover for an exercise in big-business rent-seeking."²⁰

IMPLICATIONS FOR PUBLIC POLICY

Recently Professor Ross Garnaut has argued that "policy change in the public interest seems to have become more difficult over time.... as interest groups have become increasingly active and sophisticated in bringing financial weight to account in influencing policy decisions."²¹ He argues that private interests feel less inhibited in pursuing private interests than ever before and doubts the capacity of our polity to negotiate substantial reform that occurred in Australia between 1983-2000. Further, he laments that reform must now be "painless".²²

If anything, Garnaut tends to understate the problem. His analysis is heavily influenced by the resistance of the private sector in Australia to both a carbon pricing mechanism and the mining tax in recent years. His analysis does not focus on the successful pursuit of public policy change using mythical economic crises or other propaganda. Further, it does not reflect the international context in which similar patterns can be found. Policy capture is a global phenomenon. As I have argued elsewhere:

"Never before have private interests so successfully and relentlessly argued that their interests are one and the same as the public interest."²³

The productivity crisis campaign has been successful. It's success can be measured in at least 2 ways.

First, many members of the public have heard the key messages over and over again and are not aware of the less well publicised productivity data. If The Australian has published the strong labour productivity figures, I am yet to see it. As a result many people believe that labour productivity has declined when in fact the opposite is true. Indeed, even academics are not immune. On 10 May 2013, Paul Gollan, a Professor of Management in the Economics Faculty of Macquarie University wrote in the AFR that the Coalition's IR policy failed to "tackle the problem of declining productivity".²⁴

In recent days, the Prime Minister, Kevin Rudd has emphasised the importance of increasing productivity. He has urged the importance of achieving a productivity number with a "2" in front of it. Curiously, he seemed unaware that this target had been comfortably exceeded in the last 2 years.

Senator Eric Abetz also continues to refer to the “productivity problem”.

The productivity crisis campaign has also had a measurable effect on policy formation.

The Coalition’s IR policy blueprint refers to “productivity” no fewer than 30 times.²⁵ Specifically, the policy commits to a comprehensive review of the FWA by the Productivity Commission. Yet another review of the laws, presumably with an intent to initiate a further round of substantial legislative change and all driven by a myth: that our existing IR laws have engendered or contributed to a productivity crisis.

The debate about IR laws has become tiresome and counter-productive. As the culture war over IR regulation rages, the legislation is overhauled every few years and becomes increasingly complex.

There are much bigger challenges facing Australia than whether union officials should be allowed to talk to employees during meal breaks in lunch rooms or in the open plan area outside the office of the CEO. The political, media and legislative space allocated to union right of entry dwarfs that of our ailing infrastructure including ports, airports and rail. For anyone with a genuine interest in public policy and productivity, that is a perverse outcome.

A CONFESSION

In the circumstances of the polity that I have described, it is not realistic to canvass a stable labour law regime or a new Accord or settlement. However, there is an alternative to this tired debate that is available to all employers and employees; ignore it as much as possible.

To explain what I mean, I will need to make a very public confession. It is time to get out of the closet.

I am not only an employment lawyer who has forged a career in representing employees and trade unions. I am a businessman. I am a company director and yes, I am an employer.

My views are shaped from the somewhat unusual position I occupy of both being an employer and a lawyer who ordinarily represents employees and unions in employment disputes.

I have been a director of Maurice Blackburn Ltd for almost 10 years. I am a former director of State Trustees, a financial services corporation. I have held other directorships and Board positions.

Maurice Blackburn is a mid-tier law firm employing over 700 staff in offices throughout Australia. It is party to an enterprise agreement with the Australian Services Union. Negotiations with the Union and its representatives can become willing.

Our firm operates in a competitive environment. Two of our main competitors, are listed on the ASX. We remain a private company.

I became a partner of Maurice Blackburn in 1997. As a partner, I was expected to undertake management responsibilities including managing staff, finances, marketing, strategic

direction. Like many people promoted into management, I was not promoted for any of these skills but because of my core work; litigation.

It was not until late 2012, some 15 years later that for the first time in my career, I undertook a serious management training course.

My experience of management is not unusual. In professional services and indeed other sectors, many managers rely on instinct, improvisation and learning by mistakes. Many of these mistakes often generate work for lawyers like me and emanate from a lack of skills and training. For example, there is a skill in having a tough conversation with a staff member; whether it be about under-performance, disciplinary issues or termination of employment.

Maurice Blackburn has sought to answer the productivity challenge almost accidentally; not because we detected any problem with productivity but because we are keen to compete and improve. None of what we have done is influenced or affected by the Fair Work Act.

We have undertaken a program of substantial investment in education and training for our leaders; to better equip them to meet the demands and expectations of management and leadership.

We routinely act for individuals who have experienced terrible trauma and remain deeply affected: think dying asbestos victims, those who have experienced catastrophic workplace or motor vehicle injuries or even suicidal workplace bullying victims. In turn, their trauma can also be vicariously experienced by our lawyers and staff. We are moving to more proactively manage mental health risks in the workplace by educating, training and supporting our staff about vicarious trauma as soon as they commence work in our firm.

Much of our recent focus has been on both improving our workplace culture and on embracing and adapting to technological innovation.

We have a strong record of innovation; we became the clear market leader in corporate governance class actions on behalf of shareholders within 10 years of starting such a practise. However, more recently we have decided to explicitly encourage an innovation culture throughout the firm with a range of measures including the enhanced use of technology to enable communication at all levels across a national network of offices from Rockhampton to Frankston.

This brief glimpse into my other life is intended to underline the importance of the many measures available to the private sector to improve workplace performance and productivity: involving education, skills, training, innovation, managerial capacity and experimentation.

These sorts of measures can't be legislated. A productive, fair and dynamic work place can't be legislated.

When you hear any of the following expressions: "sovereign risk", "red tape", "green tape", "business uncertainty", "too much tax", "excessive labour costs"- tune out and get cracking.

I so advise.

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- ¹ Australian Trade Commission, *'Why Australia – Australian Benchmark Report Update'*, June 2013, 4.
- ² Productivity Commission, Commonwealth of Australia, *PC Productivity Update*, May (2013).
- ³ Productivity Commission, Commonwealth of Australia, above n 1, 9.
- ⁴ Productivity Commission, Commonwealth of Australia, above n 1, 12.
- ⁵ Josh Bornstein, *'Workplace Relations: Welcome to My Day Job'* (speech delivered to Australian Industry Group on 23 October 2012), <<http://www.mauriceblackburn.com.au/media/1397183/jb-speech-2012.pdf>>.
- ⁶ Paul Kelly, *'Bell Tolls for IR Law'*, *The Australian* (online), 17 August 2011, <<http://www.theaustralian.com.au/national-affairs/opinion/bell-tolls-for-ir-law/story-e6frgd0x-1226116278232>>.
- ⁷ Geoff Winestock, *'Productivity: bosses blame the system'*, *Australian Financial Review* (online), 12 July 2012, <http://www.afr.com/p/national/productivity_bosses_blame_the_system_a6WRsuvplIPhTZEI7RHeIM>.
- ⁸ Kelly, above n 6.
- ⁹ Rob Brooker, *'The Productivity Puzzle'*, National Australia Bank Research, 27 September 2011, 3.
- ¹⁰ Grattan Institute, *'Australia's Productivity Challenge'*, Grattan Institute Report, 1 February 2011, No. 2011, 22.
- ¹¹ Jeremy Thorpe, *'Productivity Scorecard – Mining'*, Price Waterhouse Cooper, March 2012, 7.
- ¹² Ernst and Young, *'What makes Australians Productive?'*, Ernst and Young Australian Productivity Pulse – Wave 2, May 2012, 4.
- ¹³ Josh Bornstein, above n 5.
- ¹⁴ Milanda Rout, *'Lawyers Savage Bornstein Speech on Labour Regime'*, *The Australian* (online), 25 October 2012, <<http://www.theaustralian.com.au/national-affairs/industrial-relations/lawyers-savage-bornstein-speech-on-labour-regime/story-fn59noo3-1226502697059>>.
- ¹⁵ Peter Martin, *'Productivity. We can't really measure it – Productivity Commission'*, Peter Martin (online), 14 June 2013, <<http://www.petermartin.com.au/2013/06/productivity-we-cant-really-measure-it.html>>.
- ¹⁶ Alan Kohler, *'Productivity Performers: Innovation Comes Out on Top'*, ABC (online), 20 March 2013, <<http://www.abc.net.au/news/2013-03-20/kohler-productivity-improvements/4583342>>.
- ¹⁷ Alan Kohler, above n 16.
- ¹⁸ Ross Gittins, *'Productivity Rising, But Few Notice'*, *Sydney Morning Herald* (online), 11 March 2013, <<http://www.smh.com.au/business/productivity-rising-but-few-notice-20130310-2fu3k.html>>.
- ¹⁹ Reserve Bank of Australia, *'Statement on Monetary Policy : 5. Price and Wage Developments'*, May 2013, <<http://www.rba.gov.au/publications/smp/2013/may/html/price-wage-dev.html>>.
- ²⁰ Ross Gittins, above n 18.
- ²¹ Ross Garnaut, *'Ending the Great Australian Complacency of the Early Twenty First Century'* (speech delivered at the 2013 Vice Chancellor's Lecture, Victoria University, Melbourne, 28 May 2013).
- ²² Ross Garnaut, above n 21.
- ²³ Josh Bornstein, *'What's (also) wrong with the Left: Josh Bornstein on Helen Razer'*, Crikey, 17 May 2013, <http://www.crikey.com.au/2013/05/17/whats-also-wrong-with-the-left-josh-bornstein-on-helen-razer/?wpmp_tp=1>.
- ²⁴ Paul Gollan, *'Government Should Work to Overcome Conflict in the Workplace'*, *Australian Financial Review* (online), 10 May 2013, <http://www.afr.com/p/opinion/government_should_work_to_overcome_5hCb6EIXRiRdpTQvC2vMKL>.
- ²⁵ Liberal Party of Australia, *'The Coalition's Policy to Improve the Fair Work Laws'*, May 2013, <<http://www.liberal.org.au/sites/default/files/13-05-09%20The%20Coalitions%20Policy%20to%20Improve%20the%20Fair%20Work%20Laws.pdf>>.