

Fact and myth: Reflections on why Higgins made the Harvester decision

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ABSTRACT

The detailed arguments and evidence submitted during the proceedings of the Harvester case did not greatly underpin the detail and focus of the decision itself. While this dichotomy has been noted in the literature little has been written which attempts to explain why and how Higgins ignored fact and created industrial relations mythology. This is an early and still speculative examination but it highlights differences in the proceedings and the decision then offers two interpretations of the motivation of Higgins. It is suggested that Higgins ignored the facts of the case because he was a masterful tactician in the construction of a new nation state or because he was simply unable to meld the facts into the cogent whole he desired. In either case Higgins had some preconceived notion of his role as a nation-builder and the contribution the new system of industrial relations could make to the federation of Australia.

Introduction

The more the Harvester case is examined the curiouser and curiouser it becomes. While the importance of the Harvester judgment, in terms of content and impact on Australian wage regulation, has been well noted (*Ex parte McKay* (1907) Commonwealth Arbitration Reports Vol 2 hereafter Harvester Judgment; Fahey 2002; Rickard 1984 Macintyre 1985; Macarthy 1967; Fitzpatrick 1946) much less appreciated is just how this decision was made. Insight was offered by Justice Higgins himself some years after the judgment (1922), Peter Macarthy (1969; 1972) questioned the veracity of cost of living calculations while more recent analysis, in the context of wider concerns, has been given by Cockfield (1998) and by Fahey and Lack (2001). But the detail of the proceedings of the case itself, the interaction between the participants, the evidence, the argument and the philosophical underpinnings remain mostly ignored.

This paper will briefly analyse the content of the highly detailed transcript of proceedings (over 600 pages) in order to highlight and explain the anomaly between what was argued and what Higgins ultimately came to decide (National Archives of Australia Series C2274P1 hereafter referred to as the Transcript). And there were, curiously, significant differences. For example, the reasons for the creation and justification of the concept of a living wage given in the judgment are mostly absent from the proceedings of the case. The union advocate F. C. Duffy, in almost his first words of the case, stated that the fair and reasonable wage demanded by the Excise Act, and which he was seeking, was 'not a living wage' (Transcript: 4). Similarly, the cost of living evidence, so significant in the judgment, is seemingly not the preconceived argument of the unions but is suggested, even cajoled from them, by Higgins. More curious still is the lack of any wider social, philosophical or moral argument on the question of human need in this case. There is enormous detail in the transcript of proceedings. Its content throws light on the nature of manufacturing work, the variety of skills and occupations, the classification of a workforce, the rates of pay and the calculation of individual performance but it offers surprisingly little to explain why Higgins decided what he did.

The transcript of the Harvester case therefore presents the history of Australian wage regulation with a conundrum: the argument and evidence presented by the company and the unions and the discourse generated by the proceedings do not lead logically to the historically important decision that Higgins ultimately handed down. In other words, what was said only partially supported the Higgins' decision and this raises the question of why he decided what he did. What informed him, if not the facts and opinions of the disputing parties in this case? While this is a complex issue requiring a multi-disciplined, philosophical and theoretical analysis and will be dealt with at greater length in other articles currently being written, two possibilities are suggested here. One in some depth, the other posed as a question for further analysis.

The dominant explanation put forward in this paper is that Higgins was a skilled tactician who already had a broad picture in mind of what ‘fair and reasonable’ amounted to and a strong commitment to the establishment of the tribunal as a significant industrial institution. In this light the extensive hearings, much of it not ‘on-point’, could be seen as a symbolic exercise whose sheer length Higgins used to give credibility and importance to both his decision and to the institution he was seeking to embed in Australian society. But does this view give too much potency to Higgins’ mastery of the situation? Using Jacques Derrida’s (1990) discussion of judicial deliberations and “aporias” (perplexities, inconsistencies) it can be argued that perhaps in reality, despite much effort, Higgins was simply unable to gather evidence that could lead him to make a universalisable decision fully premised on the facts presented. In this light maybe the lengthy hearings were more an exercise in frustration for Higgins than a deft manipulation of symbols.

The company argument

The basic position presented by the company advocate, William Schutt, and which arose immediately the unions made a request for disclosure of the company’s balance sheets, was that the company could and did ‘pay fair and reasonable wages’ (Transcript: 15). However, when Higgins pressed Schutt on whether or not fair and reasonable wages should be defined as ‘a uniform standard’ applicable to all workers and all employers (Transcript: 22) his response was vague, admitting ‘reasonable limitations’ and exceptions (Transcript: 22-23). From Schutt’s point of view ‘there are gradations’ between workers and this was to be one of the key foundations of his argument in the Harvester case.

Schutt’s substantive argument was based on an analysis of the nature of work and wages for the various classes of workers in the McKay factory and in doing this raised a point which was to reappear as a company mantra: if the McKay workers did not get as much as similar workers elsewhere it was because their work had been simplified, mechanised and standardised. This meant less skill, judgment or discretion was required while the work was essentially repetitious. That McKay’s work required lower levels of skill and competency was evident from the fact that much of the work could be performed by Improvers or Helpers or was ‘quite easily done by Boys’ (Transcript: 25). To substantiate this deskilling argument Schutt called eight witnesses but the most important testimony was that given by George McKay, Factory Superintendent and brother of H. V. McKay. Schutt slowly and methodically took McKay through the detail of the wages book, the rates paid for various types of workers and the nature of their work. This was highly meticulous testimony but today its exhaustive nature seems laboured.

McKay also asserted that the company was paying men fair and reasonable wages and that this was calculated by considering a wide range of factors; level of skill, experience, age, qualifications, complexity of work, equipment used, and level of danger. These were all factors that McKay claimed he or his foremen were able to take into account in the setting of wages. Indeed the implication of McKay’s evidence was that the fixing of wages was based on the ‘worth’ of each individual and that only management was capable of making this complicated and sophisticated calculation.

The union’s argument

The first argument put by the unions was that the Harvester case was not about the establishment of a “living wage” but with the share of the profit ‘windfall’ that the excise duty represented to McKay (Transcript: 9). In this way, the unions were the first to raise the spectre of the capacity to pay argument in the federal wage fixing system and indeed, were actually reluctant presenters of the needs principle.

The second argument put by the unions arose from their interaction with the evidence or opinion presented by Schutt’s witnesses, in particular that of George McKay. The union advocates challenged McKay’s wage fixing criteria and went so far as to extract the admission that ‘In fixing the wages [McKay]...endeavoured to get labour at the cheapest price that [he] honestly could’ (Transcript: 133). Further, it was established that company wage fixing had little if anything to do with fairness but involved negotiating with individual workers ‘to pay him what he is worth’ (Transcript: 155). In their cross examinations the unions also attempted to deconstruct the nature

of work at Sunshine and to challenge the company's claims that its work was unique – easier, simpler and less skilled.

The third argument presented by the unions was one of comparative analysis. In addressing this part of their case the unions called witnesses who asserted that the nature of work at McKay's was comparable to elsewhere but the wage rates were lower. Full time union officials called as witnesses claimed the union rates were higher than those paid at McKay's factory and were paid in comparable companies such as Austral Otis Engineering (Transcript: 426-436). In addition, the unions tried to make a wider comparative point by calling non-union witnesses such as Charles Joseph Harris, Chief Clerk and Chief of Staff, Locomotive Branch of the Railways Department (Transcript: 383-402). It was also argued that many Wages Board determinations set higher rates for the same or similar trades (Transcript: 246) as did even New Zealand awards (Transcript: 226).

The fourth and final argument put by the unions in the Harvester case was that dealing with the cost of living. This was a relatively minor aspect of the case and, it is argued, the unions only addressed the cost of living issue because their profit share approach failed so quickly and because Higgins pushed for such evidence. In Higgins' view fair and reasonable wages had to be measured in some degree by the standard of living they could sustain (Transcript: 253). As a consequence one union advocate asserted that fair and reasonable wages were those which allowed a worker, 'to eat comfortably, to be housed comfortably and to have the reasonable enjoyments that a man enjoys in that state of life' (Transcript: 330-331). The unions evoked an idealised working class existence but in doing so merely replaced the hard to define concepts of fair and reasonable with the equally illusive comforts of a class. Interestingly, the unions did suggest the figure of 7/- per day as being the bare minimum required to pay for working class 'necessities' (Transcript: 333 & 344).

The unions called 14 witnesses to give direct testimony as to the cost of living. These were mostly male union officials (Transcript: 426-438) although three housewives were also called (Transcript: 439-443 & 504-505). More innovatively, the unions also called a Collingwood estate agent and a Prahran wood and coal merchant (Transcript: 501-504). Apart from these two all the other witnesses produced a schedule of living expenses which showed the simplicity and complexity of working class life. Higgins was an active participant in the examination and cross examination of these witnesses but their testimony did not stimulate any significant philosophical discussion about individual need, about the quality of these quantitative statistical estimates or the personal details generated by witness examination. In fact, of the 60 pages of transcript which covered the testimony of the cost of living witnesses, only 22½ pages were devoted to this issue. This was not in-depth examination or cross examination and it generated little discussion. The curiosity then is the contrast between the centrality of the cost of living in the Harvester judgment and its marginality in the discourse during the Harvester case.

The case is, of course, a watershed: but the real issue at stake is defining what that watershed actually is. Historians have largely focused on the judgment (Macintyre 1985; Turner 1965) and generally presumed that it flowed from the facts. But the case, and what it represents, becomes far more problematic when it is accepted that Higgins' decision bears only a tenuous relationship to the evidence that was presented to the court. Given Higgins' judicial background, this anomaly is quite surprising. After all, the distinctive feature of judicial reasoning is supposed to be its careful attention to the facts. Moreover, cases are meant to be carefully distinguished from each other according to slight and very subtle variations in the factual circumstances pertaining to each. Higgins was steeped in this kind of reasoning.

How, then, can the Harvester anomaly be explained? The question is even more perplexing when attention is focused on the extraordinary amount of detail that was put before Higgins. Why did Higgins allow - indeed request - such an abundance of detail when it would seem that he was going to base his decision on other considerations?

Higgins as master tactician?

One answer to the question would appear to reside in the likelihood that Higgins had another agenda. The evidence of the transcript shows that Higgins saw employment as a social act. Accordingly, he was not going to see Australian employment practices subjugated to the common law principles of contract, which was so clearly the case in England.

There are a number of instances in the transcript where Higgins' unease with the privity of contract can be discerned. At one point he told the employers that he couldn't 'understand a classification of each man by himself. You must have some method of grouping' (Transcript: 23). He said that 'I cannot treat employers as being on different planes, nor on the other hand can I treat each worker by himself' (Transcript: 23).

It is clear that Higgins believed that, when applied to the process of wage determination, contract law was not based on equality between the parties, but was really a mechanism for maintaining managerial control of the employment process. In this context, Higgins did not accept unconditionally the right of management to retain possession of its books. He put the issue to one side by not forcing McKay to produce them in this case, but only on the proviso that they could not subsequently raise the defence that they did not have the capacity to pay the amount determined by the outcome of the case (Transcript: 18). Higgins was quite clear in his view that management had to justify itself to a broader authority and also to much broader principles than those embedded in the English common law. In the *Harvester* case, that broader authority was the will of the Legislature, as set down in the Excise Act. Higgins stated that his duty was to interpret what the National Legislature meant by the words 'fair and reasonable'. Clearly, Higgins saw the act of employment as political as well as social: it was subject to the imperatives of national interest and national policy as determined by the Legislature and then interpreted by the new Court.

In denying the ultimate authority of private contractual relations, Higgins was extending the emerging principles of Australian state interventionism. He seems to have understood that the law of contract was inherently divisive when applied to something as fundamental and ongoing as a worker's employment. It would be mistaken, however, to think that the assertions of managerial prerogative put forward by the employers were the only real source of Higgins' unease. He also had concerns with the approach adopted by the Unions. He unreservedly rejected the idea that employment should in any sense be based on profit sharing, as the Union initially argued (see Transcript: 8-14, especially 12). Higgins' questioning of Duffy was razor sharp.

He also found the Employer's position untenable. What would the position be, Higgins asked, if the position of nine out of ten workers was improved, but the position of one in ten diminished (Transcript: 24)? Schutt's response was to claim that the issue was a question of finding the 'substance' of the matter. Curiously, Schutt sought this substance through a process of statistical dilution. What, he asked, would be the correct response if only one in 500 workers was underpaid? Would that mean that there was non-compliance with the Act? (Transcript: 24). This, of course, was a positivist attempt to reduce the issue to the legal category of compliance, ballasted by the authority of a statistical approach. Equity, it seems, was not an issue for Schutt when statistics could be applied to a ridiculously rare hypothesis. In his response Higgins showed that he saw the issue in moral, not statistical terms; and he saw the workers as human beings, not as factors of production to be subsumed by arid statistics and formal legalisms. While Schutt claimed that the position would represent 'substantial compliance with the Act', Higgins inverted Schutt's discourse and reminded him that 'the man who is underpaid feels it substantially enough' (Transcript: 25, our emphasis). Not content with that observation and the human feelings and subjectivity on which it was based, Higgins sought to personalise the matter further by asking Schutt to consider those feelings and not just his legal categories: 'Perhaps you will think over the point in case it may actually arise' (Transcript: 25).

The Union response was to support an outcome that advantaged the overwhelming majority, even at the expense of immiseration for a minority at the lower end of the employment ladder. Higgins did not disguise his unease with this response by the Unions. Clearly, such a position would reward workers employed in a highly profitable industry and disadvantage those employed in industries with a low rate of profit. 'Is there to be', Higgins asked, 'a lower standard for a poorer manufacturer than for a rich man?' (Transcript: 8). Higgins' concerns were surely astute. If wages were determined by profit sharing, then workers in highly profitable industries - and regions - would be advantaged over those who weren't so lucky. Such a system would encourage, even entrench, conflict between capital and labour in the process of wage negotiation and determination, and it might also fragment the labour movement, and perhaps even the nation. It would certainly tend to fragment and privatise the employment process, even if it did recognise the right of unions to negotiate a private contract through collective bargaining. Although radical in some sense, the union approach was deeply conservative in other regards. The Union response to Higgins'

question showed that they had in mind a system similar to that operating in the United States. It is clear from Higgins' exchange that he was searching for a universal principle that would shift the understanding of the employment relationship into a wider social and political context.

It should be remembered that Higgins was operating within the framework of a new Court in a new Federation. His impulse seems to have been to reject fragmentation and privatisation and to search instead for more universal principles that might promise unity and advance the idea of equality. Could a new nation be built on the basis of fragmentation across a very large land mass, bedevilled by private, regional variations in employment? The message from the national parliament was clear: trade was to be free between the States, as set down in s 92 of the Constitution; and the national parliament's determination was that Australian goods were to be protected. Herein lay the problem. It has not been appreciated by most commentators that protection from international competition actually enhanced the potential dangers that might flow from interstate competition (see Gollan 1974). With Australia's main industries based in Sydney and Melbourne, what might be the consequences of contracts negotiated between powerful capital and powerful labour unconcerned by foreign competition? The outcomes of the domestic market might be very unequal, both between industries and regions (see Convention debates re state rights in the Senate in Hirst 2001; Crisp 1980). In this context, Australia, with its young society and its large land mass, was uniquely vulnerable and clearly anxious (see McQueen 1986 on White Australia Policy). Viewed in this context, the Arbitration and Conciliation Court was charged with the duty and function of dealing with the imperatives of the Constitution and the realities of nation-building in an export-oriented economy dominated by a small population and a large land mass. On the other hand, Australia was also distinctively modern and assertive. Freed of a landed aristocracy and the rigidities of the English class system, it was arguably more 'developed', in the sense of the manner in which it embraced modernity, than England was. It would seem that, operating within this context, Higgins favoured a Third Way approach 100 years before Tony Blair and Anthony Giddens found such a term fashionable. In this sense, as in all others, Australia was becoming a distinctively modern polity. It looked to Britain, then to America, and then pushed in its own direction.

How, then, does this framework illuminate what was happening during the course of the Harvester case? If it is accepted that Higgins had his own agenda, and that this agenda can only be understood in a wider context, then it appears likely that Higgins had an interest in asking for, and receiving, large amounts of empirical data. However, his main reason for doing so, it can be suggested, was neither epistemological nor based in the legal principles of judicial reasoning: his motivation was semiotic. To approach the evidence in this manner is to see the Harvester case as a form of theatre at a decisive moment in Australia's history. Considered in this light, the mountain of factual material presented to Higgins served a number of theatrical purposes that were irrelevant to the process of judicial reasoning. The first purpose was the extension of the case and the creation of a sense of dramatic suspense. It would seem that the parties themselves were soon surprised at how long the case was going to run. McKay undoubtedly thought that the proceedings would be brief, and there are also indications that the union representatives were unprepared for the directions in which Higgins would take the case. Gradually, as the days went by, there was a sense throughout the nation that something important was happening in this room in Melbourne (See *Argus*; *Age*; *Sydney Morning Herald*).

It is important to understand that Higgins had very few theatrical devices at his disposal. He was constrained by his judicial position and also by the perception that he was a dour, humourless man of substance and principle (Crisp 1980; Rickard 1984). On the other hand, these disadvantages could be transformed into assets. After all, this was a new Court dealing with a controversial piece of legislation enacted by a young Parliament in a recently federated nation: it was a situation designed for theatre with the dour Higgins paradoxically cast as leading man.

This interpretation is consistent with the actual figure enunciated by Higgins in his decision. On its own, it is not particularly generous to the workers (Macarthy 1968). It would seem that this was not Higgins' purpose. He was keen to reject the right of management to any kind of overarching authority in the act of employment; and he was also keen to enunciate the broad principle that the idea of a decent wage lay at the heart of a socially responsible process of wage determination; but such principles do not seem to have had any practical significance in the figure actually arrived at by Higgins in this particular case.

In a sense, this is the reverse of judicial reasoning. Higgins did not go from the facts to the decision; on the contrary, he seems to have reached for a new principle while making every endeavour to ensure that the facts sat to the side, largely unrelated to an actual empirical outcome that fell comfortably within everyone's expectations.

The explanation of this anomaly probably resides in a desire on the part of Higgins to provide a figure that would not act as a focal point for intense dispute about the decision. Higgins appears to have been focused on the establishment of universal principles rather than on a statistical outcome linked to the particulars of this case. Higgins even cautioned the parties that he was 'taking this case as a sample case' (Transcript: 49). He then went on to tell other interested parties in attendance this: 'I also want you to understand that I intend to make use of the information I get in McKay's case in your case, and in other cases'. (Transcript: 50). When it is considered that there is some doubt about the extent to which Higgins was even wanting to use the data in the case actually before him, his stated intention to universalise that data takes on a theatrical dimension.

Nevertheless, it is important to appreciate, from this perspective, how the dominant values of empirico-positivism were turned against the employers, the major advocates of such an approach. The employers used the values of empiricism to extend the case, undoubtedly hoping to induce a state of paralysis. They sought to portray the employment process as so complicated and varied that detailed and nuanced understandings of the particular work process were required before any decision could be passed. Of course, it followed that only the employers possessed such detailed data. If this view had been accepted, then no universal principle could possibly have been enunciated. Any review of wage determination would involve a highly detailed case by case approach. Situated within such a framework, any adjudicator would soon be sinking within a sea of information.

Higgins' frustrated leap?

We obviously think our explanation for the gap between the Harvester proceedings and the Harvester decision is persuasive. However, one of its assumptions is troubling. In looking back at famous historical figures we have, perhaps in the same way as many historians, been keen to see Higgins as a powerful actor in near full control of a momentous event and a momentous decision. But should we not be wary of intuiting reason and clear sighted tactics to past figures especially when we know of the chaotic nature of decision making, even in the judicial arena, in our own times?

As Jacques Derrida in 'The Force of Law' (1990) has argued all judicial deliberations are haunted by "aporias" (perplexities, inconsistencies) that mean no judgment flows in an easily calculable way from the evidence that underpins it. In every case a principle must be suspended and reinvented to fit the peculiarities of the situation and this means gaps must be leapt. In every case, a moral choice must be made between two understandings of respect: 'respect for equity and universal right but also for the always heterogeneous and unique singularity of the unsubsumable example' (Derrida, quoted in Caputo, 1993: 104). So once again, no decision can be simply a mechanical application of a principle (Derrida, 1976). And, in every case a decision must be made *here* and *now*. Even if time is available 'still there comes a time - 'a finite moment of urgency and precipitation' - when the leap must be made, the gap crossed, the decision taken' (Caputo, 1993).

Perhaps we should therefore be more wary of portraying Higgins as a master tactician. Maybe the mountain of factual material presented was not so deftly used to add theatrical gravity to the proceedings. While Higgins was undoubtedly a talented judge and intellectual, he was still a mere man who was perhaps overwhelmed by the complexity and perplexity of the evidence he faced. Unable to draw advocates away from their own preferred lines of discourse, perhaps Higgins could find no way to apply a universal needs principle to the peculiarities of the situation. And perhaps he could not find any clear way past the different portrayals of what a family needs that were submitted to him. In this respect, during the proceedings Higgins was intrigued as to how families of similar size incurred different living expenses (Transcript: 459-460; 466; 475). Yet he had to make a decision, the case could not go on for ever and the parties were very unwilling to give him the information he asked for. In this light the lengthy hearings were perhaps more likely an exercise in frustration for Higgins involving a gradual realisation that his decision would inevitably have to be a leap rather than a calculation based on facts. Whatever the reason Higgins

did leap: the decision is underdetermined by the facts of the case. Higgins does not appear to have gone from the facts to the judgment; he reached for a new principle and deliberately or in frustration left the facts to the side.

As to the intellectual origins of Higgins' judgment, we have provided what we see as a rationale for his decision to reject the authority of private contractual relations as well as his decision to reject the union's profit sharing alternative (see Bennett 1994: 21-22). Beyond this, Higgins' actual needs principle seems to have been informed at least in part through his engagement with Pope Leo XIII's encyclical of 1891. In a lecture given in 1896 entitled 'Another Isthmus in History' Higgins refers to Leo XIII's concerns about the plight of the poor, his calls for measures to 'support the wage earner in reasonable and frugal comfort' (Quoted in Higgins 1896: 17) and his warnings against revolutionary change and any assault on private property. The Pope's call for reasonable and frugal comfort clearly resonate in Higgins' decision, so perhaps the Pope's views on revolution and property were also playing on Higgins' mind in the decision and during the union's submissions on the presentation of the books and profit sharing.

Conclusion

Our claims in this paper are a first step. They need further examination and analysis and especially further research into Higgins' role as the chief architect of the decision as well as the complexities and perplexities he and the other parties faced. In this respect more work is now being undertaken to look at the case through the perspectives afforded by writers such as Jacques Derrida who focus on what can be called the 'art of judgment'.

Moreover, one of our intermediate objectives is to continue teasing out the relationship between the arguments presented in the Harvester case and the Harvester decision and broader social and political values. This, in turn, is part of a far broader and longer-term project that is examining the federal industrial tribunal's historical role in reflecting and reproducing social, political, and moral values in Australia since the Harvester case.

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