A Theatre of Words and Wages: Reading the Script of the Harvester Hearing

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The transcript of the proceedings of the Harvester case heard in October 1907 presents a stark contrast with the Decision ultimately handed down by Justice Higgins, President of the Commonwealth Court of Conciliation and Arbitration. A reading of the transcript reveals the discourse presented during the case in the form of argument, evidence and witness testimony did not greatly support the notion of a 'living' minimum wage for unskilled males. This was not, for example, a union objective in the case. Using the transcript this article outlines the details put by both the employer and union advocates and identifies the highly interactive role of Higgins in this landmark case. In doing this the article explains why the judgment made by Higgins was so different to the substance of the arguments presented to him. It is concluded that it was Higgins' complex notion of nation-building which steered him away from the advocates' arguments and towards his own objectives.

There is perhaps no more famous decision of the federal Australian system of industrial relations than that made in the Harvester case of 1907.[1] It was deservedly made famous by a number of distinct implications or impacts. The Harvester case established a national minimum wage for an unskilled worker – the basic wage with the modest rate of seven shillings per day; by implication it set in place the requirement to differentiate margins for skilled earnings;[2] it elevated the calculation of human need as a guiding principle of wage fixation and established what was, arguably, the first 'living' wage in the world; it enshrined the centrality of family in wage fixing; and by omission, it helped further entrench a gender division in worker earnings. In short the details covered by the decision in the Harvester case had a powerful and long term impact on the operation of the federal tribunal and on Australian wages in general. And it needs to be made clear that the fame of Harvester was not generated by the wage of seven shillings per day. This was by no means a generous or even an unusual daily rate.[3] The significance of the Harvester decision therefore has rested on the implications and precedence of its powerful principles and humanitarian conceptions.

It may come, therefore, as a surprise to some readers to discover that the issues which then and now distinguish the Harvester decision are not much in evidence in a reading of the discourse, the evidence presented, or the tactical interactions captured by the official transcript of proceedings.[4] Indeed it is this which makes the transcript so valuable an historic source, despite its neglect. Few if any historians have referred to the transcript of proceedings and instead have concentrated attention on the decision.[5] This is because of the clarity and importance of the decision; it had obvious consequences and its impact was on the civilising of capitalism. However, a decision will not necessarily explain the process of reaching or forming a decision. Nor will it necessarily reveal the complexities of the perspectives and evidence put, the expectations and tactics of the participants or the pressures of logic, duty and compromise. The transcript is not the creation of the imagination or interpretation

of one person but is part of a discourse, a process of interaction. In this way the transcript is a critical source in explaining how and even why Justice Higgins decided what he did. Reading the transcript of proceedings adds remarkable layers of understanding and interpretation and offers a mechanism for deeper analysis of Arbitration Court decisions than the formal, published judgment. The transcript helps put the case into perspective. For instance, in reading this 640 page verbatim document there is no conscious awareness amongst the protagonists that this case was setting a national minium wage; and there was certainly no recognition of the need for margins for skill. More critically, the issue of a 'living wage' was explicitly rejected by the unions at the outset of the case.[6] The unions saw this as a profit sharing case, as a conflict over the distribution of a 'windfall' profit arising from the Excise Tariff Act. Certainly the employer advocate anticipated a much more mundane and pedestrian case than he got. For him, it is clear, the case was neither about profits nor principles of need. It seems only Higgins saw his task in this case as something bigger and more significant.

As to the much lauded calculation of human need, the reality is disappointing. The cost of living details which were presented were meagre, and offered only after persistent badgering by Higgins. But more than this, the transcript reveals only the most fleeting, vague and inconclusive discourse relating to need and living costs. Not even Higgins examines this material evidence in any great detail despite the supposed centrality of it in his decision. As already mentioned the issue of family is apparent in the decision but it is not a point of argument or discourse in the proceedings. There is little if any examination of the typicality of a five member family. The long established Australian concern with family and population growth was not even an implicit sub text in this case.[7] As to gender, beyond the division between housewives and male bread winners there was no discussion of gender based wage differentials. Working women were not part of the reality of this case. The McKay Sunshine Factory appears not to have employed any females in 1907 and no one ever raised gender as a differential in wages. Confrontation with this problem was only to come with the Fruitpickers case of 1912.[8]

While the details of the discourse revealed in the transcript are interesting and offer fascinating insight into aspects of life and work in 1907,[9] they are little to do with the bold principles ultimately outlined by Higgins in his decision. This article argues that the Harvester decision was not greatly supported by the interaction and evidence generated by the participants in the Harvester case. This is not a mere question of interpretation; the difference is palpable, it is evident with even the most cursory of readings. We will, therefore, outline the arguments put by the antagonists and textually analyse the interactions detailed in the transcript in order to show the unique unconnectedness, the overhang, of decision and proceeding. In addition, and just as importantly, it will also seek to explain why this overhang occurred and just how it was that Higgins came to decide more than was asserted.

Considered from the perspectives of cultural history, textual studies and discourse analysis, the decision of an individual judge is bound to appear both unified and coherent. This is because the very task of a judicial pronouncement is to resolve conflict, and not to hold it in suspended animation. The situation is more complex where a number of judges preside, and this is particularly so in split judgments. Such judgments brought down by a judicial bench often provide insights

into the competing principles at play in a case, and also the discursive tensions and strategies that became manifest in the matters placed the court.

In the Harvester case, a single judge presided: Higgins. Single judgments are often structured in a manner that services the narrative impulse towards closure, and in our opinion the judgment brought down by Higgins must be interpreted in this light. Considered from the perspective of Derridean deconstruction,[10] the challenge facing either the historian or the textual analyst is to reveal the key moments in the judicial text when the judicial author uses a strategy of displacement in order to transgress the logic that ostensibly drives the text of the judgment. In such circumstances, the task of the deconstructive historian is to identify the moment in the text when this discursive leap occurs and to reveal the process and textual technique by which that leap has been consummated. Characteristically, the authorial sleight of hand will take place by textual resort to metaphor. In this sense, the judicial text produced by a single judge can be analysed in much the same manner as any other text, even a piece of fiction.[11]

It is important that the judgment itself be looked at anew in such a manner, but that is not our primary task. In this article we turn our attention to a text that lies submerged, and largely neglected, beneath the text of the judgment itself. That submerged text is the transcript of the proceedings that took place over 19 days. In that text it is possible to see the jostling of ideas as arguments were put forward by the legal representatives of H.V. McKay, the unions, the witnesses, and finally by the interventions of Higgins himself. In turn, it is possible to see how the explicit arguments put forward by the parties shifted throughout the case in response to Higgins' interventions. Higgins, however, cloaked some of his responses and interventions, partly, we believe, because of semiotic strategies and partly because his judgment had to be seen to conform to the requirements of legal discourse.

The text of the transcript is in many regards more revealing than the text of the judgment. This is because it is the product of adversarial textual strategies rather than the product of a single author. Although our purpose is to focus on the transcript, we shall point briefly to some textual disparities between the evidence presented before Justice Higgins and the judgment that formally, but very tenuously, emerged from a consideration of that evidence. It is our argument that the tenuous nature of this inter-textual process is historically significant and in need of new attention and reconsideration.

It should be emphasised here that this process of textual analysis does not proceed by merely comparing the two texts. The transcript of the case presided over by Higgins is a very rich historical text, principally because it is situated at the point of intersection between a number of discourses: evident in the text of the transcript, for example, are discourses of contract law; discourses of management[12] and labour; discourses of civilisation; discourses of marginalist economics; discourses of managerial prerogative; and latent discourses of race, gender, nation building, modernity and globalisation. In the space of this article we can merely gesture to our larger project in which these discourses will be considered. Our specific purpose is to examine some of these discourses *as they were played out in the text of the transcript*. This means that we do not aim here to consider all of the arguments put by Higgins in his other writings; and nor do we explore such important cultural discourses that are only latent in the text, such as discourses of race and gender.[13]

Background to the Harvester Proceedings

Although it is well known that the new Australian nation was protectionist, it is perhaps not generally appreciated that protection was hedged and constrained by other imperatives. In other words, protection of Australian industry was not conceived of as simply the erection of across-the-board industry tariff barriers. Under the *Excise and Tariff Protection Act 1906*, individual manufacturers were required to apply to the Tariff Commission for exemption from the tariff duty imposed on their industry.[14] To be given this exemption, and therefore a protected advantage in the market place, manufacturers were required to prove they paid 'fair and reasonable wages' to their employees. In a sense, this form of tariff protection was in itself a subtle challenge to managerial prerogative.[15] The role of establishing fair and reasonable was given to the newly created Conciliation and Arbitration Court. Some rulings had been given by the first President of the Court, Justice O'Connor, in 1906 and the simplicity and brevity of his hearings would have encouraged all subsequent applicants that the matter was relatively straight forward. In 1907 Hugh Victor McKay, owner of Australia's largest agricultural machinery manufacturing plant, applied to the Arbitration Court for a hearing on the fairness and reasonableness of his wages, almost certainly expecting a quick, positive outcome.

The hearing of McKay's application began on 7 October 1907 in Melbourne and ran for 19 days. McKay's argument was presented throughout the proceedings by William J. Schutt, a Melbourne barrister who later became a Victorian Judge.[16] The unions involved were represented by Frank Duffy (KC); James Arthur and James Sutch.[17] The three union advocates were barristers although Duffy, who was a contemporary and acquaintance of Higgins, was certainly the most prominent and was later appointed Chief Justice of the High Court.[18]

Between them the advocates in the Harvester case called 49 witnesses and proffered over 79 exhibits of evidence to Higgins. Schutt, in presenting the McKay case, called only 8 witnesses (6 of whom were in the employ of McKay) and handed up around 15 exhibits. The main and most important of Schutt's witnesses was George McKay, brother of H.V. McKay and the Factory Superintendent. George McKay was on the witness stand for five days and offered evidence through examination, cross examination and re-examination, in over 170 pages of the 640 page transcript. The union advocates between them called 39 witnesses of whom 10 were union officials (4 fulltime officials), 19 were full time workers employed in various trades and by a range of businesses, 3 witnesses were housewives, 5 were public servants or employees of local government, one witness was an estate agent and another was a wood and coal merchant. Interestingly, five of the witnesses read their addresses onto transcript and so these dwellings can be found and viewed today. The simpleness of their worker cottages in 1907 has, of course, been irrevocably transformed by contemporary real estate values. There were also 2 other witnesses involved in the proceedings, Patrick Dwyer, Police Magistrate and chairman of a number of Wages Boards,[19] and Harrison Ord, Chief Inspector of Factories (Factory Inspector's Reports), but it is not now clear who called them. In the case of Ord there is the suggestion that Higgins may have sought this evidence for it was he who swore in this witness.

The nature of the exhibits varied but the titles of their content (none are included in the transcript) does not now appear to be unusual or unexpected. The company

handed up exhibits that covered such material as the company wages books, staff classifications, company rules, lists of the weight of hammers, the work/task cards used to allocate and monitor work performance, lists of workers and lists of apprenticeship reports and agreements for both bound and unbound apprentices.[20] Much of the detail of the McKay case was presented, as will be seen, by the verbal submission of George McKay although the wages books were of central importance throughout the hearing. The unions also offered a wide array of written exhibits covering such material as union rules, lists of companies paying union rates, Wages Board determinations, even New Zealand awards, examples of contracts and, most famously, estimates of living expenses.[21] The construction or presentation of evidence and argument by both sides in the Harvester case reveals a protocol and procedure that would be familiar to recent to students or practitioners of Australia's centralised tribunal system.

Before going into the detail of the employer argument and submission it is worth noting the first skirmish in the case involved Duffy and the unions' position. Although the application for the hearing belonged to McKay, and so the company's advocate, W.J. Schutt, had the right to open proceedings, it was the unions who actually did so. The unions' main advocate, Francis Duffy, began with a technical argument for the provision of the company's books: its balance sheets.[22] The unions wanted this material not simply to underline the fact that McKay could afford to pay fair and reasonable wages but also, most interestingly, because in their view tariff protection gave employers a windfall in profits. The unions wanted a share of that windfall. This argument, which hinged on the provision of the company books, was an argument for profit sharing. Indeed, it was also a capacity to pay argument. Schutt, the McKay advocate, strenuously opposed this move on the basis of privacy and the right of managerial prerogative.

Higgins responded to this argument with unusual hesitation. At a sub-textual level, exclusive possession of the books was a source of informational imbalance. Moreover, it wasn't just the unions who were at a disadvantage. Higgins himself, and therefore the court, were compromised by the informational advantage held by the employer. If employment was truly a social act, and if the court truly had jurisdiction over what constituted 'fair and reasonable' rates of remuneration, then the case for production of the books was a powerful one. The issue of placing restrictions on the publication of such information on the basis of commercial sensitivity is, of course, an entirely separate issue, but it was this issue that Higgins used as justification for not compelling the production of the books. There was an opportunity here for Higgins to advance the public interest by demanding greater corporate transparency and accountability when the expenditure of public money was at stake, but it seems that he was focused on the formal requirements of the legislature and on the private lives of individuals, and not on the means by which these could be conceptualised as related parts of a coherent philosophy. In this sense, although Higgins had a strong conception of employment as a social act, and a strong sense of individual workers as dignified human beings living with economic and social rights in a progressive society, he did not make the leap that might have seen the right of individuals to have access to information about their employment as being an essential feature of life in a modern democratic polity. Higgins view of workers and their rights remained essentially economic and passive, as the term 'frugal comfort' captures with such

eloquence and economy. For this reason, from the moment when Higgins blinked on the issue of the corporate books, informational asymmetry remained an essential feature of Australian modernity in the early years of Federation. Higgins, with strong reservations, refused to order the company produce the books.

The McKay Submission

W.J. Schutt was the sole advocate for the H.V. McKay Sunshine Harvester Company and on the whole he consistently and competently presented and managed his case. The basic point presented by Schutt, and which arose immediately a request was made for disclosure of the company's balance sheets, was that the company was

> in a position to pay fair and reasonable wages. We say further that he [McKay] does pay fair and reasonable wages and we are ready to prove that, and it does not depend on the profits or the losses that he makes.[23]

The first evidence supporting this contention was the provision of the Wages Books from 1 January 1907 until early October.

Higgins on the other hand was eager that the parties address how fair and reasonable wages were to be defined. Schutt, however, was clearly reluctant to be drawn into such a complex and essentially philosophical discussion. 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, Schutt's response was vague, admitting 'reasonable limitations' and exceptions. 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.[24]

In building his case Schutt provided some brief background information to the company. McKay's plant was located

> at a place now called "Sunshine" at Braybrook. He has carried on a similar business for the past Twenty years. At one time, the business was located at Ballarat. When this application was lodged [a] portion of the business was still being carried on at Ballarat. Now the whole of the industry is carried on at Sunshine; and Mr. McKay employs 495 workmen, I think. The machines which are manufactured at Sunshine include most of those mentioned in the schedule of the Excise Tariff Act.[25]

The duty that exemption was being sought was £6 per machine. This meant the price at which the machines could be sold at was £70. Schutt also provided some detail about the way work was organised at the factory, which was ultimately critical to understanding his case. He explained;

> The workmen have been classified by Mr. McKay, and for the purposes of this application, they resolve themselves into about 12 or 14 different classes. The greater number of the workmen are either iron-workers or wood-workers and then there are a certain number of engine drivers, labourers and so forth.[26]

At this point Schutt began to define a purely employer-centric view of fair and reasonable by stressing, firstly that the conditions under which these workers

laboured were good although he asked that Higgins 'pay a visit to the Factory' to see for himself, making this one of the first site inspections conducted by the federal tribunal. The second point made by Schutt was that the performance of work was fixed in one permanent place and that this was relevant in establishing fair and reasonable wages. A third consideration, according to Schutt, was that the work at McKay's was not arduous or dangerous and that it was consistent and did not substantially vary from week to week. The fourth indicator of fair and reasonable pay was whether they conformed to relevant wage fixing institutions such as Wages Boards. In this regard Schutt argued that McKay paid at or above the minimum of relevant Wages Boards but, as will be seen below, this was quite a minor part of the company's argument.[27]

The final and most critical determinant of fair and reasonable was the nature of the work performed. In outlining the nature of iron-work Schutt raised a point which was to reappear as a company mantra;

> the work they do is not so laborious a description as that of an ordinary ironmoulder. The amount of skill required varies according to the different machines which the workmen have to operate. As some machines require greater skill than others the workmen are remunerated accordingly. Some of the machines require very little skill indeed to work. In the main the workmen have to do the same things over and over again. They have not, as they would have to do outside, to adapt themselves to different kinds of work. … In an ordinary engineering shop, where all kinds of work is done, there is a great deal of work requiring special skill that would not be required in a place such as Mr McKay's factory.[28]

In this passage the great bulk of Schutt's argument is set out. The McKay workers did not get as much as similar workers elsewhere because their work had been simplified, mechanised and standardised. This meant less skill, judgment or discretion was required while the work was essentially repetitious. There is a discursive strategy embedded in these words. The workers are effectively constructed as passive factor inputs to be mixed and matched to the rhythm of technology and its associated organisational imperatives. Lying submerged beneath is a broader cultural discourse embracing economic theory, contract law and newly emerging theories of management.[29] Schutt's assertions imply a docile and submissive labour force requiring little skill or initiative. Where such marginal skill is required, its higher marginal productivity is rewarded commensurately by a management that is fair, intelligent and efficient. There is no sense here that labourers are human beings who function as dignified members of a civil society. The logic of Shutt's argument is that consideration of workers and working conditions should not extend beyond the workplace. Whatever people did outside the workplace was an entirely separate matter. If this view is accepted, then employment is not a social act, as the Parliament clearly considered it to be, but is a private arrangement to be organised according to the concepts of privity of contract and managerial prerogative. When the description of the modern prefabricated world of machines and their requirements are also considered, it is clear that Schutt regards machines as the subject and workers as the predicate. The power invested in this language is important, but its resonance was undoubtedly less powerful in Australia than it might have been in Britain, where the social inferiority of the working class had a longer and more rigidly

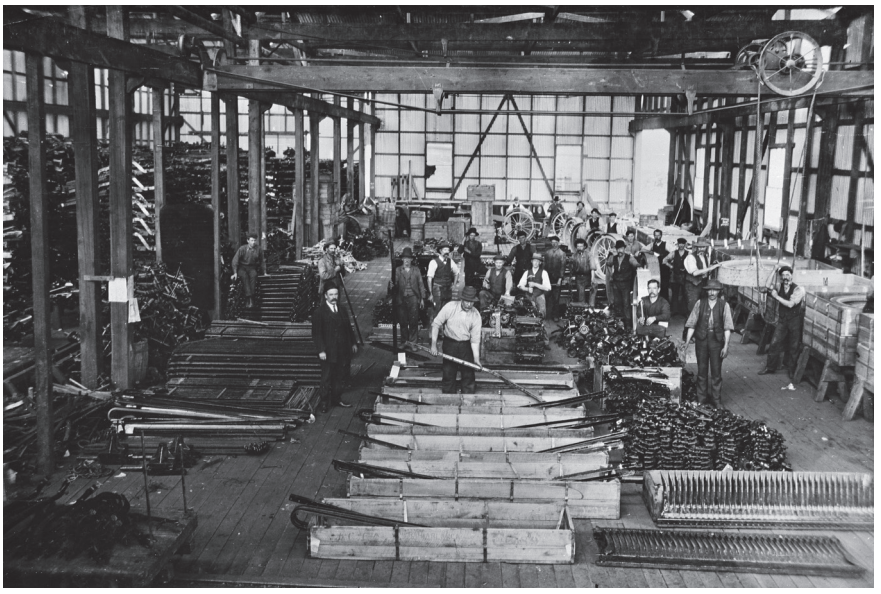
entrenched history. Australian democratic and egalitarian values were constantly being contested in the early twentieth century. Much of what Higgins has to say is social in its orientation. He is concerned not only with human dignity, but more broadly his concerns focus on the sorts of lives being lived by those in employment. In contrast to the dehumanising construction put forward by Schutt that workers should be seen simply as inert and malleable factor inputs, Higgins' workers are thoughtful human beings who read books.[30] In discursive terms, Higgins constructs them as whole human beings living in a civil and democratic polity while Schutt sees them as inert factor inputs.

Another thrust in Schutt's argument is that each workplace is unique: it has different machines, and different organisational requirements, with different demands. In other words, each workplace — and each unit within a workplace — is characterised by its own technical conditions and requirements. The logic of Schutt's position is that the world of work is infinitely diverse and therefore not suited either to the application of general principles or to overarching regulation. This line of argument presents a challenge to the court. This challenge is philosophical, jurisprudential, institutional, and finally administrative. Philosophically, Schutt's argument favours a cautious and incremental empirico-positivist approach to workplace data, but only under conditions that favour the party in possession of the relevant information and detailed technical knowledge of the production process. This very specificity – relating to each worker and to each workplace – is a barrier to the universal principles preferred by Higgins. Moreover Schutt's argument rests on a spurious claim to be objectively empiricist while the Higgins approach involves 'fair and reasonable' in a broad economic and social context.

Jurisprudentially, the Schutt approach would also confine employment law to the doctrine of privity of contract, and it would prevent the intrusion into the court's consideration of any issues relating to the lives of the workers, and even more broadly to the goals of the nation. Accordingly, the scope of the law – and the scope of the court's jurisdiction – would be considerably restricted: managerial prerogative would be preserved, and the court's task would not extend beyond ascertaining that the employer had acted reasonably in asserting that there was a more or less valid relation ship between each worker's marginal productivity and his hourly rate of pay.

Institutionally, this would leave little role for the court. Moreover, the institutional consequences would not be confined simply to the court itself. At this crucial moment in the constitutional, jurisprudential and political life of the emerging nation, a diminished court would lack the institutional authority to lay down principles that would apply across the Australian industrial landscape. Instead, the court would be little more than an empty symbol of the liberal democratic rule of law: its real function would be to rubber stamp the judgment of the employer in case after case, with each case distinct from all others that preceded it. Arguably, no court could tolerate ceding its authority in such a manner.

Administratively, Schutt's argument, if successful, would impose upon the court a significant administrative burden. The court would be inundated with huge amounts of detail. The scale of this administrative burden would provide an additional inducement for a diminished court to rubber stamp the empirical conclusions of an employer acting according to the imperatives of managerial prerogative.



H.V. Mckay Sunshine Harvester factory showing harvester combs, comb teeth, wheels and other metal parts are being packed for shipment c1918

Reproduced courtesy of Museum Victoria

Schutt's argument can be stated simply: in order to establish that McKay paid fair and reasonable wages to his workers, the nature of their work and conditions were the only relevant considerations. Comparative analysis with other firms or occupations was inappropriate. 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'.[31]

Deskilling and simplification had lowered the demands placed on workers and in the case of making nuts for example 'the machine and not the operative makes' them.[32] This linguistic construction of the production process invests machines with more active and animated purpose than it does human beings, who in turn are regarded as passive inputs to be harnessed to the imperatives of the machine. The Taylorist implications of this discursive strategy are quite striking.

This Taylorism became more evident as the employer's description of the workplace was expanded in terms of fitters; 'the greater part of the work in this department does not, we think, require very much skill' for 'all he has to do is put the pieces together'.[33] The sheet iron workers' labour was 'really comparatively simple' while the work of the woodworkers was 'all of a simple character. It is done to pattern and it is all repetition work. Further it is not dangerous work'.[34] This last statement caused Higgins to ask whether there were not circular saws in use but Schutt assured him that it was 'A very small saw'.[35] Duffy was alert to the employer's discursive strategy of investing machines and management with skills and intelligence, while investing workers with merely pre-determined, automatic movements in the service of management and its machines. Duffy was provoked to ask, perhaps to mutter, 'I suppose that saw has lost its teeth?'.[36] There is little need to go on further, for the substantive argument for every other trade or class

of work was explained in the same terms: the work at McKay's was so deskilled and simplified that even young, inexperienced and largely unskilled workers could perform most of it. In this way the fairness and reasonableness of the wages paid by McKay could not be simply established by comparing the work and wages of other manufacturers or even of Wages Boards.

The next stage of the company's case involved the examination of witnesses. Schutt called eight witnesses; George McKay, Factory Superintendent and brother of H.V. McKay; George Bult, Harvester Department Foreman; Robert Clarke, Woodworking Department; Edward Rigby, Managing Director, Austral Otis Engineering Company; John Scott, Secretary of the Agricultural Implement Wages Board; Bryant Richards and George Bishop, both blacksmiths at McKay's, and James Garde, Manager plough department of Mckay's. Between them these witnesses provided 246 pages of testimony in examination and cross examination, however the great bulk was given by George McKay whose evidence ran to over 170 pages of transcript. McKay was the company's key witness and Schutt slowly and methodically took him through the detail of the wages book and the rates paid for various classes and types of workers. Essentially McKay testified that the bulk of the work designed at the Harvester plant did not require much skill or experience. The work was simplified and standardised by the use of patterns and templates and was mostly repetitious.[37] This was highly meticulous testimony giving such detail as the weight of hammers used by various types or classes of workers to the age of workers or whether apprentices were bound or unbound.

McKay also maintained 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 he claimed he was able to take into account in the setting of wages. Indeed the implication of his 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. McKay's evidence essentially asserted the centrality of managerial prerogative in the setting of fair and reasonable wages. This did not endear him to Higgins, as some of their interchanges suggest. He came across as a calculating witness who was carefully constructing an argument. He was also dogmatic and increasingly – as Higgins questioned him, or later when he was cross examined – he became defensive and churlish.[38] McKay was a critical witness but he was not as successful as he would have wanted to be.

Schutt's other witnesses included actual employees of the company and their testimony was intended to confirm aspects of McKay's opinion, to offer specialist detail from specific departments when McKay could not credibly do so, or to examine unique working arrangements. George Bult, for example, was in charge of the Harvester making department, and the key contribution he made was to assert 'there was a great deal of difference' between his metal workers and those employed in other engineering plants. He also confirmed that the reason for variations in men's wages was due to their skill, capacity and competence.[39] Edward Rigby, from Austral Otis which manufactured mining machinery, steam engines, boilers and a range of machinery, was called to confirm that the skill levels within the McKay plant, indeed all agricultural companies, were lower than in a specialist engineering firm

like his.[40] Rigby claimed a man employed in a firm like McKay's 'has scarcely got to use his brains at all' because the work process had been so designed that all he had to do was follow the guides, patterns or templates.[41] The point that Schutt used Rigby to make was that the wages paid in McKay's factory could not be compared to the rates paid in other industries. Fair and reasonable was not universal but was related to the specific character and nature of employment in a particular industry or indeed, enterprise.

Schutt's argument was relatively simple. McKay's factory was a modern and efficient enterprise utilising labour in the most cost effective manner; namely the production process was designed in ways which deskilled significant numbers of tasks and jobs. This and the significance of the cost of labour as a factor of production meant management had to create wage scales that reflected the worth of individual workers and, more importantly, rates that were fair and reasonable when contrasted with some very specific and highly limited rates elsewhere. The detail and doggedness with which this case was pursued was intended to reassure Higgins that the company knew what it was doing in terms of wages and that they were fair. The company saw fair wages as an enterprise specific measure, determined largely by factors internal to the enterprise rather than any principle of universality. In contrast, Higgins wanted to explore fair and reasonable primarily in terms of universal human need. There was clearly a wide gulf separating the company and Higgins in this case. Indeed, as will be seen below, the unions too were initially distant from Higgins as well.

It is possible to explain the divergence between Higgins' view and that of the employers in ways that are less than charitable to Schutt. For example, it could be argued that he was simply out of his depth; that he did not really understand the broader aims and agenda Higgins was pursuing and thus stuck firmly to a game plan established before the proceedings commenced. Some evidence for this can be found in the transcript. Schutt never raised any matters regarding the cost of living and, from his surprise that Higgins wanted this discussed,[42] it is evident that he never intended to call any evidence on this issue. Indeed even when given the right to do so Schutt prevaricated[43] and then finally admitted a few days before the case concluded that he would not call cost of living evidence.[44]

However, there is an explanation for Schutt's antipathy toward the Higgins agenda that does not portray him as a dullard. The alternative is that Higgins and the employers were engaged in a political battle over who should have the prerogative when it came to setting wages and this battle was underpinned by very different views about what constituted fair and reasonable wages. While it is unlikely that Schutt realised at the outset that the Harvester case was to be a benchmark for future industrial regulation he would nevertheless have wanted to protect McKay's perceived right to set wages at a level he deemed appropriate. Indeed, Schutt and McKay both would have seen any attempt to take wage determination out of the hands of individual employers as a restriction on their flexibility to organise production so that it fitted their particular needs. Moreover, to allow wage setting to be determined by what it is that a man and his family needs in order to live in a civilised society would be to establish a principle that almost by definition stands outside an employer's sphere of desired influence. Ever since the industrial revolution most employers endeavoured to ensure that they were not made responsible for the

broader lives and well being of their employees as had been the case for lords and their serfs.[45] It is thus perhaps not surprising that Schutt was reluctant to go down that path, and his confusion at Higgins' requests is more understandable.

The Unions' Argument

Although few of McKay's workers were members of a trade union, nine of the unions which covered workers in the agricultural implements industry were represented in the Harvester case. The unions were represented by three advocates; James Sutch, Frank Gavin Duffy and James Arthur. Sutch spoke on behalf of five organisations: the Federated Sawmill, Timber Yard and General Workers Union; the Amalgamated Carpenters; the Coachbuilders and Wheelwrights Society; the Painters and Decorators Society; and the Engine Drivers Society. Duffy, the more prominent of union advocates, and Arthur between them represented the Agricultural Implements and Iron Moulders Society, the Amalgamated Iron Foundry Employees, the Tinsmiths and Iron Workers Society and the Iron Workers Assistants Society. The cases of these three advocates were well integrated with Duffy taking the lead. The others were by no means silent but they tended to concentrate their arguments, witness examinations and cross examinations toward the latter stages of the hearing.

Unlike the employer case, the arguments and intellectual strategies of the unions changed and shifted over the course of it; they were not locked into a static and inflexible position. Of course, this flexibility was not simply an expression of the advocates' intellectual capacity and shrewdness. In some real sense the shifts in union argument also highlight the fact that the unions' case often bobbed along in the wakes of both Schutt and Higgins, pushed and pulled by evidence, argument, assertion and demand. At the same time the unions were always alert to the nuance, the subtle and not-so subtle hint. On the whole it is hard to avoid the conclusion that the unions were no more in control of this case than the employer: perhaps less. This brief account of the union arguments and presentations highlights essentially the shifting nature of the unions' case.

The first argument presented by the unions was that the Harvester case was not about the establishment of a 'living wage' but rather with the share-of-the-profit 'windfall' that the excise duty represented to McKay.[46] As already explained, Higgins dismissed this argument quickly and unmercifully. Although the unions did, on the odd occasion, revisit their profit-share argument later in the case it was always half-hearted and quickly passed over. More surprising, their grasp of Higgins' universal principle of a living wage, at first so stridently rejected,[47] is only very slowly grafted onto their strategy. While the employer's advocate understandably never embraces the concept of a living wage, these unions were slow, even reluctant, to grasp what Higgins offered them. They were the natural partners in the Higgins vision but for much of the case it seems not to be a part even of their imagination. This perhaps underlies the institutional conservatism of the Australian model of unionism at the time: they were inherently comfortable with traditional collective bargaining and did not, at the outset of this case see the new industrial court actually altering this reliance. They certainly appear not to have dreamed of anything more.

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'.[48] 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'.[49] From the unions' perspective, the worth of a man could only be defined in terms of union rates or collective agreement. There is certainly no anticipation apparent in the unions' case that fairness could be established by Higgins in his new court using some process of judicial independence. 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 than elsewhere.

The third argument conveyed 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 that these were paid in comparable companies such as Austral Otis Engineering.[50] 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.[51] It was also argued that many Wages Board determinations set higher rates for the same or similar trades[52] as did even New Zealand awards.[53] In presenting this aspect of their case the unions also confronted a problem that Higgins pointedly ignored. The unions claimed they had difficulty getting any actual employee of McKay to give evidence because of the fear of retribution.[54] Indeed one of their witnesses in these comparative matters, Samuel Parnacott who was employed by a timber merchant, was sacked the weekend after he gave evidence to Higgins.[55] This was an important issue but Higgins simply ignored it.

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 clear 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.[56] Drawn into this line of thought 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'.[57] This was of little help to Higgins and displays still further the ambiguity with which the unions pursued this line of reasoning. In the end, 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 seven shillings per day as being the bare minimum required to pay for the 'necessities' of working-class families.[58] Perhaps in this they had only themselves to blame for the lack of generosity in the first basic wage.

The unions called 14 witnesses to give direct testimony as to the cost of living but there was a real sense of ill-preparedness in this. It is hard not to feel these people were cobbled together by the union at the last moment. Perhaps this was partly the result of the difficulty of getting ordinary workers to appear before the court but perhaps it also reflects the hesitancy of the unions in advancing in the direction

Higgins appeared to be pushing. In any case these concerns are apparent from the fact most of these witnesses were male union officials.[59] On the other hand, three housewives were also called but at least two were married to a union official.[60] More innovatively, the unions also called a Collingwood estate agent and a Prahran wood and coal merchant.[61] Apart from these two, the other 12 witnesses produced a schedule of living expenses which showed both the simplicity and complexity of working-class life.

Higgins participated in the examination and cross examination of these witnesses but with less vigour and engagement than would be expected given his final decision. In fact it is fair to say that the cost of living testimony of these witnesses did not stimulate any significant philosophical discussion about individual need, about the quality of these quantitative statistical estimates or even 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 actual living expenses. The situation here is even more curious, given that before this Higgins urged the calling of wives as witnesses because 'no one can give better evidence as to the way the shoe pinches'.[62] In other words it was Higgins who elevated the importance of the testimony of housewives in periodic interventions but, when presented with the presence of three he seemed suddenly reluctant to explore or peruse their insights. As a result, the evidence on the cost of living generated no in-depth examination or cross examination and on the whole stimulated 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 proceedings.

Finally, the nature of the transcript offers insight into the character and nature of the interaction between Higgins and the union advocates. It is a mixed interaction, varying in quality of engagement and exchanges. From the transcript it is apparent that Duffy felt respectful but at ease before Higgins. Duffy and Higgins knew each other from their university days and as young barristers.[63] This familiarity was not, however, an overt asset to the union case although it did lend a degree of respectful *bon homie*. As a result Duffy felt confident enough to use humour on a number of occasions to amuse, to mock, to disguise the fact he had no idea of where Higgins wanted to go or even, simply, to remind everyone in the long drawn out testimony of George McKay that he was still there. Examples of this include his quip about harmless, toothless saws or the impression that the Sunshine factory was some sort of elysian field.[64] It is more than evident that Higgins and Duffy enjoyed a rapport. On the other hand, the other two union advocates, Sutch and Arthur, did not enjoy anything as remotely intimate. When Sutch challenged aspects of the painting processes and quipped that in the eyes of the employer it seemed as though there was 'more sunshine at Sunshine' his witticism was greeted with indifference.[65] Higgins, apparently, was not amused. During an extended period of argument delivered by Arthur it is very clear from the niggling remarks and challenges of Higgins that he was much less interested in the views of this union advocate.[66]

Higgins was highly interactive and responsive with all the advocates in the Harvester case but only Duffy, urbane, relaxed and witty, seems to have enjoyed any intimacy. Certainly, the unions' case, pushed and pulled by Higgins, was

not overly favoured by him. The conclusion seems inescapable that Higgins wanted the unions to agree with him rather than to convince him.

Higgins as Leading Man in the Theatre of Harvester

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 and generally presumed that it flowed from the facts.[67] But the case, and what is 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.[68] 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?

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 could not 'understand a classification of each man by himself. You must have some method of grouping'.[69] He said that 'I cannot treat employers as being on different planes, nor on the other hand can I treat each worker by himself'.[70] 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.[71] In suspending a consideration of the legal issues relating to the submission of the corporate accounts, Higgins effectively cleared the ground for the pursuit of his broader discursive strategy. That discursive shift would be away from the corporate accounts – and the corporate perspective in general – and towards a consideration of the lives of workers in a social setting. Higgins' aim was to focus on the cost of living in society, and his discursive trajectory would go beyond the parties to the employment contract – the individual workers themselves – and would settle on an examination of the domestic testimony provided by the wives of those workers. In suspending a consideration of the accounts, Higgins neutralised a potential point of dispute with the employer and at the same time emphasised the irrelevance of that narrow proprietary issue to the much larger social concerns that he was positioning at the centre of his investigation.

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 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 job. 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.[72] 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?[73] 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?[74] 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'.[75] In phrasing his response in these discursive terms, Higgins rejected the employer's attempt to present the workers as passive, inanimate objects – as mere bodies to be used as factor inputs. In referring to the inner thought processes and emotional state of the worker, and in linking the individuality and specificity of such states to a broader sense of relative social justice, Higgins was cutting against the discursive thrust of contract law, neo-classical economic theory, and managerial prerogative, as well as the tyranny of statistics and the Taylorist tendency to reduce workers to mere bodily movements. Strategically, Higgins went even further. Not content with the abstract logic of his observation, and the human feelings and subjectivity on which it was based, Higgins sought to personalise the matter further by asking Schutt directly to consider human feelings and not just his legal categories: 'Perhaps you will think over the point in case it may actually arise'.[76]

The union response was to support a profit-based 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?'.[77] 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 were not 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.[78] 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 is also evident from other sources that Higgins had long held an attraction to the concept of a living wage. At an address to a history group at Melbourne University in 1896 he quoted at length from the 1891 Papal Encyclical on the wages of workers.[79] In this, Pope Leo XIII argued for minimum wages which ensured 'frugal comfort' because these would limit exploitation and allow personal growth and improvement: essential bulwarks against the rising appeal of socialism.[80] There can be no accident that Higgins actually uses the phrase 'frugal comfort' in his decision when, pointedly, no one uses these words in the transcript of the case. In addition, Higgins met Sidney and Beatrice Webb on their visit to Australia and was familiar with their writings and views on the need for a 'living wage' for workers.[81] Higgins was, as Rickard so economically describes him, a liberal radical and as such was exposed to and the product of wide ranging political and ideological views.

It should also 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 section 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.[82] 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.[83] In this context, Australia, with its young society and its large land mass, was uniquely vulnerable and clearly anxious.[84] Viewed in this context, the Commonwealth Court of Conciliation and Arbitration 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. It looked to Britain, then to America, and then pushed in its own direction.

Conclusion

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.[85]

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 stern, humourless man of substance and principle.[86] 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.[87] 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 between facts and findings 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'.[88] 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'.[89] 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 have involved a highly detailed case by case approach. Situated within such a framework, any adjudicator would soon be sinking within a sea of information. Higgins, however, did something quite unexpected: he suppressed his irritation at the employer's attempt to inundate the court with mountains of meaningless data; he then induced the employer to supply more of such information which he then largely ignored; finally, once he had presided over a lengthy and weighty proceeding of seemingly great significance, he claimed that he was using the evidence presented to draw wide ranging conclusions capable of general application. In contrast O'Connor's cases were much shorter and, quite deliberately, had limited precedent value.

As a final point, it should be noted that the approach taken in this article is to see the transcripts in discursive terms. Australia was a new and emerging nation on a modern trajectory. In this sense, discursive strategies were positioned within formal legal and political categories with a firm basis in English law. At the same time, however, we see in the Harvester transcripts a discernible sub-text through which a distinctively Australian sense of modernity pulsates. In our view, this sub-text can be read not only in what Higgins had to say, and in what context he said it, but also in the arguments put by the different parties; and it can also be read in the moments when such arguments were hedged, constrained and circumscribed by the discursive strategies marshalled in opposition.

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Endnotes

* This article has been peer-reviewed for *Labour History* by two anonymous referees.

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3. P.G. Macarthy, 'Labor and the Living Wage 1890-1910', *Australian Journal of Politics and History,* vol. 13, 1967; P.G. Macarthy, 'Justice Higgins and the Harvester Judgment', *Australian Economic History Review,* vol. 9, no. 1, November 1969.
4. W.M. Robbins, R. Macklin & I. Harris, 'Fact and Myth: Reflections on why Higgins made the Harvester Decision' in *Reworking Work,* Proceedings of 19th AIRAANZ [Association of Industrial Relations Academics of Australia and New Zealand] Conference, Sydney, Feb. 2005.
5. See Macarthy, 'Labor and the Living Wage 1890-1910' and Macarthy, 'Justice Higgins and the Harvester Judgment'; S. Macintyre, *Winners and Losers: the Pursuit of Social Justice in Australian History,* Allen & Unwin, Sydney, 1985.
6. *Ex parte* H.V. McKay, Transcript of Proceedings in an application to the Conciliation and Arbitration Court, Melbourne, October 1907, National Archives of Australia Series C2274P1 (hereafter referred to as the Transcript), pp. 6-7.
7. N. Hicks, *This Sin and Scandal: Australia's Population Debate 1891-1911,* Australian National University Press, Canberra, 1978; M. Hearn, 'Securing the Man: Narratives of Gender and Nation in the Verdicts of Henry Bournes Higgins', *Australian Historical Studies,* vol. 37, issue 127, April 2006.
8. See Hearn, 'Securing the Man'.
9. See for example detail in G. Blainey, *Black Kettle and Full Moon,* Viking/Penguin, Camberwell, 2003, pp. 197-230.
10. J. Derrida, *Of Grammatology*, trans. Gayatri Chakrovorty Spivak, Johns Hopkins University Press, Baltimore, 1976.
11. Derrida argues that all discourse is both rhetorical and literary. Typically, too, texts are structured according to binary oppositions, and thus they tend to privilege one category and marginalise another; J. Derrida, *Writing and Difference*, University of Chicago Press, Chicago, 1978.
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15. S. Cockfield, 'McKay's Harvester Works and the Continuation of Managerial Control', *Journal of Industrial Relations,* vol. 40, no. 3, September 1998.
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17. Sands & McDougall, 1907.
18. For Duffy see H.A. Finlay, *Australian Dictionary of Biography, Vol 8,* Melbourne University Press, Melbourne, 1981, pp. 353-353; P.O'Callaghan, 'Brothers at Law: Chief Justice Frank Gavin Duffy and George Gavan Duffy', *Australian Law Journal,* no. 78, 2004, pp. 738-745.
19. Transcript, pp. 531-538.
20. *Ibid.,* pp. 31, 127, 157, 176, 281, 317, 350, 356.
21. *Ibid.,* pp. 197, 247-248, 378-381, 403, 426, 429, 511-512.
22. *Ibid.,* pp. 6-7.
23. *Ibid.,* p. 15.
24. *Ibid.,* pp. 22-23.
25. *Ibid.,* p. 25.
26. *Ibid.,* p. 26.
27. *Ibid.,* pp. 27-33.
28. *Ibid.,* pp. 33-34.
29. See Marshall's Marginalist revolution; the evolution of contract law in which equity was seen in terms of access to the law rather than equity in outcome; Frederick Taylor and Scientific Management.
30. See M. Hearn, 'Securing the Man: narratives of gender and nation in the verdicts of Henry Bournes Higgins' *Australian Historical Studies*, vol 37, no. 127, April 2006, pp. 4-5, 9.
31. Transcript, p. 35.
32. *Ibid.*
33. *Ibid.,* pp. 37-38.
34. *Ibid.,* pp. 39, 42

35. *Ibid.*, p. 42.
36. *Ibid.*, pp. 25-42.
37. *Ibid.*, pp. 68, 77, 80.
38. *Ibid.*, p. 214.
39. *Ibid.*, p. 240.
40. *Ibid.*, p. 276.
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47. *Ibid.*
48. *Ibid.*, p. 133.
49. *Ibid.*, p. 155.
50. *Ibid.*, pp. 426-436.
51. *Ibid.*, pp. 383-402.
52. *Ibid.*, p. 246.
53. *Ibid.*, p. 226.
54. *Ibid.*, p. 426.
55. *Ibid.*, p. 404.
56. *Ibid.*, p. 253.
57. *Ibid.*, pp. 330-331.
58. *Ibid.*, pp. 333 & 344.
59. *Ibid.*, pp. 426-438.
60. *Ibid.*, pp. 439-443 & 504-505.
61. *Ibid.*, pp. 501-504.
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63. See J. Rickard, *H.B. Higgins: Rebel as Judge*, Allen and Unwin, Sydney, 1984; N. Palmer, *Henry Bournes Higgins: A Memoir,* Harrap & Company, London, 1931.
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68. Rickard, *H.B. Higgins: Rebel as Judge.*
69. Transcript, p. 23.
70. *Ibid.*
71. *Ibid.*, p. 18.
72. See *Ibid.*, pp. 8-14, especially p. 12.
73. *Ibid.*, p. 24.
74. *Ibid.*
75. *Ibid.*, p. 25, our emphasis.
76. *Ibid.*
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82. See Gollan, *Radical Working Class Politics*
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84. H. McQueen, *A New Britannia: and Argument Concerning the Social Origins of Australian Radicalism and Nationalism,* revised edition, Penguin, Ringwood, 1986.
85. See *Argus*; *Age*; *Sydney Morning Herald,* October-December 1907.
86. Crisp, *Federal Prophets*; Rickard, *H.B. Higgins: Rebel as Judge.*
87. Macarthy, 'Labor and the Living Wage'.
88. Transcript, p. 49.
89. *Ibid.*, p. 50.