

Liberty or Protection? Employment and Social Security Law Discourse in Australia

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This paper gauges the tenor of public discourse around employment and social security law. Recent disruptions highlight the insecurity of the minimum waged, casually employed working poor; they also point up the precarity of the heavily indebted, over-worked middle-class. Contrasting the cause of social protection with the paradigm of market liberty, the paper asks whether the dominant discourse regards security as a problem to be remedied with law. Three recent Australian regulatory conversations provide indications: the industrial relations roundtables, the COVID pandemic, and the women's economic security agenda. The paper is interested in what shifts a paradigm; perhaps women's economic security will be the cause that shifts liberalism. The paper has an extensive bibliography, including the submissions to the Senate Select Committee on Job Security.

I THE STUDY

This study's concern is why employment and social security law is the way it is and what prospects there are for change. Its subject is the way we talk about what the law should do. This discourse is analysed to see first whether security is regarded as a problem labour law should remedy and then what form that legal response should possibly take.

In framing the analysis, the study presupposes two paradigms are competing. One, which we associate historically with labour law, is the social protection of the workers' employment and income, while the other, which is the prevailing paradigm right now, we identify as the liberalisation of the labour market. This competition engages the function and form of labour law: both the problematisation and regulation of security are placed in contention (Wigger and Buch-Hansen 2014).

Methodology

To guide the analysis, the study nominates two markers for security, the first whether the discourse considers that casual employment should be limited and the second whether unemployment assistance should be increased. This analysis recognises the discourse may join employment security with social security law. If insecurity is a problem, and protection needs to be strengthened, should it be through employment security, or social security, or a

combination of the two? Who, in other words, should bear the responsibility for security: the worker, the employer or the state?

These two markers help pilot the analysis. Their selection is not meant to preclude identification of other markers and indeed the analysis may reveal that legal action on casual employment or unemployment assistance is not the main theme of the discourse. The primary focus is the security of the working poor; the analysis is interested in whether the security of the salaried middle-class is also discussed.

What provides evidence of the discourse? Stakeholders, advocates, politicians, judges, journalists, and academics are all contributing. Their statements are spread wide, but the analysis can be grounded somewhat by looking into the submissions being made to the Senate Job Security Committee this year, they encapsulate the essence of the two paradigms.ⁱ

Then, the study analyses three recent regulatory conversations. Presupposing that liberalism is the prevailing paradigm, the analysis asks whether protection is being advanced in any of these three cases. First the industrial relations roundtables, asking if an exercise in corporatism might have shifted the paradigm; second the response to the COVID pandemic, where the onset of a crisis might be doing so, and finally, the program for women's economic security, where a realignment in social relations might have the most potential to do so.

The study is interested in reasons why labour law is the way it is; why, more to the point, the liberal paradigm proves difficult to shift. The focus is on discourse, for, as Prassl (2018) suggests, 'narratives shape regulation'. Nonetheless, if it is to be realistic, the study must hear what the most powerful are saying (Mertz 2016). While discourses have their own power, whether they shift paradigms depends also on where they fit with economic conditions, political structures and social relations, the political economy of law making (Tomlins 2021; Adams 2021). Throughout, the study is interested in the power of unions and their allies to articulate the cause of protection; at the same time, it must pay close attention to what business and political elites are saying to keep the liberal paradigm on top.

Markers

Employment security

The marker for employment security is whether casual employment should be limited by law. Of course, this marker is bound up with other sources of security. They include adequate remuneration, sufficient hours of work, tenure, training, infrastructure, entitlements such as

sickness, parental and recreation leave, superannuation, protection from unfair dismissal, and severance payments. Intermittency, irregularity, and underemployment characterise much casual work. But even if workers are ‘permanent casuals’, many of these sources of security may still be blocked off (Professor Emeritus David Peetz submission). Legally, security is only as good as the next contract (Campbell, Macdonald and Charlesworth 2019; Kessler 2018).

These are ways casual employment compares unfavourably with ongoing permanent employment. When ongoing permanent employment became the norm, social scientists were able to talk of a workers’ welfare state. Typical or standard employment was the principal assurance of continuing prosperity for many Australians and their dependents (O’Donnell 2019; Castles 1985). We know that this discourse was always incomplete. And those in ongoing employment may not enjoy security if labour law makes way for employers to retrench them for economic reasons or dismiss them for personal reasons (Schofield-Georgeson 2020; Forsyth and Stewart 2021). Or employment conditions become so harsh they feel compelled to leave. This kind of legal insecurity reaches beyond the working poor into the salaried middle-class (Quart 2018; OECD 2019).

To these markers we should add changes on the other side of the employment relationship, the fragmentation and disappearance of the employer (Weil 2014; Prassl 2015). Even if the employee enjoys legal protections, in principle, the stable, secure employer may be ‘not there’ to honour them (Peetz 2019). While lead firms are more powerful, employers may dissolve into separate enterprises, holding firms, labour hire firms, franchisees, outsourced contractors, and liquidated companies. Then there is the characterisation of workers as self-employed, independent contractors, outside the purview of labour law (Arup 2020). Unions have lost much of their powers to represent, bargain and enforce, especially industry wide. Below the analysis must see whether the discourse recommends remediation of these sources of insecurity too.

Social security

The marker for social security is whether unemployment assistance should be increased. If applicants satisfy eligibility requirements, flat payment rates should be high enough for them to meet their most basic needs. Indeed, for a time at least after they become unemployed, rates should be high enough for them to maintain their commitments.

So too access to unemployment payments is bound up with other sources of security. They include assistance with rent, childcare, pharmaceuticals and medical care, education and training, and job search and job coaching.

Those eligible for assistance may not enjoy much security, if social welfare laws make way for agencies to postpone, reduce, suspend, or cancel payments (Mendes 2021). Waiting periods, income tests, job search requirements, various forms of conditionality, undermine security. Does real security depend on the decisions of frontline service providers and review process adjudicators (Carney 2011)?

Then there is a characterisation of the unemployed worker as outside the purview of the social security (O'Donnell and Arup 2021). Some classes of worker, visa workers especially, may not qualify because they are not citizens or residents. Assets tests, liquid assets tests and spouse income tests may exclude middle-class workers from assistance, even though they are unemployed and having trouble meeting their financial commitments. Payments may terminate when workers withdraw from job search because they are discouraged by the labour market or because they have responsibilities to care for others.

An intermediate case is those who have work but are underemployed. They do not have enough work, but the administration insists that their earnings be traded off against their social security payments or that they search for more suitable work. The analysis below should check whether the discourse recommends remediation of these sources of insecurity also.

II PROBLEM?

Liberalism

Employment security

In the dominant discourse of liberalism, by contrast, security is not to be regarded as a problem. Providing options for employment are good for the economy, for businesses and workers (see Prassl 2018). The most positive theme of this discourse is economic. Flexible, free modes of employment help drive innovation; they allow experimentation and entrepreneurialism in the economy. They facilitate the technological change and structural adjustment needed to sustain growth. Creative disruption and destruction unsettle

incumbents, giving consumers more choices. The champions here are often the new platforms (Uber submission). But established employers, such as supermarkets, also insist they must have freedom if they are to adapt and compete.

A more pragmatic rationale for freedom is that employers simply cannot organise their operations to give all workers secure employment. Employers must ride peaks and troughs of demand; these fluctuations are unpredictable and uncontrollable. Some sectors, agriculture for instance, say that demand is intrinsically seasonal (National Farmers Federation submission); others insist they must be able to hire flexibly for work outside the ordinary hours of 9-5 weekdays (Australian Retailers Association submission). To get this kind of work done, they must have ready access to a pool of workers. They wish to be able to adjust hiring quickly, even to the point of ending shifts and sending workers home if demand is exhausted.

Moreover, flexibility must be retained to respond to economic downturns. That way workers can be shed rapidly in sectors that contract and recruited in sectors that expand. The Australian Retailers Association submission to the Senate Committee cites the example of the pandemic, where workers from aviation and the universities were available to help take up the extra load in retailing and delivery.

Workers also benefit from this freedom, the discourse claims. They can work flexibly around their commitments or to complement their lifestyles. Parents and students are among those who enjoy the freedom. They can tap into an agency pool, labour hire or platform app for opportunities. They are not obliged to take up an offer of employment if it does not suit; they are free to pick and choose their times (Deliveroo submission; Amazon submission). These ways, workers enjoy considerable autonomy (see Prassl 2018)). They are not required to assume the responsibilities of work in the core of an organisation. They can work for more than one employer; they can work for themselves. See them as free souls, shakers, and movers, in a new kind of collaborative economy (Slee 2017).

Again, a more pragmatic justification is offered. These kinds of jobs give workers a foothold in the labour market. It might be for the first time because they are young, or a migrant, or on return to the workforce after they have been retrenched or withdrawn to care for others. Such work is only meant to be temporary; it should be regarded as a rung on the ladder to a good job. For many workers, the work is the source of supplementary income, a top-up to a main

job or a pension, ‘pin money’ even, in a household where others have secure well-paid jobs. These points enable liberals to say they mean well.

If trade-offs are conceded, the argument is that this kind of work is confined to a small segment of the workforce (ACCI submission; Australian Industry Group submission). Casual hiring only comprises some 20 per cent or so of the total workforce, self-employed work around 10 per cent. These proportions have remained stable for several decades. Meanwhile, contracting and outsourcing enable employers to keep core workers in secure jobs, all then for the greater good.

Much of this discourse defends the treatment of casual workers. For the long hours of the middle-class, employers also cite practicalities like time frames and the demands of clients. Moreover, they argue that industrial awards, such as overtime payments, are not appropriate to work that is professional or managerial in nature (Australian Industry Group 2020). High salaries and promotion opportunities compensate for insecurity.

Social security

In Australia, the liberal paradigm has generally accepted a place for a social security safety net. Income support is to be available to those who become unemployed and in need. That support may be indefinite; historically, the support has continued so long as the worker is unemployed. There are other categories whom the state will also support while they stand out of the workforce, such as the young, the sole parent of young children, other carers, and the elderly.

Nonetheless, liberals are insistent the safety net should not be a disincentive to workforce participation (Mendes 2019). The best outcome for those on unemployment assistance is a job. Workers must remain prepared to compete in the market for work, make themselves employable, and accept any work that is suitable. So, the net should be set at such a level, and administered in a such a way, that it supports the supply of labour to the market. Thus, it fits with other steps government takes to expand the pool of workers available to employers such as education and migration programs (see Fraser 2016; Wright and Clibborn 2020).

As well as encouraging the unemployed back to work, this setting is a message to those in work that there is no ready alternative (Boltanski and Chiapello 2018). Without this discipline, workers might become too choosy about the work they will take, even work-shy, when they need to be prepared to accept what is on offer, take up another shift, take on

another task, accept an inferior position, mobilise to move to another region, or try their hand in another sector.

Thus, activation is the dominant theme of this discourse. Still, strands of morality are evident in this conservative position, such as a desire not to reward improper conduct or undeserving classes (Walters 2000). There is also an abiding concern with budget bottom lines, a drive to reduce the cost of providing the support, both the payments themselves and their administration such as the cost of processing claims individually. At times, this economy drive sits uneasily with the urge to help private sector out, directly by letting out service delivery to private providers (O'Donnell 2019), more generally in the sense that social security loads the cost of dealing with insecurity onto the state and the taxpayer (Grimshaw 2020). Otherwise, the employers might be obliged to shoulder more of the cost, as they do in some other jurisdictions (Lansbury 2021).

Protection

Employment security

Faced with these claims, what story does this discourse tell? We see that employment insecurity is discussed principally as the plight of the working poor, meaning people who participate in the labour market but whose work is marked by low wage rates, insufficient and irregular shifts, unsociable times, little training, inadequate infrastructure, multiple employers, many substitutes, with no buffer of leave when they fall ill or care for others, the first to go when demand declines, in some cases the victims of underpayment or wage theft (Australian Services Union submission; United Workers Union submission; Transport Workers Union submission).

This insecurity is common in sectors like hospitality, retailing and aged care; it tends to be borne by women, men, the young and migrants (Campbell, Boese and Tham 2016; United Workers Union submission). But all manner of worker is exposed, men too, as casual employees and independent contractors working alongside a core of staff in warehousing, transport, security, and construction (Transport Workers Union submission). Good blue-collar jobs in manufacturing and mining are in decline.

Insecurity affects the way these workers live. Many are underemployed wanting more hours and shifts; they take work at unsociable times and in distant places because they need the extra income (Peetz, Bruynius and Murray 2019; Australian Association of Social Workers

submission; Transport Workers Union submission; United Workers Union submission; Professor Rae Cooper submission). Employers are ready to exploit this facility, keeping a pool of workers on standby and on call, even finishing their shifts early and sending them home if there is not enough work (Markey and McIvor 2018). Some casuals are given regular work for an extended period, as so-called ‘permanent casuals’, but employers remain free not to rehire them whenever they choose (Professor Emeritus David Peetz submission). Independent contractors too are readily manipulated (Stanford 2017; Transport Workers Union submission). In these detailed accounts, their experience does not sound much like autonomous decision-making. These workers are being driven, with not enough time and support to complete their assignments properly, not enough assurance that they will stay on the roster or the app, and not enough pay to live by (United Workers Union submission; Transport Workers Union submission).

Precarity makes it difficult for these workers to make plans (Standing 2011). Poverty makes it hard to afford basics like food, shelter, transport, healthcare, childcare, education, and training (Masterman-Smith and Pocock 2008; Per Capita submission; Anglicare submission). The working poor go into debt, relying increasingly on the services of buy now, pay later lenders (Kurmellovs 2020). Living from one pay to another, they cannot afford to miss a hire; they are reluctant to complain about underpayment or unsafe conditions (Ewing and Hendy 2020; Australian Services Union submission; Transport Workers Union submission).

Changes in employers fuel this insecurity. Lead firms are bigger, monopsony increasing the power of buyers like supermarket chains and technology platforms (Beaton-Wells and Paul-Taylor 2017). If these firms do not employ in-house, they control a vector through labour hire, supply chains and contract networks (Wark 2019). Technology enables them to specify, monitor and enforce conditions outside the firm (Rideshare Drivers Association of Australia submission). Yet the legal employer, if there is one, is now a small, even shell of a firm.

In this world, labour relations are increasingly hard edged. Cutting labour costs is seen as a key to competitive advantage. Institutional shareholders, hedge funds and private equity step up the pressure on employers to adopt this strategy (Nau and Soener 2019). Employers have been able to shift the risk of economic fluctuations and downturns onto their workforces (Huws 2011; Boltanski and Chiapello 2018; Per Capita submission; United Workers Union submission).

Corporatisation and privatisation of public services have spread this kind of rationality wider (Pusey 2003). In some sectors, health, disability and home care, insecure work is the result of the Government's business model and procurement practices (Australian Services Union submission; United Workers Union submission; Australian Nursing and Midwifery Federation submission). Governments outsource to labour hire, sub-contractors, gig platforms and the self-employed (Australian Services Union submission).

But the problem of the working poor is not just to be regarded as the plight of a minority. It is a symptom of a broad structural change: the widening inequalities of income, wealth, opportunity, even dignity (Wilson 2018; Sperling 2020). Class divisions re-emerge; these divides are also manifested geographically, good jobs being concentrated in gentrified precincts of big cities, while the working poor live out on the under-serviced fringes or regions in decline (MacGillis 2021). But secure employment should not be regarded as a burdensome redistribution, a tax on the economy. Even if some individual employers profit short-term from cost cutting strategies, employers as a class will benefit from improvements in the health, development, and sustainability of the workforce, including its most vulnerable members (Sperling 2020; Dr Paula McDonald & ors submission). So too the bulk of society, the COVID-19 pandemic has shown we are all at risk if some suffer, even something as basic as road safety is put at risk (Transport Workers Union submission).

There is growing recognition insecurity affects the workforce generally. White-collar clerical and professional staff are experiencing insecurity too. Sharp hiring practices undermine their employment security (Rubin 2020; Quart 2018). For instance, around a core, schoolteachers and university lecturers are employed on fixed term contracts and sessional hires (National Tertiary Education Union submission). And those who remain in ongoing employment feel precarious too: their jobs are marked by long hours, inflexible schedules, stagnant wages, micro-management, online surveillance, even bullying and harassment (Ehrenreich 2021; Pocock & ors 2012).

If these employees do not succumb to the pressures of work, they may still become the casualties of rationalisations and retrenchments. In a downturn, many employers are ready to shed staff or stand them down, rather than eat into reserves, profits, bonuses, and dividends (Australian Services Union submission). And a decline in demand for the employer's products or services is just one cause of retrenchment. Freely taken management decisions result in retrenchment. Existing management decides to outsource functions to service

suppliers, back offices, and other contractors (Australian Services Union submission); new management decides to restructure functions and hire in fresh and cheaper workers (Schofield-Georgeson 2020; Ewing and Hendy 2020; Nau and Soener 2019).

Meanwhile, the costs of living middle-class are rising, especially in the metropolitan centres where this work congregates. Unless they have private means, parents for instance who can help them buy into the market, the middle-class carry huge mortgages and high rents. Increasingly, they must pay for education and training, while higher qualifications are required if they are to compete. Without family help, childcare is expensive, yet both partners must hold down jobs to meet expenses. Such households are only middle-class because they are heavily into debt (Weiss 2019; Therborn 2020).

In these circumstances, one job loss can be catastrophic; it threatens a fall from the middle-class. In a buoyant economy, other jobs may be available. But those jobs may be only part-time or casual hires. And personal factors may compound insecurity, advancing age for example, or outmoded skills, so not all workers can readily transition to an equivalent position. Severance payments are quickly exhausted. Some employers go into liquidation, leaving workers to queue for their entitlements, even though they hold assets elsewhere or rise, phoenix-like, to trade again (Anderson 2019).

Social security

For workers in these circumstances, unemployed or indeed under-employed, government assistance is little social security. To be eligible for payments of income support, the workers must be ‘unemployed’. That currently means that the worker must be without a job, but active in the labour market searching for work. They must be prepared to accept a reasonable offer of suitable work.

If the worker drops out of the labour market, they must find some other source of income. Alternative government supports have been made available for some categories, widows at one stage, yet increasingly these entitlements have given way to active labour market participation requirements (O’Donnell 2019). Single mothers must search for work when their children go to school; the entry age for the retirement pension is raised.

JobSeeker, the principal source of unemployment assistance, allows workers to earn a little income from part-time work if this work is deemed suitable. But the assistance is reduced after that allowance is reached and recipients must continue to search for sufficient suitable

work or have their payments suspended or cancelled. Currently, JobSeeker is not designed to serve as a supplement to low employment earnings on a regular, continuing basis. Only small numbers of recipients, for instance, certain recipients over the age of fifty-five, are ‘parked’ in part-time work (O’Halloran, Farnsworth and Thomacos 2020). Other conditions, such as waiting periods before payments begin, also disconnect social security from the experience of employment insecurity.

Despite the interruption to their income, workers may be denied assistance if they retain certain assets or if their spouse earns income above a specified level. Such workers are required to rundown liquid assets, such as cash in the bank or severance pay, before receiving payments. When they become eligible, the low flat rate of payment is likely to be below their previous income level (Senate Community Affairs References Committee). If unemployment persists, the household may fall out of the middle-class and join the working poor.

Insecurity is aggravated if these conditions are administered in a hostile manner (Mendes 2020). In a discretionary scheme, assistance feels more secure if administrators are responsive to applicants’ circumstances. Otherwise, security must be obtained by legality. Then the workers need access to legal services to enforce any entitlements the law offers them. Studies find that the administration has become more punitive. Payments are denied, suspended, or cancelled by the decision of a front-line administrator or now in some situations a computer program (Carney 2020).

So, on the strength of this discourse, it would seem there is a problem in need of a remedial response. Who contributes to this discourse which problematises insecurity? Economists and sociologists lead the discussion of segmentation, inequality, and poverty; geographers are teasing out the implications spatially. The problem comes to life with reportage from the field; undercover writers provide graphic accounts (Ehrenreich 2021; Bruder 2017; MacGillis 2021). Similar ethnographic studies capture the plight of the working poor in Australia (Wynhausen 2005; Masterman-Smith and Pocock 2008).

This discourse filters through to the activists spread around the unions, charities, think-tanks, media outlets and advocacy groups. Their focus is the insecurity of working conditions like low wage rates, casual hiring, sham contracting, short rosters, lack of tenure, lack of paid leave, and underpayment. Academics contribute to the discourse, picking up on the structural settings, such as changes in the identity of the employers and the role of lead firms (Hardy 2016; Arup 2019).

The plight of the middle-class has also become the subject of ethnographic study (Quart 2018). The broad political economy implications are explored in concerns for the hollowing out of the middle-class, family breakdown, intergenerational inequality, and political extremism. Attention is drawn to the difficulties of maintaining a middle-class life, to housing affordability especially; now the link is being made to employment and social security (Sperling 2020; Nau and Soener 2019).

III RESPONSE

Liberalism

Employment security

The analysis now turns to identify the kind of responses that the discourse supports. The liberal discourse largely eschews legal protections for workers. It insists the surest source of good secure jobs is a viable, profitable, growing economy (ACCI submission, Australian Industry Group submission). To this end, the response should avoid restricting and regulating employer strategies. From time to time, government might use macroeconomic levers to stimulate and sustain the economy. But laissez-faire is the favoured response for the regulation of work (see Rawling, Johnstone and Nossar 2017). Government should leave the private sector free to operate, compete and innovate, for it knows best how to allocate resources and regulate employment. Otherwise, if government intervenes, setting standards or overruling decisions, it imposes extra costs on business, undermines competitiveness and diverts investment into other uses. It makes innovations impracticable (Australian Industry Group submission).

When protections are proposed, the regular response is they will threaten jobs: employers will stop hiring. Well-meaning protections harm those workers who most need access to employment opportunities, such as women (ACCI submission). Reformers are warned: government regulation will impede freedom to experiment with new work when these jobs are needed for the economy to adapt and progress. In this discourse, the platforms are often the most persuasive, but employer groups rally round this message (Australian Retailers Association submission).

Consistent with this approach, law should be liberal. Freedom of contract means freedom of choice: the best legal policy leaves hirings to the contracts between individual employers and employees (see Adams 2021; Bogg & ors 2015). The role of law is to support such private

contract making, by minimising the transaction costs of reaching, performing, and enforcing these contracts (Epstein). Those contracts are principally personal contracts; if the economics make sense, they may be enterprise agreements (Hamberger 2020). But the law should not try to determine what is appropriate for the industrial or social setting. In this discourse, almost all substantive regulation is opposed, including minimums, and many controls on procedures too. Employers oppose increases to any existing minimum standards, the minimum wage, loadings and penalties, minimum and maximum hours, and such like. Yet the law may regulate strongly to shield property and freedom to contract employment from union pressures (Ewing and Hendy 2020; Kimberley and McCrystal 2020; Australian Nursing and Midwifery Federation submission). The state backs economic liberalism with law, not social protection (see Pistor 2019).

In Australia, employer groups make this pitch publicly, in regular position pieces in the media and submissions to public inquiries, as well as more privately in the lobbies of government. Their discourse is informed by think-tanks and business schools versed in the Chicago School of law and economics. Here, the argument is more sophisticated than the popular opposition to ‘red tape’.

Large employers have their own regulatory conversations in-house with their professional advisers, where they workshop the choice between the legal options which liberalism makes available to them. The choices surface when legal strategies are put to workers and unions and scrutinised by the Fair Work Australia agencies and the courts (Arup 2020). The more sophisticated submissions put the arguments of the Chicago School. More legalistically, they warn against ‘judicial activism’. The courts should eschew consideration of the contexts and consequences of their rulings (Adams 2021; Barmes 2012). They should leave any protective standard setting to the legislature and, embracing liberalism, uphold the transactions the individual employers and employees have freely made (Epstein 2019).

Social security

Neither the Coalition nor the ALP has sought to truncate the social security system. It remains a big government commitment. Nonetheless, for many years now, both parties have resisted calls to increase the rate of the Newstart (now JobSeeker) allowance. Both have applied the active labour market participation policy and the conditioning of support to ensure compliance (Mendes 2019). Both too have promoted the public sector management

reforms and the privatisation of employment and training services (O'Donnell 2019). Perhaps the Coalition has pursued these reforms more aggressively than the ALP.

Under scrutiny, the Coalition has stuck by other elements of the social wage such as Medicare. However, when in government, both parties have run down essential public services like public education and public transport, forcing workers to find private means (Pusey 2003; Deakin and Meng 2020). Yet governments provide many subsidies to business and finance and vast sums to bail them out in times of crisis (Mazzucato 2013).

With such bipartisanship, social security policy has congealed; it has been a time for controlling workers' welfare, not expansive initiatives.

Protection

Employment security

Faced with this complacency, what responses does this discourse seek? The analysis finds that casual hiring has become much the focus of responses to the problem of employment insecurity, though they stress that there are other legal forms of insecurity, such as fixed term contracts, labour hire, independent contracting, and the gig economy (ACTU submission).

Thus, the goal of the ACTU campaign is to halve the amount of casual employment (ACTU submission). Decasualisation targets the hiring and commissioning practices of employers. Secure employment makes inroads into managerial prerogative: it demands that management meet higher standards when organising work and remunerating workers (Dr Paula McDonald & ors submission).

The discourse readily recommends legal regulation of casual hiring. At its highest, it places legal limits on the extent of casual hiring in a workplace or industry. More modestly, it requires casual hirings be genuine; permanent employees should not be misclassified as casuals by artificial contracts (Australian Institute of Employment Rights submission; National Foundation for Australian Women submission). At the least, permanent casuals should have a robust right to convert their employment, not just a right to request it of their employer (Australian Institute of Employment Rights submission).

The focus is also on the remuneration of casuals. Employers are required to pay casual employees a loading on their hourly rate as compensation for the benefits of permanent employment they are without. Yet it doubtful whether the loading compensates for their

fundamental insecurity; and it seems they do not end up as well paid as permanents (Dawson & ors; Per Capita submission); they should be seen at the least as ‘employees without paid leave’ (Professor Emeritus David Peetz submission). Proposals are being made to extend paid leave minimums to insecure workers, notably sick leave, and, to make this effective, the ALP now wants entitlements to be portable so that they can be carried between their multiple jobs and employers (ALP Plan 2021; McKell Institute submission).

The leave question exposes the exigency of the working poor. When work dries up, savings often do not suffice; most casual hiring is in low wage sectors. The ‘loaded rates’ of enterprise agreements have been shown to disadvantage those casual workers who rely on work outside ordinary hours at night and on weekends (Arup 2020). Moreover, employers are contesting, directly, the level at which awards set minimum hourly rates of pay and penalty rates. Employers also contest the setting of minimum hours per shift, some small protection against exploitation, though no guarantee of shifts being forthcoming and protection against zero hours contracts (Campbell, Macdonald and Charlesworth 2019).

Under these pressures, the main response has been a defence of the most basic protections (Arup 2020). Supporters expend much of their resources bound up in legal processes opposed by superior forces, arguing, for instance, that reductions in minimums do not create more jobs (Markey and O’Brien 2021). The response has also had to address the problem of widespread underpayment of the existing minimums, for insecure workers, such as young workers and visa workers, are most vulnerable to wage theft (Reilly & ors 2018; Tham and Fudge 2019; Salvation Army submission; Kingsford Legal Centre and Redfern Legal Centre submission; Maurice Blackburn Lawyers submission; Australian Services Union submission). Yet the practice has not become a national scandal; guilty corporate executives are still lauded by government and media (Clibborn 2020).

The response has begun to heed the insecurity generated by the fracturing of legal responsibility on the employer side. Unions have brought proceedings to strengthen the responsibility of lead firms for the hiring and paying practices of contractors in their supply networks (Arup 2019). In this task, unions, taskforces, and agencies have been able to draw on the modelling of this responsibility by regulatory studies (Hardy 2016). These models have a pedigree in the clothing industries (Nossar 2015).

With supply networks extending their reach offshore into other jurisdictions, labour standard setting responses are joined by campaigns for the human rights of workers in the supplying

countries. Ultimately, such responses must reach into the labour laws of other countries and the coverage of international labour law. But they also attempt to find a foothold in Australian law. That purchase may be obtained through the private law of procurement, the exercise of corporate and consumer responsibility, the take-up of Fairtrade sanctioned products for instance (Marshall and Macdonald 2010). Slowly it finds its way into public law such as modern slavery legislation. These responses show what a huge task it is to comprehend the sources of insecurity.

Labour standard setting also combines with campaigns for the respect of the human rights of temporary migrants and guest workers in Australia. Visa problems greatly undermine their power to enforce employment protections. Empirical studies seek to find appropriate regulatory responses (Reilly & ors 2018).

The response targets labour hire firms. The ALP proposes the terms and conditions of labour hire workers be equal to those of the core employees they work alongside (ALP Plan 2021; National Foundation for Australian Women submission). Proponents see licensing as a point at which to exercise regulatory control over their employment practices (Forsyth 2019). Yet greater security will come if the work is brought back into employment within the lead firm. The same applies to outsourcing of work to contractors. Sham contracting is a target in several sectors, especially transport (Transport Workers' Union submission; Australian Services Union submission); now maybe the tendency to outsource itself is coming back into contention (Community and Public Sector Union submission; Transport Workers Union submission; Qantas case). A new target here is the responsibility of the technology platforms and their users. These 'gig economy' operators are spreading, from delivery services, into other sectors such as care services (Australian Services Union submission; Australian Nursing and Midwifery Federation submission).

In this prolific discourse, employment is not the only response recommended. In a strong stream of the discourse, some responses would accept these other categories of worker and focus instead on improving their conditions through the legislation of standards or collective bargaining (Stewart and McCrystal 2019; Katz 2015; Rideshare Drivers Association of Australia submission). However, there is some ambivalence around this response. While it would attract less protections than employment, it would perhaps be a more realistic reform.

The response to the insecurity of the middle-class has centred on conditions at work, especially in the emphasis on the safety of women and their right to protection within the

workplace. The scrutiny has spread from pink-collar work, such as domestic work, where it has long been problematised, to white-collar and professional workplaces where women now have greater representation (Smith 2019).

Responses to the pressure of over-work are now being discussed. The focus is on injurious hours of work, often in unpaid overtime on annualised salaries (Opie 2016). Without proper provisions and protections, working on-line on mobile devices and from home may exacerbate this pressure (Berardi 2009). Participant accounts feed into regulatory conversations. The discourse is about health, with the responses concentrating so far on flexibility and leave, rather than the workloads as such - the long hours which they demand. Limits on the working week are not part of the discourse here as they are for instance in some European countries. We know this from the legal and accountancy sectors. Without protection, employees must either join the competition for promotion and partnership or exit the firm (Somerlad 2016; Eastal & ors 2015; Chan & ors 2014).

There has been little discussion in recent times of the most direct protection for those in 'permanent employment'. That protection is the controls law applies to termination of employment. The Fair Work legislation offers review of dismissals and access is increased by giving casuals a right to review based on continuity of service; limits on the roll-over of fixed contracts does so too. But even 'permanent employees' remain legally vulnerable to retrenchment. Instead, the unfair dismissals law has become an everyday jurisdiction, where individual cases are predominantly pitched as discrimination and victimisation rather than the economic toll exacted by capitalism. The main way protection inhibits retrenchment is the requirement to pay out the employee's accrued entitlements, like leave and severance pay, not so much the onus to justify the decision to lay off (Forsyth 2008; Stern 2012).

It seems employers may lay off as soon as the economics warrant it. There has been some general discussion of the increasing share going to profits over labour and the greater disparities in wealth in Australian society (Wilson 2018). But employers are not being required to eat into reserves, nor reduce executive salaries and bonuses and dividends to shareholders, before retrenching (Forsyth and Stewart 2021; Ewing and Hendy 2020). Instead, the more common response is for the state to tax the public purse to bail them out. Yet this rescue is made selectively and without exacting undertakings that they retain staff or give the public a stake in return (see below).

Collective bargaining was once seen as a more effective way to secure employment than appeal to individual rights, certainly where reductions in the workforce were concerned. Collective bargaining was a means to fix limits on casual hiring or outsourcing to contractors, as well as on retrenchments of existing employees. Industry-wide bargaining is a means to prevent workers being played off against each other with personal contracts. Restrengthening collective bargaining is part of the discourse, but it must deal with an elaborate legal structure which favours agreement at the single enterprise level (Forsyth 2020; Australian Institute of Employment Rights submission; Casperz and Gillan 2011). Attention is paid to such legal requirements as bargainable matters, bargaining in good faith and genuine agreement, union participation both at enterprise and industry levels, and access to arbitration if bargaining is deadlocked or stalemated (McCrystal, Creighton and Forsyth 2018).

What of the changes on the employer side? In policy circles, the discourse has begun to question the suitability of Chicago School thinking and the liberal approach it inspires, in competition and other regulatory law, to corporate concentration and the dominance of the tech platforms (Reich 2016; Sims 2021). The workplace may be fissured, but some firms loom large as either employers or lead firms. So too, abuse of the corporate form, such as the strategies of shell and phoenix companies, attracts regulatory interest (Anderson 2019), though the technical ingenuity and bad faith of these practices can be hard for the discourse to comprehend.

Social security

The discourse has been loudest arguing for a raise in the fortnightly payment made to those who are ‘unemployed’. The discussion has run for more than a decade, as the rate slipped out of parity with the minimum wage and put those dependent upon it below the poverty line (O’Donnell and Arup 2021). Academics and advocates are among those to urge the Government to boost the rate substantially; social welfare has been joined by economists and politicians (Australian Association of Social Workers submission).

The other main theme of the discourse has been relief from the severity of the conditions imposed on access to payments. Research reveals the harsh way the government agencies administer the conditions, then the obstacles the unemployed encounter seeking redress against adverse decisions (Carney 2011). Social welfare and legal studies academics form alliances with activists and professionals. An abiding concern has been the administration of

mutual obligation; the administration of income tests has been challenged with the campaign against Robodebt (Carney 2020).

For some seeking protection, the appropriate response is to make the payments more of a legal right or entitlement. So, legislation should be tightened, conditions lifted, discretion constrained, and avenues of appeal and review enhanced. Others look to an improvement in the manner of administration: rather than an impersonal, bureaucratic, even automated, administration, a more considerate, constructive service attuned to the circumstances of the individual. Income support must be combined with schemes to help the unemployed into jobs and a vocational education that gives them transferable skills. To this end, incentive and accountability structures must be recast, especially for private providers (Per Capita; Dr Paula McDonald & ors submission).

So, we can see that much of the response seeks pragmatically to improve the existing model. Yet more endemic social problems, such as the persistence of the working poor, and the fragility of the middle-class, are the impetus for new pathways to be articulated.

A radical shift would detach income support formally from labour market participation requirements. Government would guarantee a universal basic income (UBI) with tax credits and cash payments. Proponents argue that the guarantee would not undermine participation, it would ease, indeed encourage, transitions over a working life. But, at the same time, it would recognise that unemployment and underemployment are commonly involuntary situations, unfortunate circumstances that are not assisted by niggardly conditions and hostile supervision. This proposal has been revived in recent times (Spies-Butcher, Phillips and Henderson 2021; Garnaut 2021) but it remains outside the mainstream of public policy in Australia, while other jurisdictions have begun to experiment with the model, for instance in the Netherlands, Finland and California.

In the meantime, there has been little discussion of the interface between low waged, intermittently obtained work and the current JobSeeker income support. Closer coordination would accept the reality of casual and part-time employment, where workers are paid minimum pay rates rather than a living wage, instead obliging the state to help these workers avoid poverty. A UBI would be a way to do this, but a much more immediate response is to relax eligibility categories, waiting periods, income allowances and work tests for JobSeeker 'unemployment' assistance.

This response meets with ambivalence. Such coordination would permit workers to give up on the search for secure, full-time employment, which would be realistic in many cases. But, at the same time, it would free employers from responsibility to offer such employment if employment security laws remain at the same time weak (O'Donnell 2017; Australian Association of Social Workers submission; Salvation Army submission). It shifts responsibility to the public sector, tapping the public purse to compensate, even, one might say, to subsidise the practice of insecure employment (Grimshaw 2020).

While the emphasis has been on unemployment, the social security response has recognised that full-time employment income may be insufficient for some needs. Earnings have been supplemented with cash payments or tax deductions. In Australia, the social wage is still a considerable support, especially in the form of health care. Yet there are many gaps, the level of subsidy for childcare and early learning under scrutiny now (Wood & ors 2020).

Such social services help the middle-class too, but they are unlikely to assuage entirely the impact of a sustained period of unemployment. Recently, proposals have floated for a contributory scheme of social insurance where, for a time, payments would be related to previous earnings (Lansbury 2021). At present, workers must make private provision to cover commitments as best they can by way of savings, insurance, or offsets. Social insurance would be a break too from historical pathways; while such schemes operate in European jurisdictions, social insurance has not been reached the public agenda in Australia.

IV RECENT CASES

Industrial Relations Roundtables

The analysis turns now to three recent regulatory conversations. The analysis gauges how the two discourses are represented in these cases. Might new cases produce a shift in the paradigm?

It starts with the industrial relations roundtables. In 2020, the Coalition Government convened a forum for discussion of industrial relations and labour law reforms. The Government had been chipping away at reform, publishing position papers and drafting legislative amendments, after the unions and employers expressed disquiet with the state of the Fair Work Australia system. It decided to bring reform to a head with a set of tripartite roundtables. The Government organised reform discussion around five priorities, casual and

part-time work, enterprise bargaining, award simplification, greenfield agreements, and compliance and enforcement (Clibborn 2021). Employer associations and the ACTU accepted the Minister's invitation to meet. They formulated proposals based on the campaigns they had been undertaking. Discussion ensued and, for a time, the forum took on an air of the old-fashioned corporatism of the Accord, especially in the reception reportedly given to the secretary of the ACTU (Schofield-Georgeson 2021).

The discussions were to close dramatically. The catalyst was the split in the ranks of the employer associations, between the Business Council and Council of Small Business on the one side, and the Master Builders, Chamber of Commerce and Industry, and Mining and Minerals Association on the other. The split was largely over the issue whether unions should have to be part of any legislated enterprise bargaining processes; some employers prefer not to have to deal with unions at all. Nevertheless, the Minister proceeded to put a package of legislative changes to the Parliament (Australian Government, Minister for Industrial Relations 2020).

What was in the package? Employers had been spooked by Federal Court decisions finding that certain -so-called 'permanent casuals' could not be regarded as genuine casuals. That finding exposed employers to liability for payment of the benefits associated with 'permanent employment' such as leave entitlements. They argued that the casuals had been engaged and paid as such, even if they had worked continuously for long periods. They had already been compensated with the loading attached to the hourly rate for casuals. The legislation would give employers greater certainty about casual hiring, the definition making it a matter of the terms of the contract (Stewart 2021). Employers would be able, from the outset, to indicate there was to be no firm undertaking of continuing employment. The ACTU described this as the employers' wish list: casualisation was to be facilitated, indeed the reform signalled it would be entrenched (Schofield-Georgeson 2021). Then the High Court upheld the appeal against the Federal Court decisions.

At the same time, employers had been arguing that part-time employment needed to be more flexible. The legislation would authorise the Commission to amend awards to permit employers to offer part-time employees extra hours, above their roster, without the payment of the loading for overtime (Schofield-Georgeson 2021). The threshold for these extra hours to be available would be sixteen hours per week. Legally, employees would be free reasonably to refuse the extra hours. But the Government expected they would welcome the

opportunity to work more hours, even if it disturbed their roster. The ACTU characterised the reform as casualisation without the loading, while employers asked for the threshold to be lowered.

In the response to COVID, award simplification had become the occasion to relax restrictions on the hours, locations and duties employees could be required to work (Murray & ors 2021). The Commission made changes to key awards, such as the hospitality and clerks awards, to give employers more functional, temporal and geographical flexibility (Murray & ors 2021). In the package, the Government sought to empower the Commission to continue this simplification. It should look to combine and collapse the classifications which divide work up. This flexibility did not threaten security directly, but it would add to the demands being placed on those workers who were employed. The employers welcomed the push (Thornwaite and Sheldon 2021), but the ACTU said it was not needed beyond the pandemic.

There were to be changes to the legislated processes so that it would be easier to obtain enterprise agreements. The Commission would be required to expedite approvals of agreements. The reforms did not just go to process, they implicated the Commission's authority to supervise the substance of agreements. Employer associations had in their sights the easing of the BOOT ever since the Commission invalidated an enterprise agreement that Coles had struck with the SDA. Employers argued that it was far too restrictive to insist that every employee be better off, even when a majority had voted in favour of the agreement. The legislation should revert to the no-disadvantage test or something similar (Hamberger 2020).

After Coles, a major concern was the validity of agreements to pay 'loaded rates' (Arup 2020). If the uplift is high enough, the majority is likely to benefit from an all-in rate, payable whenever hours are worked. It is casuals who work principally on weekends and at night who are likely to be worse off, though under-payment cases revealed that middle-class management staff working long hours on annualised salaries had also lost out.

Employers have targeted these penalty payments for work outside ordinary hours because they made their 24/7 operations more expensive. They say that penalties are no longer needed because lifestyles have changed, and employees work these hours for preference not out of necessity. They also claim the tally of these hours is an administrative burden and makes them liable for mistakes (Arup 2020).

The Government's response was not so much to ease the test as to authorise the Commission to waive it altogether in extenuating circumstances so that employees could be paid under-award for a time. The Government's Bill addressed other items on the roundtable agenda. They included provisions for making greenfield agreements run longer. Against employer opposition, provision was made for the criminalisation of the more egregious instances of under-payment. The Bill met resistance from the crossbenchers in the Senate. The Government decided to drop the BOOT waiver provision. The Government was not prepared to go forward with the under-payment measures if the rest of the package was not accepted. The casual and part-time changes were passed at this point.

The roundtables are also informative for the reforms which were left off the agenda. They included the extension of paid leave provisions, the licensing of labour hire, the strengthening of lead firm responsibilities, the enlistment of procurement powers, and the coordination with social security. With reform at the legislative level stalemated, the focus shifted back to the approach the Commission would take to loaded rates, functional flexibility, and minimum conditions. In the following months, employers would maintain pressure on the Commission for these concessions.

COVID Pandemic

Critics say it takes a crisis to unsettle a regulatory paradigm. Regulation is not, as it is portrayed in regulatory studies, a responsive and reflexive process, one that learns from the feedback of experience to make continuous improvements and moves from reaction and remediation to prevention and risk management. Instead, something extraordinary is needed to disrupt the structure of power, history and ideology in which regulation is operating and shift the regulatory paradigm (Picciotto 2017; Wigger and Buch-Hansen 2014).

The COVID pandemic has challenged liberalism's settings for employment and social security. Yet the response, so far, is to liberalise the settings for employment security further, while making a massive, but temporary, injection into social security for the middle-class, alongside a short and begrudging allowance for the working poor.

We know from experience COVID threatened the health of many workers and laid some low. Those who were infected or were in close contact were meant to isolate. Moreover, to prevent or at least slow the spread of the virus, governments locked down locations, requiring businesses to close or go remote for extended periods. Most workers were to stay home. Under these conditions, many sectors have been hit hard, while a few have prospered.

Such precautions prejudiced frontline workers directly (United Workers Union submission. Those who deal with the public face to face, as carers, caterers, retailers, drivers, and guards, could not easily work from home. Many lost their work; some kept going to work in dangerous conditions. Then the precautions had a knock-on effect; patronage was blocked or depressed. Aviation, tourism, universities, the arts were among those sectors which contracted severely and threatened middle-class jobs as well. In the universities, thousands of casual and ongoing full-time jobs were shed; more redundancies are planned (National Tertiary Education Union submission).

Employers responded in various ways. If work was not reorganised, to pick up on preparation and maintenance, then staff were encouraged to take the leave owed to them. Then staff were stood down or put on reduced hours. Some employers ate into reserves to keep on talented and loyal staff. Others retrenched, even though that move would bring forward the payment of benefits that had accrued.

Most employers took advantage of the freedom not to rehire casual workers as soon as the demand for their work declined. Casuals were indeed the first 'to go', except in sectors made essential by the pandemic. For example, universities made use of the casualisation of their workforces in recent years to cut numbers quickly. The working poor were insecure immediately; young, female, and migrant workers hit the hardest (St Vincent de Paul Society National Council submission; Australia Institute Centre for Future Work submission). Without shifts, their income dried up. They had limited savings. But even those in salaried jobs would rapidly run out of 'liquid assets' if they were stood down or retrenched. Many were already in debt. They faced a fall from the middle-class if the crisis continued.

With unemployment and under-employment spreading, the Government prevaricated. Eventually it conceded it would need to provide some sort of subsidy if staff were to stay in their jobs. But it insisted the social security for employment would be shaped 'the Australian way', not necessarily like those payments that were already being made in other jurisdictions. Treasury would model a scheme.

In Australia, wage subsidies have been provided for small numbers of workers who struggle with employability (Howe 2008). JobKeeper by contrast was to help large swathes of employers and employees maintain their existing relationships. It was not paid directly to workers; instead, it was paid through employers. JobKeeper offered employers a flat rate payment per employee to support their wage bills. Not all obtained the payments. To be

eligible, smaller employers had to anticipate their turnover would decline thirty per cent or more on the last year. Some employers were excluded categorically. The Government refused to include the public universities despite the losses they were experiencing. Then eligible employers were not obliged to apply for JobKeeper support, though most did so.

For some employees, the JobKeeper flat rate became the only payment they would be receiving during the pandemic. Employees still had to be paid at their pre-COVID rate for the hours they were working. Yet employers already had powers to stand down employees (Forsyth and Stewart 2021); JobKeeper now came with even more liberal JobKeeper enabling stand down powers (Neil, Chin and Parker 2021). For JobKeeper related stand downs, it was clear there was no need to show a stoppage of work, in the sense that work had to have been brought to a halt by some sort of physical interruption, rather than a decline in demand for the employer's goods and services. Employees lost hours and saw their income drop. At the outset, the JobKeeper rate was around seventy per cent of the median wage and over the course of the year it was reduced. The Government opened superannuation savings.

After some uncertainty, the ATO directed that, if they did take up JobKeeper, employers were obliged to make it available to all eligible employees; in other words, the principle was to be 'one in, all in' (Neil, Chin and Parker 2021). But employers could still be selective about whom they stood down, provided they met the criteria for standing down and they did not discriminate unlawfully among the staff affected. Stand down powers enabled them to shift the economic risk of the pandemic to their employees (Forsyth and Stewart 2021).

Furthermore, they remained free to retrench staff, so long as they complied with the usual substantive and procedural requirements of the unfair dismissal laws regarding the reasons for doing so and the selection of staff (Neil, Chin and Parker 2021). JobKeeper was an incentive to retain staff, it was not an obligation. The pandemic made no difference to the ease with which employers could retrench (Forsyth and Stewart 2021; Ewing and Hendy 2020). In some cases, it became an opportunity to clear out unwanted staff. And it became a windfall for some big firms who prospered in the pandemic, for example through on-line sales, and had money to pay their staff. The taxpayer subsidised their wages bill and they were able to pay their executives bonuses and their shareholders dividends. In the pandemic, businesses also received much financial support directly by way of cash grants.

JobKeeper sustained many middle-class jobs through the onset of the pandemic. But it cannot be said to have provided them with employment security. Employees had to depend

on an upturn again in the economy which thankfully began to emerge towards the end of 2020. Unfortunately, the pandemic persisted and there were to be workers who lost their jobs for good in the fall-out and found it difficult to gain a new one. Still, true to its word, the Government ended JobKeeper payments in March 2021.

JobKeeper did much less for the working poor. Several categories of workers were excluded from access altogether. Casual workers were ineligible if they could not show they had regular work from the same employer for twelve months or more. Some workers had to contest this line with their employers (United Workers Union submission). Most visa workers were ineligible whether they were casual employment or not. These categories of worker, along with the fallouts from JobKeeper, would need to know whether the government unemployment income support of JobSeeker would afford them social security (O'Donnell and Arup 2021).

Most visa workers discovered immediately they were shut out of social security and other public services like Medicare (United Workers Union submission). The Government declined to pay them a special benefit. They could not easily return to their home countries, so they had to take whatever work was still going, while calling on whatever private means they had. Some charities lent a hand, eventually state governments and universities offered small cash payments, a sizeable group of these workers were international students.

The Minister referred casual workers to Centrelink. The Centrelink website was overloaded, and queues snaked around the corners from remaining street front offices. The plight of this large number of new claimants showed how tough the system had become. After years of resistance, the Government relaxed the criteria and conditions. The Government expanded the eligibility criteria to embrace those employees who were stood down rather than out of employment; it also included sole traders who had experienced a drop-off in their work because of the pandemic.

To ease compliance, the Government then waived many of the conditions that blocked or slowed applications and suspended or cancelled payments to recipients. Some were formalities like proof of identity and proof of circumstance. Waiting periods were also waived. Shelved also for a time were the liquid assets test, the assets test, and the partner income test, means tests that obliged applicants to run down private sources first. The main change was the lifting of mutual obligation requirements. This meant the conditions that

served as proxies for active labour market participation, such as appointments with service providers, job plans, and the number of job applications made.

Finally, the Government seemed to be saying, these workers were unemployed through no fault of their own. Conditions would be waived so they were not penalised financially, at least in the short term. Workers would not have to make futile efforts to find jobs. Most markedly, when the Government eased access like this, it added a supplement to the fortnightly payments that doubled the rate and lifted it above the poverty line. It was still not at the level of JobKeeper, but for the working poor it made a big difference. Other holding actions, such as moratoria on rental payments and childcare fees, also relieved pressure on them.

The Government reduced the supplement, and reinstated the conditions, long before the pandemic was to be over. It was clear the Government was determined JobSeeker would not become a disincentive to workers taking on work. The reimposition of these disciplines brought into relief the nature of the work which the system considers suitable for recipients to accept. There were reports that, while employment was recovering, including full-time jobs, much of the work on offer was part-time or casual, especially for women (Australia Institute submission; St Vincent de Paul Society National Council submission; United Workers Union submission; Transport Workers Union submission). Underemployment remained high. Closing of the international borders reduced the supply of temporary visa workers in sectors like food production and provision. As the season arrived, farmers complained of a shortage of fruit pickers; regional hospitality also had trouble finding workers. Plenty of work in the country, said the Minister Simon Birmingham. Yet the Government has not pressed employers to improve the security of this employment.

Even with the condition waivers, JobSeeker proved too cumbersome to give immediate income support to frontline workers who would likely lose a shift, or be removed from the roster, if they had to get tested for the virus and isolate while they waited for the results (Victorian Council of Social Service submission). They continued to go to work, some moving between multiple sites and employers, putting themselves and others at risk (Victorian Council of Social Service submission; Australian Services Union submission). Insecure work interacted with other disadvantages such as cramped housing and lack of open space (Desmond 2017).

As casuals, these frontline workers were not entitled to paid sick leave. The Commission ordered pandemic leave to be made available, for a time, to the very vulnerable aged care workers, but declined to extend it to others (Murray & ors 2021). Several states eventually offered small cash payments to encourage them to step back. Insecurity was to make them hesitant about vaccination too (Megalogenis 2021). The Government would not take responsibility for vaccinating these workers.

Another flash point was to be the security of hotel quarantine workers. The State Governments outsourced employment of these workers to private contractors who in turn resorted to sub-contractors (United Workers Union submission). The Victorian Royal Commission found that ‘casually employed security guards were particularly vulnerable because of their lack of job security, lack of appropriate training and knowledge in safety and workplace rights, and their susceptibility to an imbalance of power resulting from the need to source and maintain work’ (Board of Inquiry 2020).

Instead of snapback, the pandemic persisted, and more lockdowns were imposed. With JobKeeper done and Jobseeker back to its minimal state, the Government responded by making a disaster relief payment available to workers who lost hours. Even this payment had to be fine-tuned, a waiting period was removed, a liquid assets test too, and those on JobSeeker were permitted to apply for the relief.

Women’s Economic Security

The third case advances under the banner of women’s economic security. It asks whether a change in social relations could shift the security paradigm. Women’s employment rights have been under discussion for many years. In Australia, the law now addresses the most direct discriminations, such as those expressed in decisions to hire and fire. There is a strong push, right now, for greater equity in senior appointments. But does that mean, to be secure, women just need to be able to compete on equal terms with men? Campaigns have turned their attention to the more structurally entrenched discriminations and what employers, governments and men must do to overcome them. That, the discourse is saying, means dealing with the structures which make women insecure.

Combating violence against women has reached into the workplace. Legal powers have been installed to offer protections against bullying and harassment. However, studies that combine legal studies with gender studies and organisation theory show that more needs to be done (Barnes 2015; Smith 2019).

The impact of workloads on women is a continuing concern. Long hours, rigid hours, irregular hours, such demands of employers make it difficult for women to meet other commitments and balance work with life. As women shoulder a disproportionate share of the care for others, they are still more likely to take time off work or withdraw from the workforce (McCarthy 2020). These interruptions have immediate effects on employment and income, they have longer run impacts on career, savings, superannuation, and retirement. Older women, especially those who find themselves alone, struggle to make ends meet.

In several sectors, the professions for example, calls are being made for more family friendly work practices. For some, there is paid parenting leave, but not enough (Scott, Grudnoff and Fleming 2021). Flexibility for employees, not just for employers, is still more the rhetoric than the practice (Heron and Charlesworth 2012; Chapman 2013; Allen and Orifici 2021). Employers do not feel obliged to make allowance for family, even if they benefit as a class from reproduction of the workforce, the nurturing and socialising of children (Fraser 2016; Heron and Charlesworth 2016). Workers should come to the workplace unencumbered (Berns 2002; Murray 2005). Instead, the responsibility falls to women, with some support from the state and the public purse, to juggle work and family and find third party childcare if they want to work.

In Australia, the high cost of childcare is a deterrent to workforce participation, for all women but the wealthy (Wood & ors 2020). It is hardest on women in low waged casually employed work who must often turn instead to volunteers from family and friends. Single mothers are often the most stretched. Rather than receiving a public pension to stay at home, they have been swept up in the drive for activation (Cook and Noblet 2016). While researchers appreciate that labour participation can be beneficial, they have been counselling government to ease the stress on single mothers to comply or lose their income support (Howe and Pidwell 2016).

The focus on women's economic security returns the discussion to the precarious nature of casual employment. As the pandemic underlined, it is typical in sectors where women workers predominate (United Workers Union submission). Sector unions are joining with social welfare agencies to demand that this essential work be revalued (Smith and Whitehouse 2020; National Foundation for Australian Women submission; see further Bennett 1984) to raise wage rates and provide secure jobs. The pandemic shows that both workers and clients will benefit from decent jobs.

The Coalition Government upgraded its women's economic statement last year (Australian Government, Department of Prime Minister and Cabinet 2020). While the public discourse is shifting, the Government stays true to its liberal values (Foley and Williamson 2021). The statement picks up the demand that more be done to make workplaces safe. The Coalition has introduced its Respect at Work legislation (Australian Government, Minister for Industrial Relations 2021). That legislation would enact recommendations of the Sex Discrimination Commissioner's report, though not, notably, the central recommendation that employers assume a positive duty to prevent violence and harassment (see Shi and Zhong 2020). The Government's response has been to say that employers already are obliged under general health and safety law to take precautions.

The Government made childcare free for a time during the pandemic but then reverted to the limited subsidy scheme (United Workers Union submission). In the 2021 Budget, it increased its funding for childcare, though this boost is much less than that promised by the opposition ALP which moved first during the pandemic. Some members of the Coalition have asked what comparable is to be done for women who stay at home to care for their children. No review of social security has been forthcoming.

The Government is most remarkable for its inaction on employment: it is taking no initiatives to improve the security of women workers in the sectors they serve so well (Foley and Cooper 2021). While inaction is hard to interpret, the implication seems to be the Government thinks more substantial, secure jobs are impractical or overly expensive to ask of employers. Instead, it remains content with a pattern of casual shifts, multiple hirings and layers of subcontracting, even when it is prepared to give these firms more from the public purse (Macdonald and Charlesworth 2021; Australian Nursing and Midwifery Federation submission). The flashpoint is aged care where women predominate both as workers and clientele. The Royal Commission (2021) recommended improvements to care, including patient-carer ratios, and took on board the action plan of an earlier 2018 taskforce to secure the aged care workforce that included direct employment by government. There is no Government response. The shift is again being left to employers, with some spur, possibly, to come from the Commission.

The problem is also about the conditions under which salaried, middle-class professionals are being expected to work, the long hours and on-call demands, the expenses and debts, an issue for whole families if men are to share in the care of others (Thornton 2020). The pandemic

led to employer acceptance of working from home, it remains to be seen whether they will respond more flexibly to employee requests when it is over (Allen and Orific 2021).

The women's economic security agenda has the most potential to show up the limits to liberalism. Eventually, one would imagine, it should prove impossible for liberals to talk of women's economic security without mentioning such economic determinants as decent jobs, family-friendly work practices, affordable housing, accessible childcare, and unconditional income support (Australian Association of Social Workers submission).

V CONCLUSIONS

The pandemic points up, in dramatic fashion, the employment insecurity which workers also experience in 'normal' times and the shortcomings of social security. Meanwhile, the discourse of protection suggests ways that labour law might strengthen employment and social security. Yet the analysis shows there has been very little movement towards security, no real shift from the reigning paradigm of liberalism (Wilson; Spies-Butcher). That means security continues to depend largely on the economic rationalities of employers and government.

In this discourse, casual hiring is styled a matter of contract, allowing employers to avoid many of the crucial settings for employment security such as paid leave and protection from dismissal. Liberals have success with the argument that such employment options are good for the economy, business, and workers. The law facilitates this choice rather than restricting it. Other free options include contracting out to the self-employed. Keeping faith with this paradigm, the roundtables ended with legislation to consolidate casual hiring, while the government's agenda has ignored its impact on women's economic security. In the pandemic, employers were allowed to exploit this option, despite the personal and social harm that ensued. The working poor stayed with us; so too we saw little challenge to the heavy workloads and easy retrenchments that make middle-class employment feel insecure.

Social security remains limited to a minimal safety net with unemployment assistance rates consigning recipients to poverty in anything but a short transition. The JobSeeker supplement was withdrawn. Liberals have success arguing that social security must not become a disincentive to take whatever work is on offer. Yet conditions make it hard to combine insecure work with income support. The roundtables ignored the link between the

two, while the government's agenda for women continues to insist on activation. The pandemic showed how unresponsive social security has become to the working poor. It brought a bailout for some employers and their middle-class staff. But liberalism insisted that this too be regarded as an exceptional intervention. The government struggled with policies to provide relief to women from the clash between paid work and childcare.

These findings mean the conclusions must, from a protection perspective, be spare. They suggest we cannot expect too much from the law (Tomlins 2021); it is grappling to reconcile liberty with protection (Casperz and Gillan 2011). As legal realists we must ask why labour law is the way it is. Legal researchers and campaigners must try to understand why the political economy of law making has become so receptive to the liberal discourse. This perspective does not mean to condone insecurity by finding, for instance, that many workers are exposed to the vagaries of the labour market (cf. Ewing and Hendy 2020). Rather, by heeding reality, it enables more accurate predictions to be made and more effective strategies shaped (Adams 2021).

Who shapes this discourse? The analysis shows, on the one hand, how the union movement has become increasingly articulate about the insecurity of the working poor. The ACTU has taken up the discourse of protection, siding with those unions which are trying to represent them. But they have made little progress so far. Many of their words are spent defending the existing minimums in the commissions and courts. They need to combine these legal strategies with industrial and social strategies. The unions are beginning to join with voices in civil society such as clubs, campaigns, consumers, charities, churches, feminists, ecologists, think-tanks, and academics (Cummings 2018; Dias-Abey 2019). The movement for social protection should connect with the claims for recognition and respect which are so articulate these days; maybe the agenda for women's economic security agenda could become the bridge (Fraser 2013). The middle-class must join with these groups too, if they are to connect their own arguments for relief from the burden of work and the cost of living to the wider cause, rather than just claim privileges for themselves.

The analysis shows, on the other hand, that employers almost all support the liberal paradigm (Thornwaite and Sheldon 2021). In this solid phalanx, some are more powerful than others. Key firms have grown big; they have assumed leading positions in extended networks (Grimshaw 2020). These firms make use of liberalism to deal with their suppliers and

workers (Beaton-Wells and Paul-Taylor 2017); they in turn are pressed by their shareholders and financiers to do so. They and their associations invest heavily in shaping the discourse.

Politics commonly reflects this stance. The cross-class compromises of the welfare state are breaking down (Wigger and Buch-Hansen 2014; Wilson 2018); elites are assuming a winner-take-all approach (Denniss 2018; Giridharas 2020). Increasingly, they break free of national and local ties; finance aggravates this detachment (Roberts and Kwon 2017). Campaigns in the media champion this approach and the major political parties tend to adopt the agenda of big business and the wealthy (Wilson 2018). If challenges materialise, they are met with threats of investor strikes or accusations of class envy. We would like to think the discourse will be reasoned, and there are legitimate differences to be had about what is best for security, but often in Australia the discourse seems predisposed and polemic. Issues are not resolved by reference to empirical evidence, how much underemployment is being reported, for instance (O'Donnell and Arup 2021), or how workers rate the gig economy (Goods, Veen and Barratt 2019; Kaine and Josserance 2019).

Yet this discourse is not monolithic. We see employers prepared to break ranks, honouring employment law to bringing workers back inside the firm, providing training and careers, countering discrimination, giving respite and leave, pressing suppliers and contractors to do the same. They would also like to see the state put a brake on the strategies of acquiring, undercutting, and dictating, so that the competition between business might be conducted in a fairer manner. Small business has an interest in this fair trading. Supporting social security too, they are concerned about the welfare of their workers and the social fabric around them. In this refrain, they have counterparts in politics and the judiciary. Capitalism, it seems, must be saved from capitalists (Reich 2016; Streeck 2016).

In Australia, where public law has provided some protection, the disposition of the electorate still matters too. In this regard, some signs are discouraging. Gradual, general shifts in society seem to be undermining collectivism and solidarity. Having to make do, workers may become inured to competition, they often see no alternative. Workers become preoccupied with self, family, and tribe. As consumers, they tap into convenience and cheapness, while some citizens aspire to social distinction over others. So, they may not readily show sympathy for the plight of others (Gordon 2019). They display little of the appetite or comprehension needed to back systemic reforms.

Yet Australia's historical pathways mean legal avenues for protection still exist. Now, the analysis reveals, new think-tanks, academics, journalists, activists, and lawyers are revitalising the discourse of public policy and law making. There are models from abroad (Scott, Grudnoff and Fleming 2021). Not so long ago, the Australian electorate responded unfavourably to the liberalism of Work Choices and the privatisation of Medicare. Perhaps the jolt of the recent experiences will lead the voters to appreciate what they have in common as workers and demand something more responsive of government and the law (Megalogenis 2021).

The liberal paradigm seems alright when things are going well; persistent failures show up its shortcomings. The pandemic shows up the Coalition's almost existential resistance to take responsibility for the vulnerable, including frontline workers, over-worked women, and the unemployed. Interventions would be piecemeal, nothing fundamental was changing, no clear alternative was emerging to challenge the current configuration. Eventually the crisis would disappear; settings could be returned to normal (Spies-Butcher 2020; see Wigger and Buch-Hansen 2014). But, as Deakin and Meng (2020) point out, COVID will not be the last anthropogenic crisis. A shift to a 'social state' is required if we are to anticipate and manage the harms which the anthropocene is producing. That state includes provision for employment and social security. Perhaps the cause of women's economic security will provide the shift.

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ⁱ Senate Select Committee on Job Security. Two ALP senators, two Coalition and one Green comprise the Committee. The Committee is due to report at the end of November 2021. Submissions can be read at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Submissions