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One Hundred Years of Dynamic Minimum Wage Regulation: Lessons from Australia, the United Kingdom and the United States

The Honourable Deputy President Reg Hamilton and Matt Nichol

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The Honourable Reg Hamilton[†] and Matt Nichol[‡]

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[†] Deputy President, Fair Work Commission

[‡] Lecturer, The College of Law, Criminology and Justice, Central Queensland University

INTRODUCTION

The significant political and media attention minimum wages attract is not a new phenomenon. The origins of minimum wage regulation in Australia, the United Kingdom and the United States can be traced to the 1890s to 1910s, when minimum wage legislation was an innovative and new form of labour regulation that dealt with the poor working conditions and pay prevalent among 'sweated labour'. The political, social and economic issues raised by minimum wage legislation at the time has continued to create debate in all three countries for over 100 years. The Supreme Court of the United States identified the focus of the legal debate as to whether the state's power to legislate prevails over an individual's liberty and their freedom to contract.[3] Though this position was based on the United States' Constitution, it is applicable to minimum wage regulation in most countries and intersects with *laissez faire* economic theories on the interference of government in the labour market in setting the price of wages.[4] In the early 1900s, courts in Australia and the United States resolved this question by justifying government intervention on the basis of the social consequences of the inequality in bargaining positions in the employment relationship that resulted in an employee either accepting any level of pay offered by a 'harsh and greedy employer'[5] or low wages in preference to unemployment and starvation.[6] Courts in the United Kingdom recognised that minimum wage legislation had to respond to changes in circumstances, otherwise the legislation would not create industrial peace but be a sword.[7]

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[3] *Lochner v New York*, 25 S.Ct. 539, 543 (1905).
[4] *Adair v United States*, 28 S.Ct. 277, 280 (1908).
[5] *Adkins v Children's Hospital*, 43 S.Ct. 394, 403 (1923).
[6] Henry Bournes Higgins, 'A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration' (1915) 29(1) *Harvard Law Review* 13, 25.
[7] *Rex v Amphlett* [1915] 2 KB 233, 239 (Atkin J).

Minimum wage regulation tends to split politicians and economists into two groups. Opponents of minimum wages rely on free market or *laissez faire* theories to resist or limit state intervention on the basis that statutory minimum wages above the rate set by the market may cause unemployment and inflation.[8] Advocates support free markets but argue that governments should regulate low wages by ensuring incomes are set at a level that provides workers with dignity and allows them to support themselves and their families.[9] This ideological divide was aptly described by Hutchinson in 1919 as a conflict of social philosophy between proponents of natural law and competition and supporters of state control levelling competition for the common good of society.[10]

Understanding the policy aims of initial minimum wage laws is important to identify how legislative approaches evolved over time and what contemporary minimum wage regulation attempts to achieve. Between the 1800s and early 1900s sweated labour was prevalent in many low-skilled occupations in Australia, the United Kingdom and the United States and involved the exploitation of workers through minimal pay, long hours and poor working conditions. Such labour practices were the product of low levels of unionisation, employers trying to undercut competitors, the absence of industrial laws and the reality of developing and unsophisticated economies. At this time the 'just wage' theory was used to justify sweated labour and in the United Kingdom was attacked by minimum wage advocates, including liberals, progressives, Marxists, Fabian socialists, the Catholic church and Protestant groups.

[8] See eg. William E Even and David A Macpherson, California Dreamin' of Higher Wages: Evaluating the Golden State's 30-Year Minimum Wage Experiment, Employment Policies Institute, 2017; the research of David Neumark and William Wascher, including 'Employment Effects of Minimum and Subminimum Wages: Panel Data on State Minimum Wage Laws' (1992) 46 *Industrial and Labor Relations Review* 55.

[9] See the research of David Card and Alan Krueger, including *Myth and Measurement: The New Economics of the Minimum Wage* (1995).

[10] Emilie J Hutchinson, *Women's Wages* (1919) 96.

Thus philanthropists and not trade unions were the early advocates of minimum wage laws[11] and these advocates in Australia, the United Kingdom, the United States and Canada formed an international movement.[12]

Sweated labour led to the first minimum wage laws in Australia, the United Kingdom and the United States, which had common origins in the *Victorian Shops and Factories Act 1896* (Vic) in the then British colony of Victoria. All three jurisdictions passed similar laws to allow trade or wages boards to set industry or sectoral wages.[13] This article will examine how the minimum wage systems in all three countries evolved in response to social, political, economic and legal factors and provides a comparison of the historical minimum wage rates in graph 1 in the appendix. While there is a vast amount of multi-disciplinary literature on minimum wage laws, it is dispersed across numerous books, journals and a growing number of online materials spanning over 100 years. A key aim of this article is to consolidate this research into a single source of contemporary comparative research. Also, a historical comparative methodology to minimum wage regulation is important in understanding the development of minimum wage regulation in three developed countries with similarities in political, economic and legal systems and also to identify the factors that contributed to divergence or convergence in minimum wage laws.

[11] Rudolf Broda, 'Minimum Wage Legislation in the United States' (1928) 17(1) *International Labour Review* 24, 24.
[12] Willis J Nordlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* (1997) 2; Diane Kirkby, 'The Australian Experiment of Compulsory Arbitration' in D.C.M. Platt (ed) *Social Welfare, 1850-1950: Australia, Argentina and Canada Compared* (1989) 107, 113-114.
[13] Keith Hancock, *Australian Wage Policy, Infancy and Adolescence* (2013) 5; E.H. Phelps Brown, *The Growth of British Industrial Relations: A Study from the Standpoint of 1906-14* (1959) 206-207; United States Minimum Wage Study Commission, *Report of the US Minimum Wage Study Commission*, volume 1 (1981) 2; David Neumark and William L. Wascher, *Minimum Wages* (2008) 12.

This article is divided into four parts. Each of the first three parts examines minimum wage regulation in the three countries under study, beginning with Australia, then the United Kingdom and concluding with the United States. These parts will make comparisons between the regulatory systems in the three countries. Part D will conclude by addressing the key lessons of minimum wage regulation that can be drawn from our comparative historical study.

A. MINIMUM WAGE REGULATION IN AUSTRALIA

The first regulatory systems for setting wages

As discussed in the introduction, minimum wage regulation in Australia emerged in the 1890s as a response to the prevalence of sweated labour, as well as the industrial and social instability that resulted from the combined effects of recession, drought and the 'Great Strikes' in the pastoral, mining and maritime industries.[14] After Victoria introduced wages boards in 1896,[15] several 'new' States in the Commonwealth of Australia followed with wages boards: South Australia in 1900, Queensland in 1908 and Tasmania in 1910.[16] In 1899 New South Wales created a specialist tribunal to investigate industrial disputes and enforce its orders and 'awards' (a system first introduced in New Zealand in 1894)[17] and added a wages board to its industrial relations system in 1908.[18] Western Australia quickly implemented an arbitration system in 1902. Then, the Australian government in 1904 utilised s 51(35) of the Commonwealth Constitution that permits the federal legislature with power to prevent and settle interstate disputes through conciliation and arbitration to pass the *Commonwealth Conciliation and*

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[14] Stuart Svensen, *The Shearers' War* (1989) 201-207, 230; Justice Giudice, 'The Constitution and the national industrial relations system' (2007) 81 *Australian Law Journal* 584, 584; The Hon. Reg Hamilton, The History of the Australian Minimum Wage, undated, 4 <www.fwc.gov.au>.

[15] See eg. Higgins, above n xx (1915), 34; R Norris, *The Emergent Commonwealth: Australian Federation: Expectations and Fulfilment, 1889-1910* (1975) 198.

[16] M.B. Hammond, 'Judicial Interpretation of the Minimum Wage in Australia' (1913) 3(2) *The American Economic Review* 259, 261.

[17] Herbert V Evatt, 'Control of Labor Relations in the Commonwealth of Australia' (1939) 6(4) *The University of Chicago Law Review* 529, 530.

[18] Higgins, above n xx (1915), 34.

Arbitration Act 1904 (Cth). This Act established the Commonwealth Conciliation and Arbitration Court,[19] which along with State wage-setting institutions, possessed significant discretion in fixing the rate of minimum wages as relevant laws were either silent or adopted vague guidelines.[20]

At the time Australia's federal arbitration system represented a unique regulatory approach in industrial relations as it reflected the interdependence between labour, capital and the state in resolving labour issues.[21] In contrast to wages boards, the Conciliation and Arbitration Court was a federal court and its president was a justice of the High Court of Australia until 1926.[22] The composition of the Court contributed to a 'national' approach to minimum wages as State industrial courts and tribunals were either guided by or followed the decisions of the Commonwealth arbitral court.[23] Also, Justice Higgins, the second president of the Conciliation and Arbitration Court, distinguished the Court's powers from other industrial tribunals in that it did not declare and apply existing laws but instead set rules of conduct for employers and employees by making enforceable awards.[24]

Arbitration and the Harvester 'basic wage'

The Conciliation and Arbitration Court had an immediate impact on society and the economy when Justice Higgins created the 'basic wage'[25] in *Ex parte H.V. McKay*[26] (Harvester case).

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[19] This tribunal became the Commonwealth Conciliation and Arbitration Court from 1905 to 1956, the Commonwealth Conciliation and Arbitration Commission from 1956 to 1973, the Australian Conciliation and Arbitration Commission from 1973 to 1989, the Australian Industrial Relations Commission from 1989 to 2009, Fair Work Australia from 2009 to 2012 and since 2013 the Fair Work Commission.
[20] Hammond, above n xx, 263.
[21] Kirkby, above n xx, 108-109.
[22] Evatt, above n xx, 537.
[23] Hammond, above n xx, 279.
[24] *Australian Boot Trade Employes Federation v Whybrow & Co* (1910) 10 CLR 266, 335 (Higgins J dissenting).
[25] Justice Higgins called the Harvester wage a 'living wage' but he preferred the term 'basic wage': *W. Anglis & Company Proprietary Limited and Others* (1917) 10 CAR 465, 477.
[26] (1907) 2 CAR 1.

This wage would in effect become Australia's minimum wage and Justice Higgins used the lowest rates in Victorian government instrumentalities to set the wage for unskilled labourers at 7 shillings per day.[27] This rate was higher than award rates in New South Wales and Victoria[28] and variously estimated to be 110.5 per cent, 127 per cent or 151 per cent of average weekly earnings.[29] The objective of the Harvester wage was to enable a notional family of five to live in 'frugal comfort'[30] (average families were smaller in the three countries under study)[31] and it applied only to men or those working 'male work' (including single men).[32] Extra amounts called 'margins' or the 'secondary wage' were given to workers with trained skill or other exceptional qualities.[33] However, the basic wage and margins were combined in 1967 to create the 'total wage', a multi-level minimum wage with rates ranging from unskilled labourers to trades above the fitter skill level and even professionals and managers.[34]

Women received only 54 per cent of the male rate, unless they worked in jobs performed by men. The rationale was that women did not have the legal responsibility to support a family.[35] After World War II this level was increased to 75 per cent. The Court increasingly recognised that the government and not the minimum wage system was responsible for compensating families for the cost of children and it called for a national system of child endowment in 1931.[36] Separate award rates for men and women were abolished in 1972.[37] Then, in 1974,

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[27] Reg Hamilton, *Waltzing Matilda and the Sunshine Harvester Factory (*2011) and supporting materials available at the Fair Work Commission, Waltzing Matilda and the Sunshine Harvester Factory, 14 March 2019 <https://www.fwc.gov.au/waltzing-matilda-and-the-sunshine-harvester-factory/introduction>.
[28] *Ex parte H.V. McKay* (1907) 2 CAR 1, 7-8.
[29] Average weekly earnings data compiled from Diane Hutchinson and Florian Ploeckl, '*Weekly Wages, Average Compensation and Minimum Wage for Australia from 1861–Present*', Measuring Worth, 2018, <https://www.measuringworth.com/datasets/auswages/>.
[30] *Ex parte H.V. McKay* (1907) 2 CAR 1, 3.
[31] Wray Vamplew (ed), *Australians, Historical Statistics* (1987) 42, 50, 57; Williams, above n xx, 632.
[32] *Australian Glass Workers Union v Australian Glass Manufacturers Co Ltd* (1927) 25 CAR 289.
[33] Higgins, above n xx (1919), 192.
[34] *Basic Wage, Margins and Total Wage Cases of 1966* (1967) 115 CAR 93.
[35] Higgins, above n xx (1915), 20.
[36] Ibid 31.
[37] *Equal Pay Case 1972* (1972) 147 CAR 172.

the 'family' component was discarded from wage fixation because of the difficulty of defining a 'family'.[38] Wage reviews by the Fair Work Commission now examine the household cost of living with not one model household but 14 different household types, for example no children, one to two children, one or two incomes and single or dual parents.

By 1915 Justice Higgins had included the ability of an industry to pay the basic wage in the calculation of the basic wage.[39] From 1922 priority was given to an employer's capacity to pay the wage in decisions[40] when the Conciliation and Arbitration Court rejected adopting the higher minimum wage levels recommended by the 1920 Royal Commission on the basic wage because the economy did not have the capacity to pay the higher amount.[41] Indexation for inflation first occurred in 1913 when official statistics were published.[42] Between 1922 and 1987 the basic wage was regularly increased, including a number of times by indexation. Sometimes the need to avoid the 'instability' of damaging industrial action campaigns was a factor which influenced the level of the minimum wage.[43] In 1922 the High Court's Justice Isaacs stated that the Conciliation and Arbitration Court must not only take into account the interests of the parties to the dispute but also the general interests of the Commonwealth.[44] In 1952 the High Court said that the powers of the Court were exercised in the public interest.[45] Decisions adjusting award wage rate provisions were made in settlement of industrial disputes

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[38] *National Wage Case* (1974) 157 CAR 293, 299.
[39] Higgins, above n xx [1915], 17; Higgins, above n xx [1922], 140-141.
[40] For example, the *Basic Wage Inquiry* (1930-31) 30 CAR 21 reduced award rates by 10 per cent in response to the Great Depression and the *Wage Pause Decision* (1982) 287 CAR 82 introduced a wage pause for 6 months. From 1975 to 1981 in Australia there were 14 Commission indexation decisions and all but 3 provided less than full indexation because of other increases and industrial campaigns.
[41] Henry Bourne Higgins, *A New Province for Law & Order: Being a Review, by its Late President for Fourteen Years, of the Australian Court of Conciliation and Arbitration* (1922, reprinted in 1968) 136.
[42] Higgins, above n xx [1915], 33; The Federated Gas Employees' Industrial Union v The Metropolitan Gas Company (1913) 7 CAR 58, 69.
[43] See eg. *Metal Trades Industries Association of Australia v The Amalgamated Metal Workers' Union* (1974) 163 CAR 820, 822 (Moore J).
[44] *George Hudson Limited v Australian Timber Workers Union* (1923) 32 CLR 413, 434, 435.
[45] *The Queen v Blackburn and Another; Ex parte Transport Workers Union of Australia* (1952) 86 CLR 75, 95.

until the Work Choices reforms[46] in 2005, when the federal government used the corporations power to regulate employment in place of the conciliation and arbitration power. Nevertheless, the basic wage and then the total wage were a general policy of tribunals.

Constitutional challenges to the federal arbitration system

While the Conciliation and Arbitration Court was setting pay and conditions in awards at the beginning of the 20th century, over three decades there were a number of High Court challenges (mostly by employers) on the Constitutionality of the Court and the Act. These cases shaped wage regulation in Australia. The first wages case in the High Court concerned the Harvester basic wage decision, which was not challenged in *King v Barger, Commonwealth v McKay*[47] under s 51(35) of the Constitution. Instead, a majority of the High Court held that the Conciliation and Arbitration Court's power under the *Excise Tariff 1906* (Cth) to set a 'fair and reasonable' wage for workers manufacturing goods that were the subject of excise duties was an unconstitutional use of the taxation power.[48] However, Justice Giudice, a former President of the Australian Industrial Relations Commission, warned in 2007 to cautiously interpret *Barger* due to the influence of the doctrine of implied immunity of State instrumentalities,[49] which was abandoned by the High Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.[50]

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[46] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).
[47] (1908) 6 CLR 41.
[48] Ibid 69.
[49] This doctrine was established in *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 and held that the State and Commonwealth governments are sovereign in relation to one another and therefore are not affected by the laws of the others: Giudice, above n xx, 585.
[50] (1920) 28 CLR 129.

After *Barger* a series of cases influenced the wage setting powers of the federal arbitration court. In 1909 the High Court in the *Woodworker* case[51] used the implied immunities doctrine to rule that State awards prevailed over federal awards, a decision overturned in 1927 in *Clyde Engineering Co Ltd v Cowburn*.[52] The High Court in *Woodworker* also declared that 'paper disputes' established by a trade union's letter of demand to an employer could not establish an 'industrial dispute' within the meaning of s 51(35) of the Constitution.[53] This decision was also overturned when the High Court in 1911 ruled in *Whybrow*[54] that paper disputes could be used by unions to create federal awards.[55] In subsequent cases the Court found that paper disputes had to be a genuine inter-State dispute[56] and that they were only binding on non-union members if they were the product of a trade union letter of demand and not an employer letter.[57] *Whybrow* also decided that s 51(35) of the Constitution did not permit a provision of the *Conciliation and Arbitration Act* to give the Conciliation and Arbitration Court the power to set a 'common rule' for an entire industry and that the Act was valid despite arbitration being involuntary.[58] The High Court in *The School Teachers'* case[59] found that teachers working in State schools could not be the subject of an interstate industrial dispute.

Political challenges to the federal arbitration system

Not only did employers and industries resist paying wages set by an independent tribunal through the courts but they also utilised politics to influence the federal legislature. Initially

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[51] *The Federated Saw Mill, Timber Yard, and General Woodworkers Employes' Association of Australasia v James Moore and Sons Proprietary Limited* (1909) 8 CLR 465.
[52] (1927) 37 CLR 466.
[53] Ibid 505.
[54] *The Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow & Co* (1911) 11 CLR 1.
[55] *Merchant Service Guild of Australasia v Newcastle & Hunter River Steamship Co Ltd [No.2]* (1913) 16 CLR 705, 710; *Commonwealth Court of Conciliation & Arbitration v Australian Builders' Labourers' Federation; Ex parte Jones* (1914) 18 CLR 224.
[56] *Caledonian Collieries Limited v the Australasian Coal and Shale Employees' Federation* (1930) 42 CLR 527, 552.
[57] *Burwood Cinema Limited and Others v The Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528; *Metal Trades Employers Association v Amalgamated Engineering Union* (1936) 54 CLR 387.
[58] *The Australian Boot Trade Employees' Federation v Whybrow & Co* (1911) 11 CLR 311.
[59] *The Federated State School Teachers' Association of Australia v The State of Victoria* (1929) 41 CLR 569, 575.

the federal government attempted to expand the powers of the Conciliation and Arbitration Court after Justice Higgins described the High Court's decisions on section 51(35) as a 'Serbonian bog of technicalities, and the bog is extending' as federal awards could not prevail over State awards.[60] The federal government was unsuccessful in 1911 and 1913 in its attempts to expand its constitutional powers to include general labour conditions and wages in two referenda.[61] But political sentiment quickly changed directions. By 1920 employer resistance to arbitration was the result of various factors, including the poor post-World War I global economy, a decrease in the price of some manufactured products, the cost of arbitration and conciliation and the inability of the arbitral system to prevent strikes. Such opposition attracted political and public support, despite the Royal Commission on the Basic Wage in 1919-1920 setting a wage based on a higher level of needs than provided for in Harvester.

Between 1918 and 1920 'round table' discussions by industrial councils and specialist tribunals gained traction as an alternative to arbitration via legislation introduced by the Commonwealth, South Australia and New South Wales. These alternative systems operated for the next decade. The *Industrial Peace Act 1920* (Cth) implemented temporary industrial councils that were created by the executive government for the prevention and settlement of industrial disputes and led to Justice Higgins resigning from the Conciliation and Arbitration Court.[62] Anti-labour sentiment saw the Royal Commission on the Constitution in 1927 recommend that s 51(35) of

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[60] *The Australian Boot Trade Employees' Federation v. Whybrow and Co* (1909) 4 CAR 1, 41-42.

[61] The 1911 referendum was approved by Western Australia and 39.4 per cent of voters. The result improved in 1913 but still failed with approval from Queensland, Western Australia and South Australia and 49.3 per cent of voters: Scott Bennett and Sean Brennan, Constitutional Referenda in Australia, Parliament of Australia, Research Paper 2 1999-2000, Table 1: Constitutional Referenda 1906-1988, <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp9900/2000rp02#1>. For the Hansard transcripts of the readings of the *Constitution Alteration (Legislative Powers) Bill 1910* and the *Constitution Alteration (Industrial Matters) Bill 1912,* see Historic Hansard, House of Representatives, Bills 1901 to 1980, undated <http://historichansard.net/hofreps/bills/>.

[62] Higgins, above n xx (book), Appendix B - Statement made in Court by Mr Justice Higgins on Announcing his Resignation (September 25, 1920) 172-176.

the Constitution be amended so that the legislative power on industrial relations be the sole power of the States. In 1929 Prime Minister Bruce's attempts to rationalise the arbitration system culminated in his failed effort to exclude the federal government from all arbitration (except maritime disputes) through the *Maritime Industries Bill 1929* (Cth), causing not only an election loss but a Prime Minister losing his seat in parliament for the first time.[63]

By the conclusion of World War II political opinion had shifted and the federal government again failed in its efforts to expand its industrial relations power by maintaining wartime regulation of industry. While the *Constitution Alteration (Industrial Employment) Bill 1946* (Cth) prohibited 'industrial proscription' that was first used in the *National Security Act 1939* (Cth), it also proposed to give the Commonwealth parliament the Constitutional power in s 51(35) to set working conditions (including the basic wage) for any industry.[64] Once again a referendum on the conciliation and arbitration power failed to pass.[65]

Gradual reform of the powers of the federal industrial tribunal

In the early arbitration cases it is unclear whether the Court applied the terms 'industry', 'industrial dispute' and 'industrial matters' as defined in s 4 of the *Conciliation and Arbitration Act*, the words in s 51(35) or both. The High Court in *Waterside Workers' Federation*[66] in 1918 ruled that the Conciliation and Arbitration Court could not exercise judicial power and the Court's powers were subsequently reconstituted. Then, in 1930, legislative amendments reduced the broad wage setting powers of the Court by limiting the ability of the judges to alter

[63] Richard Morris, 'From the Webbs to Scullin: The Appearance of Industrial Relations as a Branch of Knowledge in Australia' (1993) 64 *Labour History* 70, 75, 83; Evatt, above n xx, 547; McGarvie, above n xx, 50.
[64] House of Representatives, 17th Parliament, 3rd Session, 27 March 1946, Constitution Alteration (Industrial Employment) Bill 1946, Second Reading, <http://historichansard.net/hofreps/1946/19460327_reps_17_186/>.
[65] The referendum was supported by Victoria, New South Wales, Western Australia and 50.3 per cent of all voters: Bennett and Brennan, above n xx.
[66] *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd* (1918) 25 CLR 434.

the basic wage.[67] The High Court in 1956 imposed further restrictions on the Court's powers in *R v Kirby and Others*[68] by finding that it was unconstitutional for the Court to exercise both judicial and award making functions. As a result, two new industrial bodies were established: the Commonwealth Industrial Court performed judicial functions (now exercised by the Federal Court of Australia) and the Commonwealth Conciliation and Arbitration Commission made and varied awards. Next, the High Court ruled in *Amalgamated Engineering Union*[69] in 1967 that the Industrial Relations Commission had the power to replace the basic wage with the 'total wage' in the *National Wage Case 1967*[70] and that the Constitution prevented the Commonwealth Parliament from directly setting the minimum wage.[71]

Parliament largely abandoned s 51(35) as the basis for regulating employment and industrial relations in 2005 when the Howard Coalition government utilised the corporations power in s 51(20) of the Constitution to nationalise employment regulation with the introduction of the Work Choices legislation. This approach survived a Constitutional challenge in the High Court.[72] The result is that most of the previous limitations on the wage setting powers of the federal industrial tribunal no longer have effect, though the coverage of what is now the *Fair Work Act* applies to corporations and others covered by dual systems of federal and State legislation. Since 2010 the Fair Work Commission has been the federal body responsible for resolving disputes, establishing minimum working conditions and setting the wages of many low-income workers through the national minimum wage, awards and enterprise bargaining agreements.

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[67] (1933) 49 CLR 589; *Ex parte Ozone Theatres (Aust) Ltd* (1933) 49 CLR 389, 405-406, 408.
[68] (1956) 94 CLR 254.
[69] *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section), Vehicle Builders Employees' Federation of Australia, North Australian Workers' Union* (1967) 118 CLR 219.
[70] (1967) 118 CAR 655, 658.
[71] *Amalgamated Engineering Union* (1967) 118 CLR 219, 242, 269.
[72] *New South Wales v Commonwealth* (2006) 229 CLR 1.

The importance of the early industrial arbitration system and the basic wage

Australia's early system of arbitration shaped the nation's minimum wage becoming the second highest minimum wage of industrialised nations in the Organisation for Economic Co-operation and Development ('OECD') in 2018,[73] although it may be higher as the lowest award rate is only in a quarter of modern awards and it is an introductory rate.[74] While the Harvester basic wage only applied to one employer, it covered a majority of the workforce by the end of the 1920s through its adoption by industrial tribunals in federal and State awards.[75] Regional variations in the basic wage took into account differences in the cost of living[76] and there were 34 different federal wages (and even differences in some State minimum wages).[77] By the mid 1950s the basic wage was essentially a universal minimum wage.[78] Regional wages were only removed after 1988 with the award reform process that began with the National Wage Case.[79] An argument could be made for the reinstatement of regional wages based on the diversity in the cost of living in Australia's cities, regional centres and rural towns.

The basic wage was a notable achievement of the federal arbitration system. Despite its shortcomings, the Harvester wage was not abandoned because it recognised the needs of ordinary workers as people with psychological and social attributes, rather than simply productive commodities. Such an approach resonated with government, the public and wage fixing authorities. The basic wage was also significant in that it was not a static concept and it

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[73] Organisation for Economic Co-operation and Development, OECD.Stat, Real Minimum Wages, 5 March 2020 <https://stats.oecd.org/Index.aspx?DataSetCode=RMW>.

[74] Australian Government Productivity Commission, Workplace Relations Framework (2015) 179; Review of certain C14 rates in modern awards, [2019] FWC 5863.

[75] *Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd* (1909) 3 CAR 1, 21.

[76] Higgins, above n xx (1915), 19.

[77] David Plowman, 'Protecting the Low Income Earner' (1995) 6(2) *The Economics and Labour Relations Review* 252, 257, 272.

[78] *Australia: Incidence of Industrial Awards,* Commonwealth Bureau of Census and Statistics, 21 February 1956.

[79] *National Wage Case 1988*, Dec 640/88, M Print H400, 12 August 1988.

was responsive to social, economic, industrial and legal changes. In 1933 the High Court observed that the basic wage had evolved since 1907 from a wage based on worker 'needs'.[80] Then, in *Ex parte Amalgamated Engineering Union (Australian Section)*, Chief Justice Barwick in 1967 stated that from 1937 workers received a 'prosperity loading' that was set according to the success of an industry and that at the time the basic wage included the capacity of an industry to pay the wage.[81]

In addition to the impact on wages, a number of judges, courts and academics have identified the influence of arbitration and the independent industrial tribunal on society and the economy. Kirkby observed that when introduced, the federal arbitration system was viewed internationally as the most notable experiment in social democracy.[82] Justice Evatt, a former High Court judge, stated that the federal arbitration tribunal prevented 'great evils', assisted in the unionisation of the workforce and created national employment standards through awards.[83] More broadly, McGarvie recognised the significant societal and economic effects of the Conciliation and Arbitration Court.[84] In 1933 the High Court described the Court not as merely exercising judicial power but performing a public duty that flowed from statute.[85] The case law on the Commonwealth's constitutional power to govern industrial relations facilitated an arbitral system that produced sectoral awards and wages that were generally accepted within Australian society.

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[80] *Ex parte Ozone Theatres (Aust) Ltd* (1933) 49 CLR 389, 406-407.
[81] *Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219, 233.
[82] Kirkby, above n xx, 107.
[83] Evatt, above n xx, 549.
[84] McGarvie, above n xx, 48-49.
[85] *Ex parte Ozone Theatres (Aust) Ltd* (1933) 49 CLR 389, 399.

Modern minimum wage regulation in Australia

For much of Australia's history of labour relations, the minimum wage was the centrepiece of the regulatory system. The minimum wage was relatively stable, except during the crisis period from 1966 to 1981, which is sometimes described as a 'wage explosion'. In response to this explosion the Commission adopted restrictive guidelines for ordering increases in labour costs.[86] Later, the *Industrial Relations Reform Act 1993* (Cth) limited the minimum wage to a 'safety net' of minimum standards rather than actual rates.[87] When combined with the introduction of a formal system of enterprise bargaining in 1991,[88] there was an abandonment of attempts to lift the minimum wage to market rates and in turn a dramatic decline in the number of workers who received award conditions. In 1990, 78 per cent of the workforce received award rates[89] and this number had fallen to 22.7 per cent of workers in 2018.[90] Other factors contributing to the decline in award coverage include the abolition of many State awards, an increase non-full time employment and a rise in labour hire arrangements.

Minimum wages are now annually set by the Fair Work Commission according to the criteria in section 284 of the *Fair Work Act*. The Fair Work Commission's expert panel for annual wage reviews is composed of four national members of the Fair Work Commission and three external appointments.[91] Section 284 requires the maintenance of a safety net of minimum wages that takes into account the performance and competitiveness of the national economy, the promotion of social inclusion through increased workforce participation, the relative living standards and needs of low-paid workers, the principle of equal remuneration for work of

[86] Eg. *The Wage Pause Decision* (1982) 287 CAR 82, The National Wage Case Decision 1983 (1983) 291 CAR 3.
[87] *Industrial Relations Reform Act 1993* (Cth), s 88A(b).
[88] *National Wage Case Decision 1991* (1991) 39 IR 127.
[89] Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?' (2018) 29(2) *The Economic and Labour Relations Review* 207, 214.
[90] *Annual Wage Review 2017-18* [2018] FWCFB 3500, paragraph 265.
[91] See also ss 3, 134, 284, 578 of the *Fair Work Act*.

comparable value and a fair minimum wages for juniors, trainees and employees with a disability. Balancing these requirements involves a comparison of the living standards of those on award rates with others, and the extent to which low paid workers are able to 'purchase the essentials for a decent standard of living and engage in community life', the 'equivalised household disposable income' which takes into account tax transfer payments (a modern form of Harvester) and the gender pay gap.[92]

The application of the s 284 criteria provides the Fair Work Commission with considerable flexibility in setting the minimum wage. In 2018 the Fair Work Commission used its discretionary powers to refuse to set a living wage that was 60 per cent of the median income because of the substantial risk of negative employment effects and because it could not substitute the formula in the statutory criteria in s 284.[93] Low-income workers are a key target of wage fixing in the Fair Work Commission and the Commission held in 2018 that a threshold of two-thirds of median adult full-time ordinary earnings provides 'a suitable and operational benchmark for identifying who is low-paid',[94] a benchmark based on the OECD standard for identifying low-wage earners.[95] Even though some low-paid workers live in high income households, the Fair Work Commission concludes that 'the low paid are disproportionately found in the bottom deciles, with 62.3 per cent of the low paid in the bottom half of the [household income] distribution'.[96]

[92] *Annual Wage Review 2018-19* [2019] FWCFB 3500, paragraphs 11-18.
[93] *Annual Wage Review 2016-17* [2017] FWCFB 3500, paragraphs 32-36.
[94] *Annual Wage Review 2017-18* [2018] FWCFB 3500, paragraph 32.
[95] Organisation for Economic Co-operation and Development, OECD.Stat, Wage levels, <https://data.oecd.org/earnwage/wage-levels.htm>.
[96] *Annual Wage Review 2017-18* [2018] FWCFB 3500, paragraphs 275, 329–352.

B. MINIMUM WAGE REGULATION IN THE UNITED KINGDOM

Wages and the introduction of trade boards

At the turn of the 19th century Sidney and Beatrice Webb were among the social activists in the United Kingdom who campaigned for labour reforms. The Webbs helped develop the welfare state, promoted wage regulation in sweated industries, worked with Alfred Deakin (later the second Prime Minister of Australia) and Sir Charles Dilke in relation to trade or wages boards,[97] co-founded the Fabian Society, the New Statesman and the London School of Economics and generally promoted collectivism in industrial relations. In 1906 a Fabian tract stated that a national minimum wage was needed to enable a 'healthy existence' for the 'average family, reckoned as consisting of a man, his wife and three children', while for a woman it was to be calculated for an 'adult woman living by herself.'[98] In 1909 calls for a national minimum wage in the United Kingdom were rejected in favour of trade boards for defined sectors.[99]

Trade boards were established after the passage of the *Trade Board Act 1909* (UK) and lasted until their abolition by Prime Minister Major's Conservative government in 1993. The initial trade boards covered 400,000 workers, who were predominantly women[100] and worked in tailoring, domestic chain making, card box making and machine-made lace and finishing trades.[101] Boards were composed of a mix of employer and employee representatives and independent members and the size ranged between 17 and 41 members.[102] While the legislation was criticised for its limited scope and procedural delays in implementing new wages, the

[97] Jerold L Waltman, *Minimum Wage Policy in Great Britain and the United States* (2007) 48.
[98] David Metcalf, 'Nothing New Under the Sun: The Prescience of W.S. Sanders' 1906 Fabian Tract' (2009) 47(2) *British Journal of Industrial Relations* 289, 291-292.
[99] Deakin and Green, above n xx, 206; Blackburn, (2009) above n xx, 219-227.
[100] Waltman, above n xx, 63.
[101] Deakin and Green, above n xx, 206; Waltman, above n xx, 63.
[102] Waltman, above n xx, 49, 63-64.

Trade Board Act was significant in that the United Kingdom supported the regulation of wages by the state.

The expansion of trade boards

After lobbying by the Anti-Sweating League, another five trade boards were established in 1913 and covered an additional 140,000 workers in sugar confectionary, shirt making, hollow-ware making, linen and cotton embroidery and parts of the laundry industry. Further expansion of trade boards resulted from the centralisation of economic activity after the outbreak of World War I.[103] In 1917 the Whitley Committee opposed the introduction of compulsory arbitration that was based on the Australian model but recommended expanding the powers of trade boards to facilitate negotiation and to make decisions on some collective bargaining matters. The impact was immediate. By 1921 there were over 40 trade boards covering three million workers,[104] then 47 boards in 1937 [105] and 66 boards in 1953.[106]

However, the creation of new trade boards was not without problems as the establishment of a new board was at the discretion of the government and subject to statutory tests.[107] Also, the coverage of workers was sometimes anomalous and inconsistent within an industry or profession, for example, workers in agriculture were covered but not fisheries and laundries but not dry cleaning.[108] Lord Blanesburgh's dissenting judgment in *France v James Coombes*

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[103] Waltman, above n xx, 64.
[104] Deakin and Green, above n xx, 206.
[105] Anonymous, 'The British Trade Board System' (May 1938) 46(5) *Monthly Labor Review* 1085-1099, 1087-1090.
[106] Low Pay Commission, First Report of the Low Pay Commission, Appendix 5, 203.
[107] *Wages Council Act 1945* (UK), s 4(4).
[108] Richard Dickens and Peter Dolton, Using Wage Council Data to Identify the Effect of Recessions on the Impact of the Minimum Wage, Report prepared for the Low Pay Commission, 12 April 2011 <https://pdfs.semanticscholar.org/3649/784533303e03af46b9ca3b4052848b2b749e.pdf?_ga=2.175465122.1240359338.1574908285-834281125.1574908285>.

& Co[109] in 1929 emphasised the importance of interpreting minimum wage legislation to avoid the situation where workers were forced to accept rates that they may be imposed upon them because of deficient bargaining power and the danger of wholesale evasion of protective Acts.[110]

The longest continual minimum wage: the agriculture minimum wage

Diagram 1 provides the first published 100-year series of minimum wage rates for the United Kingdom and the agriculture trade board that was established by the *Corn Production Act 1917* (UK) was the only wages board that operated for the duration of this period. Set at 25 shillings in 1917 and then 30 shillings in 1918, the *Agriculture Wages (Regulation) Act 1924* (UK) then essentially adopted the Harvester words by requiring the fixation of agricultural wages at such a level as to 'enable a man in an ordinary case to maintain himself and his family in accordance with such standard of comfort as may be reasonable in relation to the nature of his occupation.'[111] Under the Act minimum wages were raised by approximately 15 per cent in the late 1920s and then by over 20 per cent in the 1930s.[112] Yet the 1940s saw agricultural minimum wages at a rate significantly lower than industrial wages[113] and rates set by other councils.[114] Agricultural wages were representative of other boards from 1947 to 1968 but then higher from 1976 to 1993.[115] During the Formal Incomes Policies period between 1967 and

[109] [1929] AC 496.
[110] Ibid 506.
[111] Robin Gowers and Timothy J Hatton, 'The origins and early impact of the minimum wage in agriculture' (1997) 1 *Economic History Review* 82, 83.
[112] Jessica S Bean and George R Boyer, The Trade Boards Act of 1909 and the Alleviation of Household Poverty, (2009) 47(2) *British Journal of Industrial Relations* 240, 253.
[113] Alun Howkins and Nicola Verdon, 'The state and the farm worker: the evolution of the minimum wage in agriculture in England and Wales, 1909-1924' (2009) 57(2) *Agricultural History Review* 260, 272.
[114] R L Bowlby, 'Union Policy Toward Minimum Wage Legislation in Postwar Britain' (1957) 11 *Industrial and Labour Relations Review* 72 cited in R Steele, 'The Relative Performance of the Wages Council and Non-Wages Council Sectors and the Impact of Incomes Policy' (1979) 17(2) *British Journal of Industrial Relations* 224, 225.
[115] Bean and Boyer, above n xx, 253.

1975, McCormick and Turner found that agricultural rates did not decrease and that large real gains were made.[116]

In 2012 the agricultural wages board was abolished by the Cameron Conservative/Liberal Democrat government. Agricultural wages councils continued in Scotland and Northern Ireland, while Wales established its own council. The surviving agricultural wages boards of Scotland, Northern Ireland and Wales each describe the fixing of an agricultural rate as something like a collective bargaining 'negotiation' that involved presentations by trade unions, economists, employers and then some form of determination.[117]

Limitations of trade boards and minimum wages

Unlike using the courts to challenge to minimum wage as occurred in Australia (and in the United States), employers in the United Kingdom resisted minimum wage legislation by using politics to statutorily limit the number of regulated industries and the powers of trade boards. The coverage of wage boards was always small, peaking at a quarter of the workforce (4.5 million workers) in 1945.[118] At the time of their abolition in 1993, wages boards set rates for approximately 2.5 million workers, mainly in hotels, catering, retail, clothing manufacturing and hairdressing.[119] This limited coverage was initially due to the role of boards in eliminating sweated labour, and then, as a supplement to collective bargaining after passage of the *Trade Boards Act 1918* (UK) and *Wages Council Act 1945* (UK). Boards were independent but until

[116] B McCormick and H A Turner, The Legal Minimum Wage: An Experiment' (1957) 25(3) *The Manchester School* 284, 289 cited in R Steele, 'The Relative Performance of the Wages Council and Non-Wages Council Sectors and the Impact of Incomes Policy' (1979) 17(2) *British Journal of Industrial Relations* 224, 225.
[117] Email of 18 December 2018 from Ryan Davies, Agricultural Advisory Panel for Wales; email of 17 December 2018 from Ken Gray, Scottish Agricultural Wages Board; email of 19 December 2018 from Kristopher Todd, Northern Ireland Agricultural Wages Board.
[118] Deakin and Green, above n xx, 206.
[119] Dickens and Dolton, above n xx, 6.

1975 decisions needed to be implemented by Ministerial order to be enforceable.[120] In contrast to the conciliation and arbitration systems in Australia, trade boards did not establish general wage fixing 'principles' because their tripartite discussions focused on specific and narrowly defined trades and the parameters set by employer and employee members.[121] Increases to wages in line with the cost of living through indexation was rejected by government on at least one occasion.[122] Unlike the theoretical basis underpinning the Harvester basic wage, trade boards determined wages rates by a mix of assessing the conditions of an industry and comparisons with similar work in other industries,[123] the reassurance of union agreement[124] and that workers enjoy protections of comparable industries.[125] When the boards became wages councils they took into account the requirements of different occupations and industries by setting various rates between 1945 and 1986 but from 1986 to their abolition in 1993 wages councils set only one rate of pay.[126]

The demise of wages councils

Trade unions contributed to the end of wages councils due to their ambivalence in participating in wages councils. Proceedings generally did not create formal collective bargaining arrangements, nor did unions receive public recognition of their role or any new members. At times trade unions supported the abolition of wages councils, listing eight councils as 'ripe' for closure in 1962.[127] Trade union objectives were often based on a man supporting a family of

[120] Steele, above n xx, 229, 231; *Trade Disputes Act 1909* (UK), s 5; *Wages Council Act 1945* (UK); Otto Kahn-Freund, 'Minimum Wage Legislation in Great Britain' (1949) 97 *University of Pennsylvania Law Review* 780, 805.
[121] Hancock, above n xx, 9.
[122] The Report of a Commission of Inquiry on an Application for the Establishment of a Wages Council for the Hairdressing Trade, 1947, 8, quoted in F.J. Bayliss, *British Wages Councils* (1962) 109.
[123] Deakin and Green, above n xx, 207.
[124] Bayliss, above n xx, 63.
[125] Gertrude Williams, The Myth of 'Fair Wages' (1956) *The Economic Journal* 621, 629.
[126] See *Wages Act 1986* (UK).
[127] Dickens and Dolton, above n xx, 19.

five,[128] so family adequacy again was important in wages council deliberations. Many unions also called for a national system of family support payments to address family poverty.[129] In addition to union concerns there was some criticism of the absence of a national minimum wage and that women received lower wage rates.[130]

The demise of wages councils began in the 1960s when the view developed that statutory regulation of wages was suppressing voluntary collective bargaining, leading to the abolition of 27 wages councils from 1960 to 1970. However, voluntary collective bargaining did not increase for the half a million workers who were no longer covered by wages councils. The election of conservative Margaret Thatcher as Prime Minister marked the formal transition to the end of wages councils. First, the *Wages Council Act 1979* (UK) reduced the number of councils and labour inspectors. Then, the *Wages Act 1986* (UK) limited the powers of wages councils to set only basic time and piece rates. By 1990 there were 26 wages councils that covered 2.5 million workers, 75 per cent of whom were women. Except for the England and Wales agricultural wages councils, the remaining 26 councils were abolished by the Major Conservative Government in 1993.[131] One study concluded that abolishing the wages councils did not create new jobs and that there was a greater dispersion of wages and therefore inequality.[132]

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[128] Hilary Land, 'The Family Wage' (1980) 6 *Feminist Review* 55, 75; Gertrude Williams, 'The Myth of Fair Wages' (1956) 64 *Economic Journal* 621.
[129] Paul John Sellers, 'The UK Living Wage, A Trade Union Perspective' (2017) 39)6) *Employee Relations* 790, 791.
[130] Blackburn, above n xx, 228.
[131] Deakin and Green, above n xx, 208.
[132] Richard Dickens, Paul Gregg, Stephen Machin, Alan Manning and Jonathan Wadsworth, 'Wages councils: was there a case for abolition?' (1993) 31(4) *British Journal of Industrial Relations* 515.

A national minimum wage

Soon after the end of wages councils a national minimum wage was introduced with the complete reformulation of wages policy.[133] The *National Minimum Wage Act 1998* (UK) provided for the making and enforcement of a national minimum wage, which was first set at £3.60 per hour in 1999. This rate was the same as the average rate set by wages councils in 1993, an apparent attempt at continuity in order to not disrupt industry.[134] The Secretary of State for Business Enterprise and Regulatory Reform sets the minimum wage and may consult with the Low Pay Commission. After the rate was decreased in 2008 in response to the recession caused by the global financial crisis, the minimum wage has consistently risen in real terms since 2013. In 2019 the minimum wage was £8.21 per hour for workers over 25 years of age.[135] Deakin and Green posit that the national minimum wage did not result in the negative economic effects of inflation and reduced employment that orthodox economic theory associates with increasing minimum wages.[136]

In 1998 the Low Pay Commission was established to set the national minimum wage. It is a tripartite body that is composed of nine commissioners: three from trade unions, three from business and three independent members. Brown describes the Low Pay Commission as a 'social partnership' and that when it meets, employers and unions adopt polarised positions above and below the final agreement point. Consequently, a number of 'rounds' of bids are made and the Commissioners attempt to reach agreement. The Chairperson acts as conciliator and the parties slowly converge in what is often a difficult process that involves the presentation

[133] Blackburn, above n xx, 215.
[134] The First Low Pay Commission Report 1998, 11, 95. The recommended rate was £3.70 per hour in June 2000, beginning at 3.60 per hour in April 1999.
[135] United Kingdom Government, Minimum Wage, Minimum Wage Rates, undated <http://www.minimum-wage.co.uk>.
[136] Deakin and Green, above n xx, 209.

of current economic data and the substantial body of research that the Commission either undertakes or purchases.[137] The Low Pay Commission's reports are only a recommendation but are always accepted by government.

The minimum wage is received by approximately 6.5 per cent of eligible workers in the entire economy.[138] The Low Pay Commission's wage fixation process resembles the collective bargaining of a traditional wages council but without the benefit of 'going rates' from outside collective bargaining and with national scope. The principal constraint is not preserving collective bargaining but avoiding the negative economic impacts of inflation and unemployment.[139] Since 2013 increases have been above inflation.[140] The Low Pay Commission estimates that nearly a third of all workers have directly or indirectly benefited from the minimum wage, including spill-over as relativities are maintained.[141]

A living wage

In 2011 the United Kingdom introduced a voluntary 'real living wage' through the Living Wage Foundation. Not only was the living wage set above the national minimum wage at £9 and £10.55 in London,[142] but it applies to all workers aged over 18 years who are not apprentices or trainees. By 2018 there were 4,978 employers accredited by the Living Wage Foundation, covering 1.7 million workers or 6 per cent of the workforce.[143] Living wage campaigners were not only able to successfully lobby employers to voluntarily pay the real

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[137] William Brown, 'The Process of Fixing the British National Minimum Wage, 1997-2007' (2009) 47(2) *British Journal of Industrial Relations* 429, 429, 436-438.
[138] Low Pay Commission, National Minimum Wage: Low Pay Commission Report 2018, 61.
[139] Deakin and Francis, above n xx, 210.
[140] Deakin and Green, above n xx, 210.
[141] The Low Pay Commission, 20 Years of the National Minimum Wage, April 2019, 17.
[142] Living Wage Foundation, What is the real living wage?, undated <https://www.livingwage.org.uk/what-real-living-wage>.
[143] Edmund Heery, Deborah Hann and David Nash, 'Trade unions and the real Living Wage: survey evidence from the UK' (2018) 49(4) *Industrial Relations Journal* 314, 320-321.

living wage but the United Kingdom introduced a statutory national living wage.[144] In 2016 in the context of widespread review of government benefits and services, Chancellor Osborne announced a new national living wage for workers aged over 25 years. The government's remit to the Low Pay Commission in 2017 expressed the ambition to increase the living wage to 60 per cent of median income by 2020 on the condition there was sustained economic growth.[145] Despite the Low Pay Commission noting that the minimum wage in 2018 was at a 'tipping point', beyond which adverse employment effects may result,[146] it recommended in 2019 that the minimum wage be set at 60 per cent of median earnings in 2020.[147] This recommendation was based on a combination of the record high employment rates and corresponding unemployment levels not seen since the 1970s,[148] growth in nominal pay and sustained economic growth conditions.[149] Nevertheless, firms paid for the 2019 increase by reducing pay hierarchies, removing pay premiums, limiting non-wage benefits, passing on associated costs to customers, improving productivity and accepting smaller margins.[150]

C. MINIMUM WAGE REGULATION IN THE UNITED STATES

Labour and the Fourteenth Amendment of the United States Constitution cases

A series of Supreme Court cases from the 1890s to 1908 influenced minimum wage laws in the United States for nearly three decades. In 1898 the Supreme Court in *Holden v Hardy*[151] held that a Utah law that set a maximum working day of eight hours for workers in mines and smelters did not violate the Fourteenth Amendment of the Constitution by denying a citizen's

[144] Edmund Heery, Deborah Hann and David Nash, 'The living wage campaign in the UK' (2017) 39(6) *Employee Relations* 800, 811.
[145] Low Pay Commission, *National Minimum Wage Low Pay Commission Report* (2018) xvii.
[146] Ibid 188.
[147] Low Pay Commission, *National Minimum Wage Low Pay Commission Report* (2019) xix.
[148] Ibid paragraph 1.58
[149] Ibid paragraph 9.37.
[150] Ibid paragraph A2.41.
[151] 18 S.Ct. 383 (1898).

right to liberty (including the freedom to contract) without due process as the government could exercise its police powers to protect the health of workers. However, the Supreme Court narrowed this exception in *Lochner* in 1905 when it held that a maximum hours law for bakers involved labour law and not the exercise of police powers.[152] In 1908 this exemption was modified in *Muller v Oregon*[153] when the Supreme Court ruled that a law setting maximum hours for women did not violate the Fourteenth Amendment as the legislation protected women.[154]

The first State minimum wage laws

At the time of *Muller* the idea of minimum wage laws were gaining traction in the United States. The Webb's and Fabians influenced the Wisconsin school of labour economics, whose members played a central role in the progressive reform movement in the United States that shaped minimum wage campaigners,[155] including various groups advocating women's work rights.[156] In 1912 President Theodore Roosevelt promoted a living wage.[157] Influenced by *Muller*, the first minimum wage laws in the United States were limited to women and children. In 1912 Massachusetts was the first jurisdiction to introduce a voluntary minimum wage that considered the needs of workers and employers, which was set by a commission and tripartite wage board and that was enforced by public opinion. Nordlund described 1913 as 'the year of the state minimum wage' as eight States passed minimum wage laws.[158] Other States soon followed. In contrast to the 'Massachusetts' model, the 'Oregon' model created a mandatory

[152] *Lochner*, 25 S.Ct. 539, 541, 544 (1905).
[153] 28 S.Ct 324 (1908).
[154] Ibid 327.
[155] Metcalf, above n xx, 291-292.
[156] Waltman, above n xx, 52-53.
[157] Address by President Theodore Roosevelt before the Convention of the National Progressive Party, Chicago, August 1912, accessible at <https://www.ssa.gov/history/trspeech.html>.
[158] The States were Utah, Oregon, Washington, Minnesota, Nebraska, Wisconsin, California and Colorado. For an overview of these laws see Dorothy W Douglas, 'American Minimum Wage Laws at Work' (1919) 9(4) *The American Economic Review* 701.

living wage and the 'Utah' model established a statutory flat minimum wage that would provide the regulatory basis for the federal minimum wage.[159]

The constitutional validity of minimum wage laws

After the Supreme Court upheld the constitutional validity of Oregon's minimum wage law on procedural grounds in *Stettler v O'Hara*,[160] Nordlund argued that by 1921 minimum wage laws for women and minors were accepted in the United States as part of the 'protective' function of labour law on the basis of economic, social and political objectives.[161] However, a majority of the Supreme Court in *Adkins* rejected the constitutionality of minimum wage legislation in 1923. The Court held that the District of Columbia's minimum wage law violated the Fifth Amendment (federal equivalent to the Fourteenth Amendment) due to the social and economic progress of women since *Muller* and because the wages set by boards did not take into account the impact on employers.[162] The regulatory responses to *Adkins* varied. Some employers in States such as North Dakota and California accepted the minimum wage rate as reasonable in 1923, legislators in Massachusetts believed the voluntary nature of their law fell outside *Adkins* and other States like Wisconsin changed the language of their statutes to prohibit 'oppressive wages'.[163]

At the end of the 1920s the decline in hours and average weekly earnings connected to high unemployment and wage disparities between men and women and unionised and non-

[159] Nordlund, above n xx, 11-14.
[160] 243 U.S. 629 (1917). Only eight justices heard this case as Justice Brandeis recused himself due to writing the defence brief in *Stettler* prior to his appointment to the Supreme Court: David Ziskind, 'The Use of Economic Data in Labor Cases' (1939) 6 *University of Chicago Law Review* 607, 639.
[161] Nordlund, above n xx, 17-21.
[162] *Adkins*, 43 S.Ct. 394, 399, 401-402 (1923). *Adkins* was affirmed in *Murphy v Sardell*, 269 U.S. 530 (1925) and *Donham v West Nelson Company*, 273 U.S. 657 (1927).
[163] Nordlund, above n xx, 25.

unionised workers[164] ensured that the minimum wage campaign did not end. Critically, the National Consumers League created a uniform wage bill in 1933, which attempted to comply with *Adkins* by replacing a 'living wage' with a 'fair wage' that incorporated the needs of employers. Eight States implemented the model law (eight States retained pre-existing wage laws)[165] and court action quickly followed. New York adopted the model wages law in 1933 and mandated a 'living wage' wage for women and minors that represented 'fair and reasonable value of the services rendered'.[166] In a 5-4 majority, the Supreme Court in *Moorehead v New York, ex rel Tipaldo*[167] in 1936 refused to distinguish the New York law from *Adkins* on the basis that it required a fair wage, and in doing so, declined to overturn the New York Court of Appeals construction of the State law.[168] But the dissenting judgments of Chief Justice Hughes[169] and Justice Stone[170] highlighted the ideological division in the Court[171] and the minority position prevailed only six months later. Griswold argued that Justice Roberts changed his vote in *West Coast Hotel Co v Parrish*[172] as the Supreme Court of Washington state ruled the minimum wage law[173] was invalid and therefore *Adkins* could be reviewed.[174] The new majority in *West Coast Hotel Co* held that the legislative protection of women was a legitimate exercise of the state's police powers as their low wages were the product of weak bargaining power that some employers exploited.[175]

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[164] Ibid 3-6.
[165] Ibid 25-26.
[166] Labor Law N.Y. (Consol. law 1933), section 551(7).
[167] 56 S.Ct. 918 (1936).
[168] Ibid 922 (Justice Butler).
[169] Ibid 928-930 (Chief Justice Hughes).
[170] Ibid 932, 934 (Justice Stone).
[171] Erwin N Griswold, 'Owen J. Roberts as a Judge' (1955) 104 *University of Pennsylvania Law Review* 332, 333.
[172] 7 S.Ct. 578 (1937).
[173] Laws 1913 (Washington) c. 174, 602, Remington's Rev. Stat. (1932) § 7623 et seq.
[174] Griswold, above n xx, 341-343.
[175] *West Coast Hotel Co*, 300 U.S. 379, 398-399 (1937). In the same year the Supreme Court upheld the constitutionality of the *National Labor Relations Act* in *National Labor Relations Board v Jones and Laughlin Steele Corporation*, 301 U.S. 1 (1937).

President Roosevelt and a federal minimum wage law

At the same time the States developed wage laws in an attempt to comply with *Adkins*, President Franklin D Roosevelt began the move to a federal minimum wage when he proclaimed in 1933 that 'no business which depends for existence on paying less than living wages to its workers has any right to continue in this country'.[176] President Roosevelt's effort to regulate wages in the *National Industrial Recovery Act of 1933*[177] was declared unconstitutional by a majority of the Supreme Court in *Schechter Poultry Corporation v United States*.[178] A similar fate awaited the wage provisions of the *Bituminous Coal Act of 1935*[179] in *Carter v Carter Coal Co*.[180] Immediately following the decision in *West Coast Hotel Co*, President Roosevelt sought to enact a federal minimum wage law, a decision which also negated the President's attempt to break the ideological deadlock in the Supreme Court through 'court-packing' legislation[181] that would have increased the number of justices to 15.[182]

While southern legislators and businesses were vocal opponents of a federal minimum wage, their northern counterparts and union leaders were supporters, in part due to the belief that their industries would gain a competitive edge. Nordlund stated that the passage of the *Fair Labor Standards Act of 1938* ('FLSA') represented a difficult compromise between the President, Congress, organised labour and the business community.[183] The FLSA not only implemented hour and pay protections for workers, it also created a wage and hour division of the

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[176] President Franklin D Roosevelt, 'Statement on N.L.R.A.', 16 June 1933 <http://www.presidency.ucsb.edu/ws/?pid=14673>.
[177] (48 Stat 195).
[178] 55 S.Ct. 837 (1935), 846, 848, 851-852.
[179] 49 Stat. 991 (1935).
[180] 56 S.Ct. 855, 869-870 (1936).
[181] *Judicial Procedures Reform Bill of 1937*.
[182] For commentary on the court-stacking laws, see eg. Joseph Alsop and Turner Cateldge, *The 168 Days* (1973); Gregory A Calderia, 'Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan' (1987) 81(4) *American Political Science Review* 1139.
[183] Nordlund, above n xx, 35-44, 49.

Department of Labor to administer the Act and that had the power to appoint industry committees to set wages. The minimum wage was fixed at 25 cents per hour, that increased to 30 cents by October 1939 and 40 cents by October 1940. In addition, maximum weekly hours of 40 hours were required by 1940, overtime pay was introduced and exemptions for some categories of employees such as learners, apprentices and disabled workers.[184] Despite support from President Roosevelt,[185] regional wages were prohibited.[186]

The new majority of the Supreme Court ruled in *United States v Darby*[187] that the FLSA complied with the Fifth and Fourteenth Amendments and the commerce clause in Article 1 of the Constitution. Then, in *Opp Cotton Mills, Inc.et al v. Administrator of Wage and Hour Division of the Department of Labor*,[188] the Court ruled that the delegation of legislative power from Congress to an administrator and industry committees was constitutional. The Court also held that the composition and procedures of the textile industry committee did not violate the Act.[189]

The gradual decline of the federal minimum wage

The immediate effect of the FLSA was to directly increase the wages of approximately 300,000 workers,[190] though the number may have been higher when taking into account the impact of States that amended their minimum wage laws to include men and other workers excluded from the FLSA.[191] Over time the ability of the FLSA to provide a sufficient wage for low-

[184] Ibid 51.
[185] Ibid 40.
[186] Waltman, above n xx, 59-60.
[187] 312 U.S. 100 (1941).
[188] 61 S.Ct. 524 (1941).
[189] Ibid 532-536.
[190] Waltman, above n xx, 59-60.
[191] See Isador Lubin and Charles A Pearce, 'New York's Minimum Wage Law: The First Twenty Years' (1958) 11(2) *Industrial and Labor Relations Review* 203, 203, 205.

income earners was diminished by various factors, primarily the action and then inaction of Congress. Between 1938 and 2020 Congress increased the rate of the federal minimum wage 22 times from $US0.25 to $US7.25.[192] The effectiveness of increases to both the rate and coverage of the minimum wage between the 1940s and 1960s were limited by various 'trade-offs' in the legislative process, for example, increases being phased-in over several years, new workers covered by the federal minimum having a lower hourly rate than existing workers and the creation of exemptions for some workers or employers.[193] Since the passage of the FLSA, 17 occupations have been exempt from the minimum wage and maximum hour provisions[194] and a further 30 jobs excluded from the maximum hour requirements.[195] These exemptions led Alexander and Grow to describe the FLSA as 'Swiss cheese' in its protection of minimum wages and overtime.[196] By 1988 there were 27.5 million workers who received pay rates lower than the federal minimum wage.[197]

The minimum wage peaked in real terms in 1968[198] and has since continually declined in value.[199] After the 1981 increase, the minimum wage did not change again until the 1990s, due in part to President Reagan's hostility to the federal minimum wage and Congressional deadlock on various proposed reforms that included increasing the rate and introducing a youth wage.[200] Consequently, the federal minimum wage experienced its largest historical decrease

[192] U.S. Department of Labor, History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 - 2009, undated <https://www.dol.gov/whd/minwage/chart.htm>.
[193] Nordlund, above n xx [1997], Chapters 4-6.
[194] *Fair Labor Standards Act of 1938*, 29 U.S.C. 201, § 201, § 213(a).
[195] Ibid § 213(b).
[196] Charlotte S Alexander and Nathaniel Grow, 'Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act' (2015) 49 *University of California Davis Law Review* 123, 130-131.
[197] Willis J Nordlund, 'A Brief History of the Fair Labor Standards Act' (1988) 39(11) *Labor Law Journal* 715, 724-726.
[198] United States Minimum Wage Study Commission, above n xx, Figure 4-3, 72.
[199] Robert Pollin, 'Introduction' in Robert Pollin, Mark Brenner, Jeannette Wicks-Lim and Stephanie Luce (eds) *A Measure of Fairness: The Economics of Living Wages and Minimum Wages in the United States* (2008) 1, 17.
[200] Nordlund, above n xx [1997], 176.

in real value.[201] The last increase to the federal minimum wage was in 2009, when President Obama oversaw a rise in the wage to $7.25.[202] Further attempts by President Obama to increase the federal minimum wage were unsuccessful. Over a recent six-year period Democrats introduced a range of bills that proposed various increases to the minimum wage but it is unclear how the wages in these bills were calculated.[203] In 2017 the value of the federal minimum wage was extremely low at 0.34 per cent of median wages, compared to 0.55 per cent in Australia and 0.54 per cent in the United Kingdom.[204]

A multi-jurisdictional approach to regulating minimum wages

As a result of Congressional inaction extensive localised grassroots campaigns in a number of cities in the United States saw citywide 'living wage' ordinances for workers employed by cities and city contractors. These workers received wages above the federal rate. The first living wage law was passed in Baltimore in 1994 and by 2010 there were 125 cities and local councils with living wages legislation. More than 40 cities in 2017 had living wage ordinances that applied to all workers.[205] Living wages now range between $8.50 and $16.[206] Living wage living campaigners extend beyond trade unions to include community groups and religious organisations,[207] whose informal alliance has since 1998 been coordinated by the Association of Community Organizations for Now ('ACORN').[208]

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[201] Ibid 165.
[202] *Fair Labor Standards Act of 1938*, 29 U.S.C. 201, § 206(1)(c).
[203] Stephanie Luce, 'Living wages: a US perspective' (2017) 39(6) *Employee Relations* 863, 864.
[204] Organisation for Economic Co-operation and Development, OECD.Stat, Minimum relative to average wages of full-time workers, undated <https://stats.oecd.org/Index.aspx?DataSetCode=MIN2AVE>.
[205] Luce, above n xx [2017], 865, 867. Living wages have spread to other organisations, including school boards, ports, tourist areas and universities: Stephanie Luce, 'What next for the U.S. Living Wage Movement?' (2011) 65/66 *Canadian Review of Social Policy* 128, 131, 133.
[206] Luce, above n xx [2017], 865, 867.
[207] Robert Pollin and Stephanie Luce, *The Living Wage: Building a Fair Economy* (1998) 1.
[208] ACORN now provides strategic advice, resources and conferences for over 200,000 members in chapters across more than 90 cities: Association of Community Organizations for Reform Now, Introduction to ACORN's Living Wage Web Site, undated <http://livingwagecampaign.org>.

Some States in the 1980s began to raise their minimum wage above the federal rate.[209] The living wage campaign quickly spread to the States and there were 29 States (and the District of Columbia) in 2019 whose minimum wage was above the federal standard.[210] State minimum wages range between $8.25 and $13.25[211] and are set by legislatively mandated raises, indexing to inflation or by reference to the federal minimum wage.[212] When State legislatures or Congress block minimum wage increases, living wage advocates in some States use referenda to pass minimum wage increases.[213]

The living wage campaign gained national attention in 2012 when New York fast food workers went on strike for a $15 minimum wage. The impact of the $15 minimum wage campaign is significant. In January 2019 Democratic Senator Bernie Sanders introduced the *Raise the Wage Act*[214] in the Senate, which proposes to incrementally raise the federal minimum wage to $15 for all workers (including tipped employees) by 2025.[215] At the same time Representative Robert Scott replicated this bill and introduced it to the Democrat controlled

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[209] David Neumark and William Wascher, 'Reconciling the Evidence on Employment Effects of Minimum Wages – A Review of Our Research Findings' in Marvin H Kosters (ed) *The Effects of the Minimum Wage on Employment* (1996) 55, 55.

[210] National Conference of State Legislatures, State Minimum Wages | 2019 Minimum Wage by State, undated <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> and Congress of the United States Congressional Budget Office, The Effects on Employment and Family Income of Increasing the Federal Minimum Wage, July 2019, 1, 4.

[211] National Conference of State Legislature, above n xx.

[212] Congressional Research Service, State Minimum Wages: An Overview, Updated 25 January 2019, 6-7.

[213] Referenda that increased the minimum wage include Oregon in 2002, Florida and Nevada in 2004 and Arizona, Colorado, Missouri, Montana, Nevada and Ohio in 2006: Waltman, above n xx, 169. More recently in 2018 Missouri and Arkansas used referenda to increase their minimum wages: see eg. Aimee Pichee, 'Voters in GOP-led states give themselves raise, increasing minimum wage', *CBS News*, 7 November 2018 <https://www.cbsnews.com/news/voters-approve-minimum-wage-increases-in-midterm-elections-in-missouri-arkansas/>.

[214] S.150 – Raise the Wage Act, 116th Congress (2019-2020).

[215] S.150 – Raise the Wage Act, 116th Congress (2019-2020), Text, Sections 2 and 3, <https://www.congress.gov/bill/116th-congress/senate-bill/150/text>.

House of Representatives.[216] Then, for the first time in ten-years, a chamber of Congress voted to increase the federal minimum wage when the *Raise the Wage Act* passed the House of Representatives in July 2019.[217] The Congressional Budget Office estimates that 27 million workers would benefit from the proposed $US15 wage and end poverty for 1.3 million workers.[218] While the Presidential and Congressional elections in 2020 may result in an increase to the federal minimum wage in the future, 89 per cent of minimum wage workers in the United States currently earn wages above the federal rate.[219] The result is the living wage campaign being described as one of the most successful movements in the promotion of labour standards in the United States.[220]

D. LESSONS FROM COMPARATIVE MINIMUM WAGE REGULATION

Who sets the minimum wage?

In each of the three jurisdictions under study, who sets the minimum wage is critical in determining not only the number of low-paid workers who receive a wage that is above the rate set by the market but also the ability of these workers to earn an income that allows them to support a family and meet the basic costs of living. In Australia the Constitution and political system produced a regulatory system where an independent State or federal tribunal sets the minimum wage. This system has evolved from a mix of wages boards and arbitration courts using broad discretionary powers to set sectoral minimum wages to the Fair Work Commission

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[216] H.R.582 – Raise the Wage Act, 116th Congress (2019-2020), Text, Sections 2 and 3 <https://www.congress.gov/bill/116th-congress/house-bill/582/text>.

[217] H.R.582 – Raise the Wage Act, 116th Congress (2019-2020), Actions, <https://www.congress.gov/bill/116th-congress/house-bill/582/actions>.

[218] Congress of the United States Congressional Budget Office, The Effects on Employment and Family Income of Increasing the Federal Minimum Wage, July 2019, 1, 4 <https://www.cbo.gov/system/files/2019-07/CBO-55410-MinimumWage2019.pdf>.

[219] Ernie Tedeschi, 'Americans Are Seeing Highest Minimum Wage in History (Without Federal Help)', *The New York Times*, 24 April 2019 <https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html>.

[220] Katherine Stone and Scott Cummings, 'Labor Activism in Local Politics: From CBAs to 'CZBAs'' in Guy Davidov and Brian Langille (eds) *The Idea of Labor Law* (2011) 273, 284.

(and its predecessors) using legislative criteria to annually review and fix a national minimum wage through awards. While Justice Beeby stated in 1935 that the minimum wage should be the 'highest that industry can carry',[221] a large gap had developed between the minimum wage and market rates by 2018.[222]

The United Kingdom also has a tradition of an independent tribunal setting minimum wages. But unlike Australia trade boards and sectoral wages only applied to a small part of the workforce. In 1998 the introduction of a universal minimum shifted the Minister's traditional power to refuse to make a wages board determination enforceable to setting the minimum wage considering advice from the Low Pay Commission. In addition, the voluntary living wage since 2011 has been governed by an independent non-government body, the Living Wage Foundation.

In the United States Constitutional challenge to the ability of government to set work conditions and wages led to the States using independent wage boards to set minimum wages for women and minors only. The Great Depression and the Supreme Court's decision in *West Coast Hotel Co* enabled the introduction of a federal minimum wage for men and women. Importantly, wage setting powers were transferred to Congress, who without statutory guidance on how to set the minimum wage, implemented changes to the rate and coverage of the federal minimum wage over a number of decades that were the product of political 'trade-offs' in the legislative process. Over the past three decades the decline of the federal minimum wage was the result of Congressional failure to regularly increase the wage rate. In response, living wage

[221] *The Metal Trades Employers Association v the Amalgamated Engineering* Union (1935) 34 CAR 449, 454 (Beeby J).
[222] *Annual Wage Review 2017-18* [2018] FWCFB 3500, paragraph 265.

campaigners are now important regulatory actors in setting wages for low-income workers as their grassroot actions effectively target, city, State and now federal politicians.

The 'political' minimum wage

Politics is a critical component of minimum wages in that it shapes the legislative powers and independence of the wage setting body. Central to the political debate on minimum wages is the ideological divide between supporters and opponents of *laissez faire* economics and the ability of the state to interfere with the market setting the price of labour. Conservative politicians in the three countries generally rely on economic objections to the level of the minimum wage, while liberal and progressive politicians focus on the societal goal of equity. But as Waltman pointed out in the context of the United States, variations on these standard positions exist within both major political parties.[223] Referendums in some States are a means to circumvent political inaction by legislatures. The political pendulum in the United Kingdom quickly swung from Prime Minister Major's decision to abolish wages councils (and therefore minimum wages) in 1993 to the Blair Labour Government's implementation of a national minimum wage in 1998. In Australia, a combination of the damage caused by the 'wage explosion' in 1981 and perhaps a reassertion of free market ideology undermined support among conservatives for traditional wage fixing.[224] The culmination of anti-minimum wage sentiment was in 2005 when the Howard Liberal/National government transferred the power to set minimum wages from the Industrial Relations Commission to a new body called the Australian Fair Pay Commission. As was the case in the United Kingdom, an election result swung the political pendulum in 2009 when the newly elected Rudd Labor Government returned wage setting powers to the federal tribunal with the passage of the *Fair Work Act.*

[223] Waltman, above n xx, 28-29.
[224] G.O. Gutman, 'The Hancock Report – A Last Hurrah' in H.R. Nicholls Society, *Arbitration in Contempt* (1986) 303.

Despite a Productivity Commission recommendation in 2015 to again transfer the wage fixing function from the Fair Work Commission to a separate body,[225] the re-election of conservative federal governments in 2016 and 2019 have not seen changes in who sets the minimum wage.

Does the minimum wage create equity?

The majority of the Supreme Court in *West Coast Hotel Co* held that minimum wage laws are justified when the unequal bargaining position of a class of workers prevents them from rejecting less than a living wage, in turn, negatively affecting their health and wellbeing and placing a financial burden on the community.[226] General equity objectives of minimum wages include addressing poverty, reducing lower level wage dispersion,[227] facilitating a degree of economic equality,[228] promoting social solidarity, protecting vulnerable workers and recognising different regional living costs. Determining what is an equitable wage is contentious and reports by industrial tribunals and parliaments highlight a range of approaches.

An equitable minimum wage may be determined using the long-held approach in Australia of assessing a household's needs within the limits of economic capacity. The traditional approach in the United Kingdom involves comparisons with collective bargaining outcomes or other wage comparisons.[229] A third approach used in the United States is to link the minimum wage to the poverty line,[230] a method rejected in Australia after a brief period of use.[231] Relevant data used to set an equitable minimum wage rate include comparisons with median earnings, collective bargaining rates, living costs, inflation, unemployment levels, economic growth and

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[225] Productivity Commission, *Workplace Relations Framework Final Report*, 30 November 2015, 225.
[226] *West Coast Hotel Co*, 300 U.S. 379, 398 (1937).
[227] Dalton, above n xx, 10.
[228] Low Pay Commission Report 2018, above n xx, 67.
[229] Household income utilising tax and benefits is also now taken into account by the Low Pay Commission: ibid paragraph 59.
[230] Pollin, above n xx (2008 – non-intro), 22; Luce, above n xx (2017), 864.
[231] See eg. *Wage Setting Decision July 2009* (2009) 183 IR 1, 43; *Annual Wage Review 2010-11* 203 IR 119, 226.

every indicia about the performance of the economy. This process creates a notional and temporary fair wage rather than an absolute fair level.

The role of economics in setting the minimum wage

Pollin argued that the performance of the economy is central to setting the level of the minimum wage and that changes in the rate need to be linked to the business cycle.[232] Australia and the United Kingdom have historically increased the minimum wage in real terms, thereby distributing economic growth. But both countries have also made real reductions to the minimum wage after recessions.[233] In 2015 the Low Pay Commission stated that the findings in its more than 140 commissioned reports demonstrated that generally the national minimum wage has led to higher than average wage increases for the lowest paid workers and that little evidence exists of negative economic effects.[234] In 2019 the Fair Work Commission observed that 'modest and regular' minimum wage increases did not result in disemployment effects.[235] This observation is supported by Pollin's position that small minimum wage increases during economic growth can be managed by a business and absorbed by customers.[236] In the United States, some cities, States and recent federal minimum wage bills in Congress, implement increases to the minimum wage over a number of years. This not only provides certainty for employers and employees but it allows employers to make adjustments to meet the increased labour costs over a number of years. The practice of annual reviews in Australia and the United

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[232] Pollin, above n xx (2008 – non-intro), 27. This rate was suggested by the Australian Council of Trade Unions as a national living wage in the 2019 federal election campaign. Although the Labor opposition campaigned for the introduction of a living wage, they did not state the rate.

[233] Real reductions in the minimum wage were made in 6 out of 7 recessions in Australia since 1955, and in the United Kingdom after 2008, although the United Kingdom agricultural rates were less responsive, with real reductions in only 5 out of 8 years of recession and then with a lag in three of those.

[234] Low Pay Commission, *National Minimum Wage Low Pay Commission Report* (2015) xiii, quoted in Margaret McKenzie, 'The erosion of minimum wage policy in Australia and Labour's shrinking share of total income' (2018) 81 *Journal of Australian Political Economy* 52, 68.

[235] *Annual Wage Review 2018-19* [2019] FWCFB 3500, paragraph 195.

[236] Pollin, above n xx (2008 non-intro chapter), 27.

Kingdom also allows businesses to plan for wage increases, though there is some uncertainty as to how much the minimum wage will change from year to year.

The future of the minimum wage?

This article has demonstrated that the minimum wage regulation in Australia, the United Kingdom and the United States has evolved for over 100-years in response to politics, ideology, law, economics and society. Yet the future of the minimum wage is not without challenges. The ability of the minimum wage in all three jurisdictions to support a worker is based on the underlying assumption that low-income workers are employed on a full-time basis. Part-time and casual employment has increased for many of these workers, who may need to work longer hours or have multiple jobs to support themselves and their families. Wage underpayment is another threat but is not a new phenomenon. Prosecutions for breaching the Victorian wages board rates that were established in 1896 and 1897 were usually dismissed because of a lack of evidence.[237] Subsequent legislation had mixed success[238] and there is now considerable debate about the problem. American workers in the State minimum wage cases from the mid-1910s to the 1930s were among the first workers to experience the underpayment of minimum wages. Congress addressed this issue in 1949 when it gave the administrator of the minimum wage program greater power to recover backpay resulting from underpayments.[239] In the early 2000s the non-payment of the early city living wages in the United States was common, reflecting in part the complexities of determining whether a federal, State or city minimum wage applies to workers.[240] Other ongoing issues include the minimum wage in Australia and the United Kingdom not reflecting large geographical differences in the cost of living and the

[237] Report of the Chief Inspector of Factories, Work-Rooms, and Shops, for the year ended 31st December 1897, Government Printer Melbourne, p.21

[238] See Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24(3) *Melbourne University Law Review* 839.

[239] Nordlund, above n xx (1997), 76.

[240] Luce, above n xx (2005), 33.

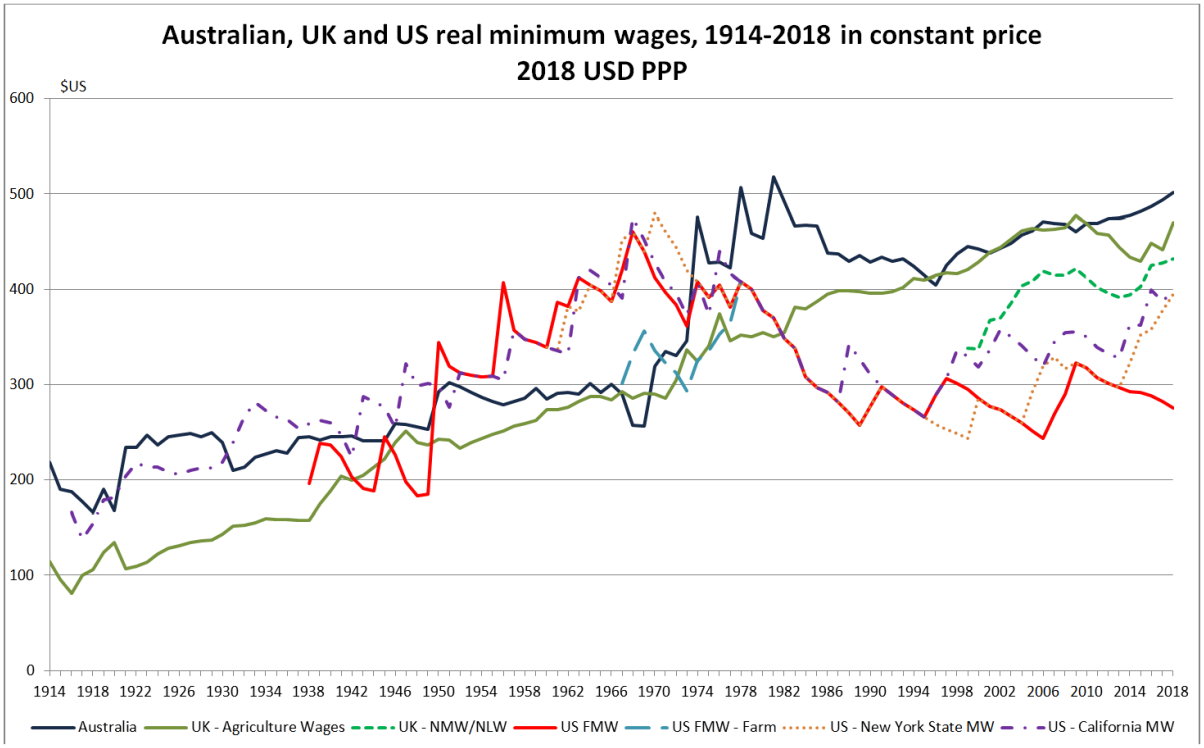
need for more extensive junior or apprentice rates of pay in the United States if the minimum wage increases.

CONCLUSION

The minimum wage is a contentious measure, made temporary because of inflation, and a means of providing employees with appropriate minimum buying power for their labour. It is dependent on an economy supporting the wage level and is becoming more important in the United Kingdom and the United States, although institutional change is possible in Australia, which has always had the most comprehensive system. While there are common objectives such as avoiding adverse economic effects, distributing economic growth and adequacy or equity of income, each adjustment decision is an unpredictable discretionary one, except that Australia and the United Kingdom maintain a relatively high minimum compared to general earnings.

APPENDIX

Graph 1 – 100 years of minimum wages in Australia, the United Kingdom and the United States[241]



[241] The data for this graph was compiled by the Honourable Reg Hamilton with the assistance of Registry staff. Sources of the data can be provided upon request of the authors.