13 December, 2005

H B Higgins turns J W Howard on his head.

Ray Evans*

Now that John Howard's industrial relations reform bill has been enacted, it is time to assess this legislation in its historical context, and decide whether the Prime Minister has fulfilled his ambition, declared on 31 August 1983, "to turn H B Higgins on his head".

Tragically, it is clear that Henry Bournes Higgins has reached out from his grave and has turned J W Howard on his head.

This twist of history is the consequence of the Government's continuing acceptance of the Marxist dogmas which inspired the trade union movement of the 1880s and 1890s. The Marxist class-struggle view of the world also provided the platform from which those politicians of the 1890s and 1900s, Higgins, Hughes and Kingston particularly, got the 1904 C&A Act through the Parliament. Alfred Deakin acted as the Godfather in this enterprise and that Act, with its tribunal and its privileged trade unions, became the twin sister to the protectionism that was established as the central core, along with White Australia, of the Deakin settlement. The 1904 C&A Act was 34 pages long, and although brief compared with its progeny, it sufficed to do immeasurable harm to economic life in Australia for the next century. The 2005 descendant of the 1904 Act is some 700 pages long with 500 pages of explanatory memoranda, and an unknown quantity of regulation still to be drafted and promulgated.

As Higgins and his supporters saw it, the common law of property, contract and tort; which provided the legal framework under which Great Britain had, during the C19, become the world's greatest economic, technological and naval power, and under which Australians had become, in per capita terms, the most prosperous people in the world, was no longer adequate to govern the relationship between employer and employee. In particular, they believed that the common law, and the courts which administered it, had failed to recognise that class warfare was the reality which governed economic life, and that the power of the State, rather than the rule of law, had to be brought to bear to quell this civil strife which threatened the very fabric of civilisation. This was the thinking which lay behind the title of H B Higgins' 1922 apologia *A New Province for Law and Order*. As Steven Cranshaw SC, put it "The deregulated industrial relations environment of the 19th century, which Higgins described as "rude and barbarous", was replaced by a "new province for law and order", the system of conciliation and arbitration." (SMH 28 Nov 05).

The arguments which drove the new "law and order" protagonists were simple, if completely erroneous. For them the class struggle was the main social fact of economic life. The common law was irrelevant to the new social reality. The state therefore had to supersede the common law by appointing tribunals which would rewrite the common law contracts which had, up till then, provided the legal framework which allowed the labour market to match workers to jobs with unprecedented efficiency.

The last remnant of this Marxist class-war mindset is found today in the imbalance of power

doctrine. It is this doctrine which is used to justify union claims to legal privilege, and the unions and their lawyers cling to it passionately. It was seen in all its imaginary splendour in the TV advertising run by the ACTU during September last; a campaign which panicked the Government into spending serious money on the most tedious and arguably counterproductive advertising campaign in Australian political history.

This may seem to some as ancient and irrelevant history. But the truth is that the dispute over the superiority of regulation as opposed to the freedom which is entrenched in the common law, is still the central issue in this debate. And the tragedy is that the Howard Work Choice Act, with minor exceptions, supports regulation and disparages freedom. It is freedom, exercised under the common law, which encourages real entrepreneurship, and sustains economic growth. It is regulation which stultifies growth and stifles entrepreneurship. If you doubt this, look at Europe.

So a useful measuring stick for evaluating the Work Choice Act to consider whether or no the Act returns us to common law principles, or takes us further down the Higgins path of limiting the freedom which people have in drawing up an employment contract which is to the mutual advantage of both parties. Tragically, although the PM and Minister Kevin Andrews talk about "flexibility" and productivity, there is hardly anything in this Act which takes us back to the Common Law. It's most serious flaw is that it maintains the lock-out provisions of the regulatory regime founded in 1904. Those who are now unemployed, and cannot get a foothold on the employment ladder because the wages which would make them welcome in the labour force are illegal under the present Act, will continue to be locked out under the new legislation.

The new body established to enforce the lockout is to be called the Australian Fair Pay Commission. The word "fair" in Australian political life has become a weasel word (I can suck meaning out of a word as weasels suck eggs). This new tribunal has no power under the Bill to reduce wage minima to let the unemployed into the labour market. No, it must follow the awards initially set down by the AIRC and even though these awards will arguably diminish in impact over time, the quality of fairness will be severely strained for the current generation of unemployed, a significant proportion of whom now come from families who have been wholly dependent on welfare for a generation. The FPC will become the most important regulator for those workers and companies which will come under the Act by virtue of their corporate status.

The unfair dismissals provisions of the Brereton Act of 1993 have been repealed, at least for firms employing less than 100 people. At the same time, however, the door has been opened wide for litigation based on anti-discrimination laws. The Virgin Blue case is being appealed. Depending on the outcome of that case, companies hiring new staff will be forced to try to work out how to avoid similar litigation. Since the act of choosing a new employee, or promoting an existing employee, means discriminating against all but one of the applicants for the job, the new field of anti-discrimination law will provide new employment opportunities, in a no-cost jurisdiction, for hundreds of lawyers.

We still have not learnt that freedom works and that regulation impoverishes. This Act is an opportunity lost. How long will it take us to get a labour market regime based on freedom?

* Ray Evans is President of the H R Nicholls Society