

## NSW LABOR'S VISION FOR FAIRER WORKPLACES

I was brought to the practice of law, and to politics, by a concern for how the world of work impacts on the individual and society. That is why I found myself in the ALP. Labor is one of a small family of political parties around the world which is not merely social democratic in character, but has an organic connection with the organised movement of working people embodied in trade unions. That connection, with unions forming the actual foundations of the party organisation, ensures that the ALP remains focused on two things.

Firstly, with how public policies affect everyday citizens living in our towns and suburbs across the State.

While fraternal parties around the globe have from time to time struggled with socialist and other philosophies, and how they might inform an approach to governing - or not - the ALP has throughout its history been concerned with the practicalities of delivering social and economic change that can be observed and measured in everyday life. Industrial arbitration, to ensure fair pay. Workers' compensation insurance. A good education system, including both schools and TAFE, to ensure people have the skills to earn a decent living and be socially mobile. A health system where your access to medical attention comes from your Medicare card, not your credit card. Occupational superannuation, to ensure dignity in retirement. In these and many other areas, Labor Governments at State and Commonwealth level have developed and delivered distinctive policies informed by the notion which inspired the Labor political project itself: providing people with meaningful access to public goods that enrich life, because we are part of a community and not on the basis of social or financial privilege.

This approach was described in the early twentieth century as "*socialism without doctrine*", by the French political theorist and socialist politician Albert Metin,<sup>1</sup> based on his observations of Labor Governments in Australia and New Zealand using the power of the State to deliver beneficial social change without being fixated on theory. This remains an apt description of Labor today.

Secondly, the enduring organic connection with the union movement has ensured that political Labor has remained concerned with how the world of work itself impacts people, their families and the wider community. Work determines your income and, in large part, the standard of living you and your family enjoy, as well as many of the opportunities that are afforded your children. Particularly in smaller workplaces, the relationship between those who work and those for whom they work are among the most important relationships in our lives. Difficulties and breakdowns in those relationships can, and do, cause not only financial hardship but

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<sup>1</sup> Albert Métin (1901). *Le socialisme sans doctrines: la question agraire et la question ouvrière en Australie et Nouvelle-Zélande (Socialism without Doctrines)*. Paris: F. Alcan. p. 281.

emotional and psychological harm as well. As anyone who has practiced law in this field or in the field of industrial relations can tell you, dealing with crises in the workplace or the ending of an employment is not unlike those upheavals that occur in other personal relationships. The consequences for affected persons, particularly the party with less bargaining power and fewer options, can be profound and life shaping.

Accordingly, how we regulate work, the rights people have individually and collectively, and how the power dynamic between employers and the workforce is mediated, says a lot about a society. Labor in both State and Federal spheres has delivered frameworks that emphasise collective approaches to wage fixing, whether through awards or industrial agreements, encouraged collective institutions, including unions and employer associations, whose interactions were supervised by specialised tribunals and courts composed of persons with expertise in the field of employment. These arrangements were underpinned by a range of individual legal rights to protection from unfair dismissal, from unfair work contracts, and a range of other protections from unlawful discrimination. The linking theme was the objective of achieving greater balance between workers and those who engage and pay them, so that they can have if not an equal relationship at least a less unequal one, one free from exploitation.

The conservative Liberal and National parties (“the Coalition”) have, when in office, sought to dismantle or at least weaken these protective laws and the institutions that enforce them, not so much deregulating the labour market but creating a regulatory framework which emphasises and strengthens the existing, inherently greater economic and bargaining position of employers, limiting the scope of issues that can be brought by workers to courts and tribunals for decision, reducing the scope of what can be included in industrial arrangements, and other measures to limit the effectiveness of unions and collective action more generally.

The cumulative effect of these policies has been the loss of industrial arbitration for wages, the continued decline of union density across industries and the acceleration of casual, contract and other forms of insecure and impermanent work to the point where Australia now has a record rate of temporary work. All of this has resulted in the flat wages growth we have today. The profit share of national income is soaring, while the share going to workers is equal to the lowest level since the Second World War.

Over time, people will not be able to get loans to buy a car, much less a home. They won’t be able to take holidays or sick leave. Workers’ discretionary and general spending will continue to contract and with it our economy. On any analysis this approach is lose-lose for our society, including the business community.

Since the late 1980’s, as Labor and the Coalition succeeded each other in government, so too the approach to industrial relations (“IR”) and laws changed, reflecting the contested field it has

become after nearly a century of cross-party consensus. The first place to experience this was NSW, with the Greiner Government elected in 1988 embarking on controversial and far reaching changes to industrial laws which were then imitated around the nation as other Coalition Governments took office. This culminated in the Howard Government's *Workplace Relations Act* of 1996.

But just as NSW was the first to shift to the right on IR, it was also the first to step back to the centre. In the mid-1990's, Jeff Shaw QC<sup>2</sup> and NSW Labor developed a bold and distinctive model for IR in this State, focused on driving workplace productivity and ensuring fairness for working people, which acquired support from unions, employers and the wider community. These were implemented by the Carr Labor Government<sup>3</sup> and was used as a model for other Labor Governments around Australia. It was the classic embodiment of timeless Labor values, in modern language and with modern sensibilities. Progressive and technically competent. There is insufficient space here to make good this claim. One example will suffice: the law and architecture for pay equity matters in the 1996 NSW Act was, and remains, superior to anything in the Commonwealth system, whether your point of reference is the law, the procedures available for identifying any gender-based pay gap, or the practical outcomes.<sup>4</sup>

This settlement lasted until the WorkChoices laws of 2006, which not only created the worst system for workers but stripped the States of the majority of their IR systems and depriving even more workers of rights and protections. While the Rudd-Gillard Labor Government's *Fair Work Act* took away the worst excesses of WorkChoices, and restored many individual and union rights, it did not return to the States their lost jurisdiction. Nor did it remove prohibitions on the States effectively legislating in areas such as unfair contracts and equal remuneration laws in relation to private sector workers.

In NSW, changes brought about by the current Coalition Government since 2011 have seen the Industrial Relations Commission ("IRC") stripped of its power to set fair wages and conditions and reduced to only a handful of members, struggling to keep on top of their work and unable to put together appeal panels. Work safety laws and their enforcement have been watered

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<sup>2</sup> Jeff Shaw QC was a leading industrial barrister, then Attorney General and Minister for Industrial Relations in the Carr Government 1995-2000 and later a Justice of the Supreme Court of NSW

<sup>3</sup> The *Industrial Relations Act* 1996

<sup>4</sup> Compare *Automotive and Metal Workers Union v HPM Industries* (1998) 94 IR 129 with *Miscellaneous Workers Kindergarten and Child Care Centres etc (State) Award* (2006) 150 IR 290. Even the later and successful *Equal Remuneration case* (2011) 208 IR 345 ("The Commonwealth SACS Case No 1") did not overcome all the procedural and legal issues, in my view; see also Macdonald, Fiona; Charlesworth, Sara --- "Equal Pay under the Fair Work Act 2009 (Cth): Mainstreamed or Marginalised?" [2013] UNSWLWJL 21; (2013) 36(2) University of New South Wales Law Journal 563.

down and moved into the regular court system, the Industrial Court abolished, and public sector employment rights seriously eroded.<sup>5</sup>

Today there is a growing campaign from the union movement and the community to “Change the Rules” that govern work. How, and in what way, the rules are changed is a vital debate for society in general. With the balance having shifted decisively to the Commonwealth Government, the question is whether there is any space for a distinct State contribution to regulating work.

I believe there is both the space and the necessity for a continued State Labor contribution, not to compete with the Commonwealth but to complement and supplement a federal system. This should be based on three pillars:

- i. Improving, refining and reorganising existing State laws, courts and tribunals into a single system that deals with the world of work. This will provide the foundations of a diverse and sophisticated industrial jurisdiction, supervised by a court and a tribunal properly equipped to promote both fairness and efficiency at work.
- ii. Filling the gaps in the *Fair Work Act*, where matters have expressly been left to the States.<sup>6</sup> This includes anti-discrimination and work safety laws, among others. A NSW Labor Government should use these avenues to expand workers’ protections and create innovative and modern solutions to ongoing workplace problems that remain unaddressed at any level.
- iii. Using the undoubted general powers of the State to legislate with respect to matters entirely within its competence, such as the criminal law, and matters untouched by federal regulation to deal with new and emerging issues. This would include addressing matters such as wage theft and providing minimum pay and conditions to those working in the so-called ‘gig’ or ‘new’ economy.

At the 2015 election, NSW Labor put forward a bold suite of measures using these very approaches. We have continued to build on that foundation in the years since. We have committed to new measures with real teeth to protect workers who are pregnant or have family responsibilities in terms of flexible work; new protections from sex discrimination in redundancy, dismissal and the non-renewal of work contracts; improved pay discrimination laws; new laws to tackle bullying at work, and to protect whistleblowers whether they work in the public sector or in the private sector. Because returning home safely at the end of each day is a right everyone should share, NSW Labor has committed to the highest standards for work

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<sup>5</sup> See *Government Sector Employment Act 2013*; *Government Sector Employment Regulation 2014*

<sup>6</sup> See s27 of the *Fair Work Act 2009* (Cth)

safety laws and enforcement. Not only will we return safety prosecutions to a specialist industrial court, we will ensure that the IRC can make orders to settle disputes about work safety and injured worker rehabilitation. Using our power to make laws providing leave for victims of crime<sup>7</sup>, we will ensure victims of domestic violence get ten days' paid leave.<sup>8</sup>

In 2017, we announced a comprehensive package to combat the scourge of wage theft: making it a crime to deliberately fail to pay wages and entitlements – providing tough criminal penalties against companies and the possibility of jail for individuals, underpinned by a range of supporting measures, including making head franchisors liable for what goes on in their franchise network and the registration of labour hire firms to ensure they provide safe and fair work conditions and do not undermine industry standards.<sup>9</sup>

The Victorian Labor Government is now adopting a similar approach on wage theft. Federal Labor is also considering what it might do in this area.<sup>10</sup> What started in NSW is gathering momentum.

We have also committed to tough modern slavery laws, to remove exploitation from the State's procurement supply chain.<sup>11</sup>

Just as '*big data*' is shaping our social interactions, it is also influencing the world of work. A lot has been spoken about the gig economy and how it represents an important body of innovation in our economy, enabled by technological change. I agree, but innovation must not come at the cost of creating new forms of exploitation.

*Gig or new economy* workers acquire work through 'platforms' such as Uber, or AirTasker, among many others. While the platforms provide access to the work, they are not an employer and workers have none of the benefits or protections of employment. These workers are also not independent contractors, and do not have even the superficial rights found in the Commonwealth *Independent Contractors Act*. They are outside all forms of legal protection. As

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<sup>7</sup> *Fair Work Act*, s27(2)(h)

<sup>8</sup> <https://www.smh.com.au/business/workplace/nsw-labor-commits-to-extending-paid-domestic-violence-leave-to-10-days-20171205-gzz7xh.html>;

<sup>9</sup> <https://adamsearle.org/issues/tackling-wage-theft/>

<sup>10</sup> <https://www.smh.com.au/business/workplace/pressure-mounts-on-federal-labor-to-pledge-to-criminalise-wage-theft-20180525-p4zhjj.html>

<sup>11</sup> <https://www.theguardian.com/world/2017/oct/18/australian-governments-warned-they-could-by-buying-supplies-made-by-slave-labour>;  
<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-76590/link/95>

technological and social change continues, an increasing number of workers will find themselves in this position.

While these arrangements might work to the advantage of some workers, there are many others who can obtain only part-time or casual work in our economy, unable to get enough hours pay to meet their needs and the needs of their family. They are forced to seek work on the margins of our economy and to do so outside the protective frameworks provided by current laws.

While the legal rights of these workers is being tested in courts in Europe, Britain<sup>12</sup> and the USA<sup>13</sup>, it is with mixed results, and there is much uncertainty. That is just not good enough. People who work in the gig economy should have minimum pay and safe workplaces, like other workers. We must create a legal framework for the setting and enforcement of minimum pay and conditions for all 'gig' workers.

While there is not the space here to give a full account of our policies and approach, I have endeavoured to give a short outline of what we will seek to achieve if we are elected to government in 2019, and to place this program in the context of our history. The second Labor Prime Minister, Andrew Fisher, is credited with describing our party's program as being to achieve for all working people "*the fairest condition of life; the fullest opportunity to rise in life.*"

<sup>14</sup>More than a century later, this remains our objective.

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<sup>12</sup> <https://www.theguardian.com/commentisfree/2017/nov/30/gig-economy-workers-paid-holiday-european-court-of-justice-holiday-brexit>

<sup>13</sup> <https://theconversation.com/end-of-the-gig-economy-dont-read-too-much-into-a-california-court-ruling-95906>

<sup>14</sup> Peter Bastian, Andrew Fisher: An Underestimated Man, (2010), UNSW Press, p32