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Bronwen Claire Ewens

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Wellbeing through Legislation and Litigation: the Australian Example

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1. Introduction

- 1 “Australian political culture is very utilitarian and looks at the greatest happiness for the greatest number. The United States and Britain are individual-right cultures, so the idea that you should be forced to do something for the greater good of the majority would not be something that’s inherent in the political culture,” states Professor Ian McAllister of the Australian National University (ANU), in explaining why compulsory voting, unique in the Anglosphere, enjoys “widespread support” across the nation. (McAllister, 2016). In the same interview identifying differences between Australian sociopolitical culture and those of the two most populous Anglophone countries, McAllister noted that compulsory voting has ‘widespread’ national support, noting that opinion surveys by the ANU show that the ‘portion of people who are very strongly in favour of it (compulsory voting) far outnumber the people who are very strongly against it’.
- 2 Is it Australia’s compulsory voting laws that underpin this utilitarian political culture and how successful is it in ensuring subjective wellbeing (SWB), if this is taken to mean ‘the greatest happiness for the greatest number’? In April 2001, the year after Seligman and Csikszentmihalyi introduced the concept of positive psychology, (Seligman and Csikszentmihalyi, 2000) the Australian Unity mutual company and Deakin University’s Centre on Quality of Life started producing the Australian Unity Wellbeing Index (AUWI), a comprehensive measure of how satisfied Australians were with their lives referenced in academic journals worldwide (Australian Unity Wellbeing Index, 2011). This far pre-dates Nicolas Sarkozy’s and David Cameron’s preoccupations with assessing non-material wellbeing in the wake of the 2007 global financial crisis.

- 3 For nearly two decades, the AUWI has evaluated satisfaction with life across a range of areas – standard of living, health, achievement (purpose) in life, personal relationships, safety, community connection and future security; in other words, it assesses Australians’ satisfaction with their own lives as well as with life in general in Australia, which covers national preoccupations such as security and the economy (Hawkins, 2014). Also in 2001, the Australian Bureau of Statistics (ABS) published *Measuring Wellbeing*, a book giving primacy to objective indicators while acknowledging that “(t)here can be no single measure of wellbeing that satisfies all parties interested in helping people improve their lives.” (Australian Bureau of Statistics, 2001).
- 4 In its 33rd Personal Wellbeing findings, published in 2016, the AUWI found that “[t]he Personal Wellbeing Index has been generally rising over the last 16 years and it is currently, numerically, at its highest level yet recorded (76.7 points)” (Australian Unity Wellbeing Index, 2016).
- 5 According to the 2017 *Better Life Index* created by the Organization for Economic Co-operation and Development (OECD), which measures both subjective and objective indicators, this is a good outcome. “In general, Australians are more satisfied with their lives than the OECD average. When asked to rate their general satisfaction with life on a scale from 0 to 10, **Australians gave it a 7.3 grade on average, higher than the OECD average of 6.5**” (OECD, 2017).
- 6 **This paper will examine Australian legal milestones that have been instrumental in bringing about the greatest wellbeing (both objective and subjective) for the greatest number of Australians, and how Australians have accepted the costs and constraints they have engendered in a way that ‘individual-rights’ cultures in the Anglosphere¹ notably the USA and the UK, might consider unpalatable.**

2. Pioneering in Legislating for Fair Minimum Wage

- 7 In *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone’s Wellbeing*, Wilkinson and Pickett demonstrate that subjective suffering in the form of stress, anxiety, depression and addiction is worse in economically unequal societies like the UK and the US than in the least unequal ones (Norway, Finland and Japan) (Wilkinson and Pickett, 2018).
- 8 Relative, not absolute deprivation, is the driver of a lack of subjective wellbeing. Wilkinson and Pickett cite research from the *Journal of Social Policy* showing that while the poor in Britain and Norway are objectively far better off than the poor in India and Uganda, “the subjective experience of being poorer than others in each society was found to be remarkably similar.... (they experienced an) internalized sense of shame” that engendered feelings of self-loathing, despair and depression. (Wilkinson and Pickett, 2018).
- 9 According to the OECD’s Better Life Index, **the average household net-adjusted disposable income per capita in Australia is USD 33 417 a year**, more than the OECD average of USD 30 563 a year, but there is a considerable gap between the richest and poorest – **the top 20% of the population earn more than five times as much as the bottom 20%** (OECD, 2017). This distribution is comparable to Canada’s and less unequal than that prevailing in the UK and USA, as well as Japan. In the US, the ratio of the

difference in earnings between the top 20 percent and the bottom 20 percent is as high as eight (OECD, 2017).

- 10 Australia is not a socialist country, nor does it lack for billionaires. In fact, Gina Rinehart, the richest Australian, has at times been named the richest woman in the world. Moreover, the billionaire population is booming. With a population of 25 million, Australia counted 33 billionaires, an increase from 24 a year ago (SBS, 2018).
- 11 One fact mitigating the effects of the fivefold difference between the earnings of the top and bottom 20 percent is that social mobility in Australia, even if somewhat lower than in Canada, is markedly higher than in the UK or US. This was shown in major comparative study by the US-based Stanford Centre on Poverty and Inequality by Miles Corak, an economics professor at the University of Ottawa. (Corak, 2016). It is also worth noting that despite the OECD statistic, the World Economic Forum reported in 2016 that Australia had the world's highest minimum wage, US\$ 9.54, after the relevant adjustments are made for the post-tax rate and for purchasing power parity (World Economic Forum, 2016).
- 12 The concept of a 'fair and reasonable wage' – an obvious means of promoting socioeconomic equality – was introduced in legislation in Australia in the 1907 *Excise Tariff Act* but not defined until *Ex parte H.V. McKay* – known ubiquitously as the **Harvester case** – was heard later that year at the Commonwealth Court of Conciliation and Arbitration, the national workplace relations tribunal.
- 13 Then-Deputy Prime Minister Julia Gillard emphasized Australian pride in legislating for a living wage shortly after nationhood, stating in a 2008 speech that the link between the compulsory living wage and the Australian obsession with fairness is inextricable:

The signature values of nations are often defined by the circumstances of their birth. This is as true for Australia as for other countries. And for us there's one value above all others that we identify with as truly our own. It's the value that emerged out of the circumstances of Federation, which coincided with the industrial turbulence of the late nineteenth and early twentieth centuries. That value is fairness. Or as we like to put it: 'the fair go'. It inspired us to establish a society that aimed to give every citizen a decent standard of living. And it led us in 1907 to establish the principle of the living wage. (Gillard, 2008)

- 14 Gillard is not alone in seeing the implications of the mandated minimum wage as being greater than merely the financial. Former Australian High Court justice Michael Kirby wrote: "We forget the truth when we pretend that the national arbitral tribunal of this country was a mere agency of economics. ... it has been an agency of something more important - industrial equity, a 'fair go all round' or, as many would now describe it, human rights – " (Kirby, 2004) and, one could add, of human dignity, and therefore of subjective wellbeing. Moreover, a former dean of law at The University of Sydney, Ron McCallum, believes that "the establishment of wage rates on a national basis ... contribute(d) to increases in our national productivity on a reasonably egalitarian basis, which helped in the welding together of our nation" (McCallum, 2005).
- 15 One result of this in the fairly recent aftermath of *Harvester* was Australia's distinctive participation in the First World War. Lacking military conscription – unlike the UK, Canada, New Zealand and the United States – Australia, with a population of fewer than five million, sent 416,809 volunteers to fight on the other side of the world, of whom more than 60,000 were killed and 156,000 wounded, gassed, or taken prisoner. This

horrific toll sealed the Australian identity definitively, more so than the *Harvester* case did, yet it is interesting to consider what the national mood must have been in the first 15 years of the twentieth century; one of pride, solidarity, of being ‘all in it together’, both when the *Harvester* case was heard and when war was declared, and of a young nation being truly ‘welded together’.

- 16 Henry Bourne Higgins, president of the **Commonwealth Court of Conciliation and Arbitration** in 1907, was a man of his times. Though a Protestant, he was deeply influenced by Pope Leo XIII’s 1891 encyclical *Rerum Novarum*, or *Rights and Duties of Capital and Labor*, which discussed the relationships and mutual duties between labor and capital and established the notion of ‘the dignity of labor’ in Catholic social thought. The correlation between dignity – perhaps the very opposite to the feeling of ‘shame’ dogging the poor surveyed by Wilkinson and Pickett – and decent wages was emphasized sharply by Higgins in a 1915 article he wrote for the *Harvard Law Review*: “No employer is entitled to purchase by wages the right to endanger life or to treat men as pigs” (Higgins, 1915).
- 17 It bears repeating that Higgins sought to identify and enforce not just a minimum wage but a “fair and reasonable” one. He thought that bargaining as a means of obtaining this was not feasible, given the asymmetry in power between employer and employee. In *Harvester*, he cited an English case, *re Stuart* [1893] 2 Q.B. 201, to state that:

I cannot think that an employer and a workman contract on an equal footing, or make a ‘fair’ agreement as to wages, when the workman submits to work for a low wage to avoid starvation or pauperism (or something like it) for himself and his family; or that the agreement is “reasonable” if it does not carry a wage sufficient to insure the food, shelter, clothing, frugal comfort, provision for evil days, etc, as well as reward for the special skill of an artisan if he is one (Higgins, 1907).

- 18 His ruling is remarkable for its meticulousness and its grounding in sworn evidence. Higgins set about assessing what a “fair and reasonable” level of remuneration would be both by abstract reasoning and by collecting solid evidence. His reasoning, quoted here at length, led to the bolded conclusion:

The provision for fair and reasonable remuneration is obviously designed for the benefit of the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers. If Parliament meant that the conditions shall be such as they can get by individual bargaining- if it meant that those conditions are to be fair and reasonable ... there would have been no need for this provision. The remuneration could safely have been left to the usual, but unequal contest ... for labour, with the pressure for bread on one side, and the pressure for profits on the other. **The standard of ‘fair and reasonable’ must, therefore, be something else; and I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilised community** (Higgins, 1907).

- 19 Having defined his criterion, Higgins went on to ascertain whether the wages of McKay’s employees, with no overtime or “constancy of employment” was a fair and reasonable sum that met the benchmark. Higgins accepted the evidence led by “nine housekeeping women” that the average weekly expenditure for a labourer’s home of about five persons seemed to be about £1 12s. 5d. In this calculation, Higgins included

only rent, groceries, bread, meat, milk, fuel, vegetables, and fruit. He went on to emphasize:

This expenditure does not cover light, clothes, boots, furniture, utensils (being casual, not weekly expenditure) rates, life insurance, savings, accident or benefit societies, loss employment, union pay, books and newspapers, tram and train fares, sewing machine, mangle, school requisites, amusements and holidays, intoxicating liquors, tobacco, sickness and death, domestic help, or any expenditure for unusual contingencies, religion, or charity. If the wages are 36s. per week, the amount left to pay for all these things is only 3s. 7d.; and the area is rather large for 3s. 7d to cover - even in the case of total abstainers and non-smokers (Higgins, 1907).

- 20 Higgins also cannily appealed to employers' self-interest, noting that an underfed, underpaid workforce was not in the employer's interest, writing that:

One witness, the wife of one who was formerly a vatman in candle works, says that in the days when her husband was working at the vat at 36s. a week, she was unable to provide meat for him about three days in the week. This inability to procure sustaining food - whatever kind may be selected - is certainly not conducive to the maintenance of the worker in industrial efficiency (Higgins, 1907).

- 21 If Higgins was appealing to employers' self-interest, it was perhaps because he had no illusions about their priorities:

The employer can displace men by introducing machinery as he chooses. He can make the work as monotonous and as mind-stupefying as he thinks to be for his advantage. He has an absolute power of choice of men and of dismissal. He is allowed ... to make any profits that he can. But when he comes, in the course of his economies, to economise at the expense of human life, when his economy involves the withholding from his employees reasonable remuneration, or reasonable conditions of human existence, then, as I understand the Act, Parliament insists on the payment of Excise duty (Higgins, 1907).

- 22 After hearing evidence and using his criterion of "the normal needs of the average employee, regarded as a human being living in a civilised community", Higgins decided that the wages being paid to the McKay employees were insufficient, and that seven shillings a day, or 42 shillings a week, was a "fair and reasonable" wage for an unskilled labourer with a wife and three children to support. This was an increase of 27 percent to the pay of the unskilled labourer then employed by McKay.
- 23 By the 1920s, this living wage applied to over half of the Australian workforce. It became known as the 'basic wage' or a 'family wage', the assumption being that the sole breadwinner in the family was the husband. As Higgins wrote in the *Harvard Law Review*: "Treating marriage as the usual fate of adult men, a wage which does not allow of the matrimonial condition and the maintenance of about five persons in a home, would not be treated as a living wage" (Higgins, 1915).
- 24 Higgins, an idealist without illusions, wrote in the *Harvard Law Review* that: "Give (workers) relief from their materialistic anxiety; give them reasonable certainty that their essential material needs will be met by honest work, and you release infinite stores of human energy for higher efforts, for nobler ideals" (Higgins, 1915). More than a century before David Cameron made his 2010 House of Commons speech about the

‘Big Society’ and distinguished GDP from “what really matters” (Cameron, 2010), Henry Bourne Higgins had decided that all Australians must, by law, be paid a living wage that would enable and empower them to pursue “higher efforts”.

3. Legislating for Road Safety

- 25 “‘Safety’ is an Australian fixation”, observes William Coleman of the ANU’s College of Business and Economics (Coleman, 2016). Safety and public measures to ensure both objective and subjective wellbeing in Australia are not limited to public awareness campaigns or sloganeering, but rather, mandated by law in a way that might seem heavy-handed in other Anglosphere jurisdictions. Once again, we can detect the Australian predilection for utilitarianism over individual rights.
- 26 First, let us define safety as a state of not being in danger or at risk. Its importance to objective wellbeing hardly needs elucidating. But it also matters to subjective wellbeing, and not just because death or injury caused by neglect or accident cause incalculable psychological suffering to victims and their loved ones. The AUWI features “how safe you feel” as one of its seven indicators of personal wellbeing and 2016’s *The Victorian happiness report: the subjective wellbeing of Victorians* takes as a criterion of its evaluation of subjective wellbeing whether people feel safe walking alone down a street at night, considering this an element of social capital (Victoria State Government, 2016). Finally, in 2018, the South African consultancy New World Wealth ranked Australia as the safest country in the world for women (NWWealth, 2018). Australians will generally accept reasonable restrictions on their autonomy if a higher purpose – in this case, safety – is being served. For examples of this, we will move from the living wage litigation of the nation’s early days to the latter third of the twentieth century. This is not to say that the country did not evolve during that time. One clear development was the advent of multiculturalism, triggered by the end of the Second World War. A federal Immigration portfolio was established in 1945 and negotiated agreements with Britain, some European countries and with the International Refugee Organization to encourage migrants, including displaced persons from war-shattered Europe. The result is that ‘Australia has a higher proportion of people born overseas (26 per cent) than other high-immigration nations, including New Zealand (23 per cent), Canada (22 per cent), the United States (14 per cent), and the United Kingdom (13 per cent).’ (SBS, 2017).
- 27 While post-war developments changed the ‘face’ of Australia, the ideals of building a better, more inclusive, fairer and safer society did not. An interesting and emblematic fact is that in 1970 the state of Victoria was the first jurisdiction in the world to mandate the use of seat belts by all vehicle passengers. The law took effect nationally in 1972. The comparable year for the UK is 1991. In Canada, Ontario led the way in 1976, with other provinces and territories following at their leisure, some waiting until 1991.
- 28 Similarly, random breath testing (RBT) of drivers for alcohol was introduced in Victoria in 1976 and went national in 1985. Refusing to be breath-tested is a criminal offence, punished with greater severity than testing over the limit. According to research gathered and analysed by the Australian Foundation for Alcohol Research and Education (FARE), “Australia is deemed to have the most successful RBT program internationally, measured in terms of alcohol-related traffic crash (ARTC) reductions,” (Erke, Goldenbeld, & Vaa, 2009). Perhaps partly for this reason, fully 96 percent of the

population supports it (Petroulos, 2011). The present author's personal experience supports this finding. Australians willingly tolerate the trifling inconvenience of being breath-tested roadside since the enforcement of RBT demonstrably saves lives; few would see it as a violation of their rights. It is simply "a part of everyday life" (ABC News, 2017). There is even a popular reality TV show, produced in cooperation with the police, depicting people who have agreed to be filmed while being tested. A success with the viewing public, the show has been running since 2010.

- 29 The early and ready acceptance of mandatory RBT in Australia stands in contrast to the UK, where it does not exist, Canada (where it was introduced as late as 2018) and those US states that have not introduced it. New Zealand enacted compulsory breath testing legislation in 1993. It is in keeping with McAllister's diagnosis of the country's utilitarian political culture; Australians readily accept the 'sacrifice' of submitting to potential RBT while driving in return for safer roads and reduced loss of life.

4. Gun Control for a Better and Safer Australia

- 30 The mass shooting at Port Arthur, Tasmania, was the deadliest in Australia's history. It left 35 killed and 23 wounded. When the massacre took place, on 28 April 1996, John Howard had been prime minister for about six weeks after 13 years of Labor governments. However, he acted effectively, swiftly and decisively to negotiate a National Firearms Agreement which enjoyed bipartisan support and was implemented by all the state and territory governments.
- 31 In response to the Port Arthur massacre, Howard convened a special meeting on 10 May of the Australasian Police Ministers' Council (APMC) at which all Australia's states and territories agreed to implement stringent and uniform firearms laws. (In Australia, the regulation of firearms is the responsibility of the state and territory governments, not the federal government.)
- 32 "Port Arthur was our Sandy Hook.... Port Arthur we acted on. The USA is not prepared to act on their tragedies," (Fischer, 2016) opined Tim Fischer, one of the most conservative politicians in Australia, 20 years after the massacre, which occurred when he was deputy prime minister. (Glover, 2017).
- 33 Fischer here was signalling not just Australian pragmatism but also the utilitarian ethos McAllister ascribes to the Australian polity and society. Indisputably, gun control promotes objective wellbeing. A rigorous statistical study published in the *Journal of the American Medical Association (JAMA)* concluded that the ban was associated with reductions in mass shootings and total firearms deaths. (JAMA, 2016). There have been no mass shootings in Australia since 1996. In addition, noted the lead author of the study, Professor Simon Chapman, "[w]e've shown that a major policy intervention designed to stop mass shootings has had an effect on other gun-related deaths as well", given the reduction in suicides and all types of homicides (not just mass killings) by firearms since 1996 (Chapman, 2016). Indeed, the OECD Better Life Index reports that "**Australia's homicide rate is 1.0**, lower than the OECD average of 3.6." (OECD, 2017).
- 34 Given this link to personal safety it is argued that subjective wellbeing will also increase if the use of firearms is controlled. As stated above, the AUWI features "how safe you feel" as one of its seven indicators of personal wellbeing. Drawing on Maslow's hierarchy of needs, the 2018 *World Happiness Report* states that safety is a vital condition

for happiness (*World Happiness Report*, 2018). In the wake of the Port Arthur massacre, Howard's campaigning was relentless. He produced polling that showed that his reforms had a 90 percent support rate among the Australian public. In addition to this positive persuasion, Howard was prepared to wield a 'stick'. If the states did not fall into line, he threatened to hold a referendum and seize power for firearm registration from the states.

- 35 "If you have political capital, you can be certain of one thing: it will disappear. You don't keep political capital for very long. You either see it disappear through inaction, or you spend it on a good cause," (Howard, 2016), Howard reflected 20 years after the event. That Howard, a conservative's conservative, was prepared to spend the political capital he enjoyed soon after his election on gun control, as well as the fact that he enjoyed bipartisan and popular support, is another indicator of Australians' readiness to sacrifice, to a certain extent, individual rights and freedoms for the greater good.
- 36 Persuading the states to enact uniform firearms control legislation was one challenge. The next was passing legislation at the federal level to make possible the 'buy-back' of firearms, the incentive for gun owners to surrender their weapons. In the end, 650,000 firearms were surrendered and melted down, at a cost of \$350 million.
- 37 Howard raised the funds by a short-term increase of 0.2 % in the national Medicare Levy, the tax that funds Australia's national health system. At his Second Reading Speech of the Medicare Levy Amendment Bill 1996, Howard, the first elected Australian prime minister to identify himself as a conservative (Australian Broadcasting Corporation, 2007) stated: "I do not enjoy for one moment imposing this degree of additional regulation and inconvenience" (Howard, 1996). This was completely in keeping with his belief in small government and with his conviction that his party "must always be seen as the party of individual freedom and personal rights," (Howard, 1996).
- 38 Yet Howard was no challenger of the Australian ethos that, within reason, the greater good must prevail over individual wishes and liberties. As he said in his Second Reading Speech:

It is a matter of honest regret that taxpayers need to meet this cost, and that law-abiding gun owners need to surrender guns which they have found useful to them in one way or another But, **when the whole of the matter is weighed, there is a greater good to be served in taking such comprehensive measures** These historic measures are designed to avoid any slide into a gun culture in this country. ... **It is our obligation to build a better and safer community for all Australians.** (Howard, 1996). (Emphasis added.)

- 39 Twenty years later, in a series of interviews about Port Arthur and its legislative aftermath, as well as the reduction of firearms-related deaths in Australia, Howard rejected the idea that the US, with its Second Amendment (Bill of Rights, 1791) obsession, could follow the Australian example to reduce the toll that gun deaths and shootings take in that country:

[T]he last thing I want to do is pretend the culture and the circumstances in America and Australia are the same. (In the US) gun possession is seen, wrongly in my view and historically erroneously, as being some kind of fundamental right of the individual. The original intention was the right to maintain state militias. (However), I thought "(f)or heaven's sake, what's the

point of being in office when you can't do something significant in relation to something that affects community safety?" (Howard, 2016).

- 40 Incidentally, John Howard's interpretation of the text is far from controversial. For most of last century, the United States Supreme Court and federal courts held that it only applied in the context of militias, the right of states to protect themselves from federal interference and was not an individual's right (Yuhus, 2017).

5. Wellbeing Versus Intellectual Property Rights in the War on Smoking

- 41 The link between health /objective wellbeing and tobacco consumption requires no elaboration, and it is surely self-evident that the benefits to health and longevity that abstention brings will also promote the happiness of the ex-smoker's loved ones.

- 42 In terms of subjective wellbeing (SWB) recent research published in *The BMJ* found

no evidence that the change in SWB of those who quit smoking under stricter tobacco control policies is different from those who quit under a more relaxed regulatory environment. Furthermore, our cross-sectional estimates suggest that the increase in SWB from quitting smoking is statistically significant and also of a meaningful magnitude (Weinhold and Chaloupka, 2017).

- 43 Through legislation and litigation both domestically and abroad, the Australian government has done everything it feasibly can to discourage smoking. Since 1 December 2012, all tobacco products sold, offered for sale, or otherwise supplied in Australia must be contained in 'plain packaging'. There are no longer any Marlboro Men or luxury-looking Benson and Hedges packets to be seen, a sea change from the previous situation, when cigarettes were sold in branded packaging but plastered with health warnings. Cigarette packs sold in Australia now feature images of gangrenous limbs, cancerous lungs and broken, rotting teeth. This is in keeping with subsection (2) of the *Tobacco Plain Packaging Act 2011* (Cth), (the TPP Act), which states that:

(2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:

- (a) reduce the appeal of tobacco products to consumers; and
- (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
- (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

- 44 As was the case with the gun buy-back and associated Medicare levy, the legislation effecting this pioneering approach to the deterrence of tobacco consumption was supported by all the main political parties. *The Sydney Morning Herald* reported in May 2011 that

New laws to sell cigarettes in plain packets are set to pass parliament after the coalition swung behind the Gillard government move.

Opposition Leader Tony Abbott said the coalition would not oppose the laws when they were presented to parliament later this year, but would propose a number of amendments. However, if the amendments - which Mr Abbott did

not spell out in detail - were not carried, coalition MPs would allow the bill to pass. (*The Sydney Morning Herald*, 2011).

- 45 The bill passed the House of Representatives in August 2011, supported by “both major parties” (Australian Broadcasting Corporation, 2011). It passed the Senate in November of that year. Even those who spoke and voted against it, such as opposition whip John Williams, stated: “I do hope that this does reduce smoking but I also hope that it does not cost the nation billions and billions of dollars. And I do hope the government have their legal advice correct.” (Williams, 2011).
- 46 Section 3(1)(a) of the TPP Act is very clear about its purpose: “The objects of this Act are: (a) to improve public health...” The aggressiveness of the Australian legislation to discourage tobacco consumption inspired politicians in other Anglosphere countries and encouraged other jurisdictions to follow suit (Mayor Michael Bloomberg of New York hailed the Australian Attorney-General as “a rock star” for her efforts) (Bloomberg, 2012).
- 47 A 2016 post-implementation review (PIR) by the Australian Department of Health stated that “[w]hile the full effect of the tobacco plain packaging measure is expected to be realised over time, the evidence examined in this PIR suggests that the measure is achieving its aims” (Australian Government Department of Health, 2016) and that “[t]he body of experimental, behavioural and other studies into the effects of the tobacco plain packaging measure shows that it is having a positive impact on the three specific mechanisms of reducing the appeal of tobacco products, increasing the effectiveness of health warnings, and reducing the ability of the pack to mislead.”
- 48 Once again, Australia led the world in using the law to bring about wellbeing, and the world noticed. Following Australia’s lead, a number of other countries now also require plain packaging: France (for cigarettes sold after January 2017), UK (May 2017), New Zealand (June 2018), Norway (July 2018), Ireland (September 2018) and Hungary (planned for January 2022). Matthew Rimmer, writing in the magazine of the World Intellectual Property Organization, noted that the World Health Organization welcomed the landmark ruling and called upon the “rest of the world to follow Australia’s tough stance on tobacco marketing” which is fully in line with the WHO Framework Convention on Tobacco Control. The Director-General of the WHO, Dr Margaret Chan, said that the ruling would encourage other countries to implement tobacco control measures, such as the plain packaging of tobacco products, noting, “with Australia’s victory, public health enters a brave new world of tobacco control. Plain packaging is a highly effective way to counter industry’s ruthless marketing tactics.” (Rimmer, 2013).
- 49 Not unexpectedly, the tobacco industry mounted a challenge. In response to the 2011 legislation, British American Tobacco (BAT) and JT International SA filed suit against the Government of Australia in the nation’s High Court (its supreme court). The tobacco giants alleged breach of the Australian *Constitution*, specifically, section 51 xxxi which concerns “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws”, claiming that their intellectual property, specifically, copyright, design, goodwill, trademarks and trade dress such as arrangements of words, colours, designs, logos, lettering and markings had been expropriated.

- 50 By a majority of six to one, the High Court rejected the tobacco companies' arguments that there had been an acquisition of property under the Australian *Constitution*. The majority judges variously described the case of the tobacco companies as "delusive", "synthetic", "unreal", and suffering "fatal" defects in logic and reasoning.
- 51 Then-Chief Justice Robert French quoted academic literature to point out that: "Intellectual property is ... a purely negative right, and this concept is very important. Thus, if someone owns the copyright in a film he can stop others from showing it in public but it does not in the least follow that he has the positive right to show it himself." The Chief Justice went on to point out that "BAT correctly submitted that rights to exclude others from using property have no substance if all use of the property is prohibited". Accordingly, he opined:

There is ... an important distinction between taking of property and its acquisition. Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights....On no view can it be said that the Commonwealth as a polity or by any authority or instrumentality, has acquired any benefit of a proprietary character by reason of the operation of the TPP Act on the plaintiffs' property rights. (French, 2012).

- 52 Current Chief Justice Susan Kiefel noted:

The (TPP Act) and ... Regulations, in conjunction with the 2004 and 2011 Information Standards, may be a rare form of regulation of the packaging of a harmful product, in that they require those distributing a product to place warnings on the product's packaging which might dissuade persons from using the product at all. However, the plaintiffs did not seek to argue that the measures were not appropriate to achieve the statutory objectives or disproportionate to them, or that the legislation was enacted for purposes other than those relating to public health. In the end result, their argument was only that the possible achievement of the statutory objectives of the (TPP Act) was sufficient to amount to an acquisition for the purposes of s 51(xxxi). It is possible that there be a statutory objective of acquiring property, as there was in the *Bank Nationalisation Case*, but there is no such purpose evident in the present case. The central statutory object of the (TPP Act) is to dissuade persons from using tobacco products. If that object were to be effective, the plaintiffs' businesses may be harmed, but the Commonwealth does not thereby acquire something in the nature of property itself. (Kiefel, 2012).

- 53 The single dissent, from Justice Heydon, was by no means laudatory to the purposes and existence of the tobacco companies, which he accused of trafficking in "lies and death" (Heydon, 2012).
- 54 Having lost its case at Australia's High Court, Philip Morris turned to the International Permanent Court of Arbitration in The Hague, claiming that the TPP breached Australia's Bilateral Investment Treaty with Hong Kong. The tobacco company's failure was spectacular, as not only did the PCA rule against Philip Morris, it also ordered the company to pay Australia compensation of tens of millions of dollars, possibly \$50 million (*The Sydney Morning Herald*, 2017).
- 55 Finally, in June 2018, the World Trade Organization's panel of judges ruled in Australia's favour, rejecting arguments brought by Cuba, Indonesia, Honduras and the

Dominican Republic that the TPP Act infringed tobacco trademarks and violated intellectual property rights (World Trade Organization, 2018).

6. Legislation in Favour of Well-Being and the Compulsory Vote

56 Australians generally accept restrictions on their autonomy if a higher purpose is being served, to a degree that would often be unacceptable in comparable Anglophone jurisdictions. It is tempting and by no means illogical to link their acquiescence to the mandatory vote specific to Australia in the Anglosphere.

57 Although it became compulsory for both non-Indigenous Australians, both male and female, to enrol to vote before the First World War, a decline in voluntary voter turnout from more than 71% at the previous 1919 election to less than 60% at the 1922 elections was the catalyst for legislation to make voting at the federal level mandatory. From the start, it was non-controversial:

On 17 July 1924 a Private Member's Bill ... was debated in the Senate. Five Senators spoke on the Bill and it was passed that day. In the House of Representatives only three members spoke. Significantly, for such a piece of far-reaching legislation, Mr Tony Smith MP, noted that there were only a few speakers on each side and it went through on the voices. (Parliament of Australia).

58 The States and Territories comprising the federation then enacted bills making voting compulsory at their level of government. Voting at the local council level and in referenda is also compulsory.

59 The compulsory vote promotes an attitude that everyone has their say and that eventually the greatest good for the greatest number does prevail. A causal link between the compulsory vote and the propensity of the Australians to accept some degree of restriction on their autonomy is impossible to prove, but indications exist that support at least a correlation.

60 When former US President Barack Obama praised Australia's compulsory voting system in a 2016 speech at the University of Chicago Law School, he called it "transformative", noting how it would counteract the all-too-powerful influence of "big money" in the US electoral process. (Tovey, 2016). Obama highlighted the 2014 findings of the Pew Research Center, which found that the millions who refuse to participate in American elections are younger, more diverse and less affluent than those who do vote. This skews policymaking in favour of the affluent. To take just one example, "more nonvoters say that government aid to the poor does more good than harm than say the opposite (51% vs. 43%). Likely voters, by 52% to 43%, say that government aid to the poor does more harm than good". (Pew Research Center, 2014). Along the same lines, a BBC report from 2013 canvassed the issue and quoted Rohan Wenn, of a non-partisan advocacy group: "(In other countries) the people who don't vote are the poor and disenfranchised, and those are exactly the people we think should be voting" (Wenn, 2013).

61 The Australian Political Science Professor Ian McAllister posits that the high voting turnout caused by compulsory voting may increase overall satisfaction with the political system. (McAllister, 2016). Yet the UK-born McAllister does not believe that

compulsory voting would work elsewhere in the Anglosphere, owing to the uniquely Australian utilitarian social and political mindset. Similarly, Professor Lisa Hill states: “our system of compulsion creates a particularly equitable democracy, where all eligible citizens have an equal say in the outcome in Australia voting is not simply a privilege, it is also a duty” (Hill, 2012). Supporting Hill’s contention that the system enjoys broad backing, an article in *The Conversation*, an Australian academic publication offering public affairs commentary, stated:

[M]any experts consider Australia’s electoral system to be one of the finest in the world. The majority of Australians apparently share this view: 70% approve of compulsory voting.

For decades, compulsory voting has done what it was supposed to do: maintain high and socially even turnout levels that are the envy of the industrialised voluntary-voting world. Prior to its introduction at the federal level in 1924, turnout was hovering in the 50–60% range (of registered voters). Since then, it has remained steady for many decades at around 93%. The system is easily accessible, well-managed and, despite some rare but highly publicised cases, controversy-free. Without compulsory voting, turnout would be considerably lower at around 55–60% of the eligible population, mimicking similar democracies such as the US or Canada.

Switching to a voluntary system ... would plunge Australian democracy into the same crisis of citizenship that democracies everywhere in the voluntary-voting world are going through: that is, the rapid decline into gerontocracy as voters – especially young people – turn their backs on voting in droves. (The Conversation, 2015).

- 62 The Australian parliament has a Joint Standing Committee on Electoral Matters whose role is to enquire into matters relating to electoral laws and practices and their administration. Accordingly, it reports on the conduct of federal elections, reports of irregularities in state elections, trials of electronic voting systems, and electoral funding. There has been no governmental or popular desire of sufficient import for it to examine the benefits and disadvantages of compulsory voting.
- 63 Australians travel widely and are subjected to British and U.S. media from childhood. They appear unconvinced that their lives would be better in the larger Anglophone countries. Thanks to the ‘unicorn’ E3 visa, Australian citizens enjoy the right to work professionally in the United States without the paperwork and hurdles faced by citizens of every other country. Yet this unique privilege has limited interest for Australians: in 2017, half the quota of E3 visas went unused. (Knott, 2018). While many Australians use ancestral passports or working holiday visas to spend time in Britain, the relatively low wages offered in the UK, and the knowledge that traditionally, Britons have sought a better life in the New World, act as impediments to any notion that the UK offers a higher standard of living or quality of life.
- 64 *The Economist* gave its imprimatur to the Australian way of life and the political centrism promoted by the compulsory vote in late 2018 (emphasis added):

Rising incomes, low public debt, an affordable welfare state, popular support for mass immigration and **a broad consensus on the policies underlying these things** – that is a distant dream in most rich countries. Many Western politicians could scarcely imagine a place that combined them all. Happily they do not need to, because such a country already exists: Australia.... **Australia’s political system rewards centrism. All eligible citizens must vote**, by law..... The system of preferential voting, whereby Australians rank

candidates in order of choice, rather than picking just one, also exerts a moderating influence. (*The Economist*, 2018).

7. The Potential Disadvantages of the Benthamite, Utilitarian Approach

- 65 Do individuals and their rights suffer in a culture that promotes the greatest good for the greatest number? Surely it is worthy of note that Australia lacks a constitutionally-anchored, stand-alone Bill of Rights, in contrast to the *Canadian Charter of Rights and Freedoms*, for example, or the U.S., New Zealand, English Bills of Rights or the UK Human Rights Act?
- 66 Perhaps this fact is all the more ironic given that it was an Australian, Herbert Vere ('Doc') Evatt, in his capacity as President of the General Assembly of the United Nations, who presided over the adoption and proclamation of the Universal Declaration of Human Rights.
- 67 It would be a mistake, however, to think that individual rights are slighted despite the lack of a Constitutional guarantee. This century, Victoria enacted the *Victorian Charter of Human Rights and Responsibilities Act 2006*, and every law passed in Victoria must be compatible with the Charter. (State of Victoria, 2019). Similarly, the Australian Capital Territory passed its *Human Rights Act* in 2004. Both pieces of legislation were influenced by the Canadian, New Zealand and UK examples, though not that of the U.S. (Stephenson, 2017). In general terms, they reflect the International Covenant on Civil and Political Rights.
- 68 The Australian Constitution guarantees certain rights, such as freedom from a state religion and freedom of conscience. Before its enactment by the Westminster parliament, residents of the Australian colonies already enjoyed the rights and protections laid out in the 1688 English Bill of Rights and Magna Carta, as well as the heritage of common law. Like Canada, New Zealand and the UK, Australia also ratified and implemented into domestic legislation seven of the key international human rights treaties. The tally for the USA is four.

8. Conclusion

- 69 Australia's efforts in legislating safety and wellbeing began soon after Federation in 1901. The *Harvester* litigation of 1907 mandated a living wage for all workers, however the employer was faring financially. President Higgins rejected any notion of profit-sharing, saying that the remuneration was to be paid whether the profits were nil or 99.9 percent. He was adamant that the living wage was necessary not just to achieve a basic standard of material wellbeing, but also to promote dignity, equity, and a civilised society, which today we might consider as inseparable from subjective wellbeing.
- 70 Australia has been earlier than other Anglosphere jurisdictions to use the law to mandate such measures as the wearing of seatbelts and random breath testing.
- 71 Although Australia has led the way internationally in promoting the reduction of tobacco use through plain packaging legislation and litigation, other jurisdictions, in the Anglosphere and elsewhere, have emulated this approach. It is perhaps easier for

those nations lacking the utilitarian political ethos to do so as smoking, unlike fair wages, gun control and road safety, can only be discouraged, not controlled, through legislation and litigation. No-one thinks a prohibition on tobacco would be practicable.

- 72 Australia's Benthamite, utilitarian political culture means that citizens expect the state to promote the greatest good for the greatest number, and the law is used as the tool to regulate Australian society across a number of spheres and in a number of ways. It is reasonable to conclude – though hard to prove – that the compulsory vote, unique in the Anglosphere, promotes the feeling of everyone having a stake in the polity and of legislation truly reflecting the will of the majority.

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NOTES

1. The five Anglophone/Anglosphere/predominantly English-speaking countries that constitute the close-knit 'Five Eyes' intelligence pact. All are OECD member states that share a common-law heritage and all except the UK are 'New World' countries. It is these commonalities that make comparisons and differences useful and interesting.) This paper also aims to shed light on the belief that '[i]f there is one characteristic that separates Australians from much of the world, it's that belief we are on a mission to create a truly great society'. (Downer, 2019)

ABSTRACTS

From the time of the nation's federation and independence, in 1901, Australian authorities have concerned themselves with the wellbeing, through the health and the social justice of the citizenry. It is interesting to keep in mind that Australia, uniquely in the Anglosphere, has the compulsory vote, and not just in federal elections. Citizens who fail to vote in state government and local government council elections are also fined. As early as 1907, the young nation mandated a universal minimum wage, a wage sufficient to meet the needs of a person living in a 'civilised society'. The nation continued to evolve under the influence of these notions of solidarity and civic-mindedness. Signs of these values are noticeable in a number of laws and lawsuits relating to wellbeing in Australia. One example is the fact that the state of Victoria was the first jurisdiction in the world to mandate the wearing of a seatbelt by every person in a motor vehicle. Similarly, Australia was a pioneer in random breath testing of drivers. Towards the end of the twentieth century, in the wake of a massacre in Tasmania, Australia quickly and effectively passed laws making firearms illegal in most circumstances. This century, it was the first country in the world to ban trademarks, attractive images and colours from cigarette cartons. It is telling that, far from resenting these laws, which people in other countries might consider meddlesome or intrusive, the vast majority of Australians welcome them, as they tend to value equality and solidarity over individual rights. Given this societal context, citizens appreciate governmental efforts to promote their wellbeing.

Les autorités australiennes se sont intéressées au bien-être des citoyens, à travers la santé ainsi que la justice sociale, depuis l'indépendance de la nation en 1901. Il convient de garder à l'esprit que l'Australie est le seul pays anglophone dans lequel le suffrage est obligatoire, et ce à chacun des trois niveaux gouvernementaux: local, fédéral, et national. C'est en 1907 que le pays a fixé un salaire minimum obligatoire national; un salaire qui satisferait les besoins d'une personne vivant dans une 'société civilisée'. Ce sont avec ces notions de solidarité et de civisme que le pays a continué à évoluer. On remarque ce sens du civisme en Australie lorsque l'on examine certains litiges et lois relatifs au bien-être. Par exemple, ce fut l'État du Victoria qui fut la première juridiction du monde à rendre obligatoire le port de la ceinture de sécurité par chacun des passagers d'une voiture. De même, l'Australie a initié les contrôles aléatoires d'ivresse au volant. Vers la fin du 20^e siècle, suite à un massacre en Tasmanie, l'Australie a promulgué avec rapidité et efficacité l'interdiction des armes à feu dans la plupart des circonstances. Il y a moins de 10 ans, c'était le premier pays à interdire l'utilisation des marques et/ou de couleurs et images attractives sur les paquets de cigarettes. Il est important de noter que la plupart des Australiens

apprécient ces lois, qui seraient considérées comme ‘envahissantes’ des libertés dans bien d’autres pays. Les Australiens attachent plus de prix à l’égalité et à la fraternité. Dans un tel cadre social, la promotion du bien-être du citoyen est appréciée.

INDEX

Mots-clés: Australie, civisme, bien-être, litiges, lois, sécurité, santé, anglophone

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AUTHOR

BRONWEN CLAIRE EWENS

bcewens@gmail.com