

The Harvester minimum wage case and its importance to Australian society after 110 years

Australian Catholic Council for Employment Relations
(ACCER)

Extract from ACCER submission to the Annual Wage Review 2016-17 conducted by the Fair Work Commission in Sydney on 18 May 2017

ACCER was represented by Brian Lawrence, past-chairman of ACCER, and Fr. Frank Brennan SJ AO, Chief Executive Officer of Catholic Social Services Australia.

1. We would like to introduce our submissions with a reference to the historical context of the setting of minimum wage rates in Australia, in particular the fact that this year is the 110th anniversary of the *Harvester* case. It is an anniversary that should be marked in this annual wage review because the Fair Work Commission is the successor to the court which decided that case. For 110 years this tribunal and its direct predecessors have had to consider the fairness of minimum wage rates. This is a history worth commemorating. There is probably no tribunal in the world that can trace its involvement in this kind of work to an earlier date.
2. Three days ago in Melbourne the Fair Work Commission marked this anniversary with a shortened re-enactment of the *Harvester* hearings. The publicity for that event, described as *Harvester revisited* stated:

“2017 marks the 110th anniversary of the historic *Harvester* case, a key decision leading to the introduction of Australia’s first minimum wage in the 1920s. In honour of this anniversary, the Fair Work Commission is presenting a mock hearing in which the *Harvester* case will be revisited.
The event seeks to acknowledge the importance of the Harvester case, and demonstrate how principles from that historic decision continue to influence the Commission today.”
(Emphasis added)
3. The mock hearing was held in the Supreme Court of Victoria building in William Street Melbourne, the very building in which the Commonwealth Court of Conciliation and Arbitration sat in October and November of 1907 to hear and determine *Harvester*. The Court was then constituted by the President, Mr Justice Henry Bournes Higgins, who was also a judge of the High Court of Australia. The re-enactment of *Harvester* was the Fair Work Commission’s contribution to Melbourne’s annual Law Week programme. It might be noted that there was no shortage of resource material for the mock hearing: the *Harvester* transcript runs to 647 pages. The evidentiary basis of the case was very substantial.
4. It is true that *Harvester* continues to inform our current wages system. The legislation under which this annual wage review is conducted, the *Fair Work Act 2009*, was publicly launched by a speech entitled *Introducing Australia's New Workplace Relations System* at the National

Press Club on 17 September 2008. The then Deputy Prime Minister, the Hon Julia Gillard, started her speech with the following:

“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*.” (Emphasis added.)

5. The campaigns around Australia for the setting of a living wage to protect workers had been under way for more than a decade before *Harvester* and a range of minimum wage rates had been set in some industries; but it was the intellectual rigour and the evidentiary basis of the judgment of Justice Higgins in a case about what constituted “fair and reasonable” wages that gave meaning to the term and provided the basis upon which minimum wage rates were set in later minimum wage disputes. The object of the living wage principle is to give workers a decent standard of living: a decent standard of living for themselves and their families.
6. Before saying more about *Harvester*, we would like to return to this very week in May 1907, when the third Thursday of the month was the 16th May, not 18th May as it is today.
7. A short walking distance to the north-west from where this Commission is now sitting in William Street, East Sydney, the State Court of Arbitration was then sitting at Chancery Square, an area now known as the Hyde Park Barracks. The Court of Arbitration, presided over by a judge of the Supreme Court of New South Wales, Mr Justice Heydon, was hearing a wage claim by the Shop Assistants’ Union in a case entitled *Shop Assistants’ Union v Mark Foy and the Masters Retailers Association*. Over several weeks the court heard evidence about the wages paid to shop workers and the adequacy of those wages. The proceedings were reported in the law reports section of *The Sydney Morning Herald*. The reports contained a recitation of the submissions and evidence, including exchanges between counsel and witnesses. On Tuesday 18 May 1907 the paper reported that William Lowe, who was the founder of one of Sydney’s iconic retailers, W. Lowe and Co., had given evidence in support of the claim. He was a major employer at that time. The paper reported that Mr Lowe had deposed that he employed about 130 hands in manufacturing goods and between 40 and 50 people in his shops in George and Oxford streets.
8. The paper also reported an exchange in Mr Lowe’s cross examination.

“Mr. Kelynack: In what capacity do you come here, as an employer or an employee? -I come here as an employer, and also as a man who wants to give a living wage.
In reply to Mr. Kelynack, witness said that if the claims of the union were upheld it would mean an increase of about £6 a week in his wages sheet.
Mr. Kelynack: Are you not in competition with Mark Foy and other houses?

Witness: Yes; but I would like the Court to know that I am not giving evidence to harm employers. I am here to assist the employees in getting a decent living wage.”

7. In the same week as this significant case was being heard by the State Court of Arbitration, the Commonwealth Court of Conciliation and Arbitration was also sitting in Sydney, just another short walk away from here, this time to the south at the Darlinghurst Courthouse. At this time the President of the Court was Mr Justice O’Connor, another member of the High Court. The Law List in *The Sydney Morning Herald* of Thursday 16 May 1907 advised that there were five applications made under the *Excise Tariff Act* to be heard that day. This is the same legislation and the same kind of applications heard and determined by Justice Higgins six months later, after his appointment as the new President of the Court.
8. The decisions in the five applications were reported in *The Sydney Morning Herald* of 17 May 1907. For various reasons none of them involved a contest and a decision as to what would be fair and reasonable wages. In regard to the application by Meadowbank Manufacturing Co., the paper reported:

“Mr. Peden Steel, on behalf of the Meadowbank Manufacturing Co., applied, under the Excise Tariff Act, for a declaration that the rates of wages paid were fair and reasonable. The object was to secure exemption from the clause requiring inspection by a Customs officer.

An affidavit by Ernest Samuel Trigg, on behalf of the company, was read. He also gave evidence stating that the company employed 250 to 270 men *under union conditions*. The matter would have been brought before the State Arbitration Court but for the fact that there was no dispute. He put in an agreement by the Clyde Engineering Company and Ritchie Brothers and their employees, which he said would have been the basis of the common rule.

His Honor (sic) said he was perfectly satisfied that the rates were fair and reasonable, and would remain in force so long as the schedule of wages embodied in the order was paid, or until further order.” (Emphasis added)
9. Mr Justice O’Connor sat in Adelaide in the following month to deal with similar applications, but none was a contest that required him to determine a fair and reasonable wages.
10. The Darlinghurst Courthouse was the courthouse in which the High Court of Australia sat when in Sydney, as it was in this week in 1907. At that time, with Melbourne as the national capital, it might be said that the High Court was in Sydney on circuit. On Wednesday 15 May 1907 a public notice appeared in *The Sydney Morning Herald* announcing that a free public lecture, entitled *The Struggle for Existence*, was to be delivered by Mr Justice Higgins that night at the Chatswood Town Hall. The paper carried a report of the lecture on the following day.
11. Justice Higgins was used to public lectures. Prior to his appointment to the High Court he had been a leading silk at the Victorian Bar, a member of the Victorian and Commonwealth Parliaments and a former Attorney-General of the Commonwealth. He was born in Ireland

and came to Melbourne as an eighteen year old. Following his appointment to the High Court in October 1906 *The Catholic Press*, published in Sydney, recorded that he “has long been recognised as the first Equity lawyer in Australia. It has been the practice of leading lawyers in Sydney to refer important cases to him for his opinion”. It also reported that a prominent, but unnamed, Sydney lawyer had said that “A better man could not be found in the whole of Australia - certainly not in Sydney, where our Bar is very weak”. The writer noted that the last part had been “added sadly”. No doubt, there are many, possibly some in this hearing room, who would claim that times have changed in this regard over the past 110 years. It could be that an education and practice in Equity conditions the legal mind better to understand fairness in the resolution of the relations between unequal parties.

12. It might be thought by those who do not know more about Henry Bournes Higgins that *The Catholic Press* was trumpeting the standing of one of its own. Not so. Justice Higgins was the Protestant son of a Protestant clergyman. The paper described him as the “most popular Irishman in Australia” and “the idol of the Irish people of Australia”. It claimed that “Ireland has no more patriotic son”.
13. The Commonwealth Court of Conciliation and Arbitration was established by the *Conciliation and Arbitration Act 1904*. Justice Michael Kirby, one of Justice Higgins’ successors on the High Court, (and a member of a predecessor of this tribunal) commemorated the centenary of that legislation in a paper entitled *Industrial Conciliation and Arbitration in Australia – A Centenary Reflection*. In referring to these early years he wrote:

“In a recent talk, claiming that a hundred years of conciliation and arbitration was “more than enough” ... a critic linked me and what he called my “present-day absurd perspectives” with Justice Henry Bournes Higgins. Little did he know that I could not have been more flattered.

In fact Higgins, like myself, traced his origins to Protestant Ireland. He was brought up in the Church of Ireland and educated by the Wesleyans. But he was greatly influenced (doubtless through his religious upbringing) by notions that we would now describe as based on fundamental human rights. In the 1890s Higgins embraced ideas that had been propounded in 1891 by Pope Leo XIII in his encyclical *Rerum Novarum*. As you will understand, it is no small thing for a person with such an Ulster background to adopt papal ideas. ...

Higgins saw conciliation and arbitration of industrial disputes as an idea inextricably linked to concepts of civil rights and basic human dignity. Civil rights was the language of the English common law. Basic human dignity was the language of *Rerum Novarum*.

Higgins' considerable intellect and sense of history helped him and his supporters to create what was described as "... an antipodean amalgam of Catholic social thought, the ideas of the Fabians, Sidney and Beatrice Webb and North American progressivism". It was this potent mixture that was to provide the intellectual under-pinning of the movement towards federal conciliation and arbitration in Australia. We forget the truth

when we pretend that the national arbitral tribunal of this country was a mere agency of economics. From conception down to the present, 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."

(<http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj>, 22 October 2004, footnotes omitted)

14. This connection was taken up by another son of a clergyman, former Prime Minister Bob Hawke, in the inaugural Bishop Manning Lecture in October 2010. Not only had Mr Hawke been the Australian Council of Trade Unions' industrial advocate in major wage cases and its President, his thesis at Oxford University was on the history of the Basic Wage from its colonial antecedents until 1953. Mr Hawke set the scene by referring to the debates at the Constitutional Conventions.

"In April 1891 delegates from the colonies meeting in Sydney for the first of three Conventions to draft a constitution for the proposed new nation – the Commonwealth of Australia – defeated a proposal to include a federal power in regard to conciliation and arbitration. Just a few weeks later, on 15th May 1891, Pope Leo XIII promulgated the papal encyclical *Rerum Novarum* (on Capital and Labour) which was to become a bedrock of the Church's teaching on social justice.

Most significantly *Rerum Novarum* profoundly influenced the thinking of Henry Bournes Higgins, a major advocate for the inclusion of a federal conciliation and arbitration power and later the President of the Commonwealth Conciliation and Arbitration Court who formulated the concept of the basic wage in the 1907 Harvester Case. The incongruity of this influence was wryly remarked upon by Justice Michael Kirby in a 2004 lecture commemorating the centenary of the establishment of the Conciliation and Arbitration Court

But the logic, the humanity and the compassion of *Rerum Novarum* sat squarely with the embryonic arguments that Higgins had used at the Sydney Convention and these were arguments, now bolstered by the intellectual and institutional weight of *Rerum Novarum* that he was able to use with ultimate success at the 1898 Melbourne Convention.

As I have said my friends, this ground-breaking philosophy of *Rerum Novarum* deeply influenced the thinking and arguments of Higgins who (with Kingston from South Australia) finally won the day at the 1898 third, and last, Constitutional Convention by narrowly (22-19) securing the inclusion of the power for the Commonwealth to legislate for "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State."

But even more remarkable was the way in which over the next eight years this conjunction of Ulsterman and Pope did so much to shape the social fabric of the evolving Australian nation. No bill in the history of the federal parliament has had a more tumultuous passage than that introduced on the 7th July 1903 to create the Commonwealth Court of Conciliation and Arbitration. Seventeen months and eight days elapsed before the bill received the Royal Assent on the 15th December 1904 – during that period one minister resigned, two governments fell and it was steered through the parliament under four different prime ministers.

It was three years later however – in the 1907 Harvester Case – that witnessed the ultimate fusion of the philosophy of the Pope and the philosophy and practice of the Ulsterman.

Higgins' 42 shillings became known as the basic wage and was inserted in all federal awards as the foundational element of the whole award structure. The basic wage retained this important role for almost fifty years until the introduction in 1965 of the total wage.”

15. The Commonwealth Court of Conciliation and Arbitration had been established to deal with interstate industrial disputes in accordance with the powers conferred by the *Constitution*. The *Excise Tariff Act of 1906* invested it with another function, with the central question being whether an applicant under that Act was paying fair and reasonable wages. *Harvester* differed from earlier cases of this kind because, having found that the wages being paid were not fair and reasonable, Justice Higgins then decided what would be fair and reasonable wages for the unskilled and skilled workers employed by the applicant employer.
16. Because of that statutory test the *Harvester* judgment had no need to use the term “living wage”. However, Justice Higgins’ reasoning on what was a fair and reasonable wage for unskilled workers came to be regarded as a living wage and the basis upon which the Court would arbitrate in settlement of industrial disputes. This continued even though the High Court ruled in 1908 that the *Excise Tariff Act* was beyond the constitutional power of the Commonwealth and invalid. The living wage which emerged from *Harvester* survived that ruling and became the Basic Wage.
17. None of the people participating in the cases in the State Court of Arbitration case or the Commonwealth Court of Conciliation and Arbitration in the third week of May 1907 could have appreciated that in 110 years in a hearing room between the two courts a national wage tribunal would be considering the minimum wage rates for skilled and unskilled workers, with its decision having a direct impact on the wages and living standards of more than 20% of the Australian workforce and having an indirect effect on a similar proportion through the negotiation of collective and individual employment agreements.
18. We must recognise the immense workload and responsibility placed on this Commission. We should also recognise the fact that this kind of task is left to an independent statutory body. The Commissions functions are sometimes called “quasi-judicial”, but in relation to wage setting they can be fairly described as judicial in nature. This kind of system is much more preferable than a wage setting system that depends on the decisions of the Legislative and/or the Executive branches of government.
19. We should emphasise, however, the changes that have taken place in our understanding of the rights of workers. There is a connecting line from the living wage as it emerged from

Harvester to currently recognised human rights. In our submissions of 29 March 2017 we have outlined the connection between the pursuit through the living wage principle and the development of an the articulation of the human right to decent wages, recognised in the *Universal Declaration of Human Rights* in 1948 and the *International Covenant on Economic, Social and Cultural Rights* in 1966. Having ratified that agreement, Australia is bound to enact legislation that gives reasonable and proportionate effect to the right under Article 7(a) of the Covenant “...to the enjoyment of just and favourable conditions of work which ensure, in particular: ... Remuneration which provides all workers, as a minimum, with ... Fair wages and... A decent living for themselves and their families” (Article 7(a)).

20. The *Fair Work Act 2009* now recognises the same kind of logical distinction identified by Justice Higgins. First, a wage set by reference to the inherent human dignity of workers and their families and the right to a wage that provides a decent standard of living for workers and their families. In addition to that, if the worker is possessed of further skills and responsibilities, he or she has a claim in justice to a wage that guarantees fair remuneration for those skills and responsibilities.
21. The Basic Wage was absorbed into total award wage rates in 1965, but re-emerged in 1997 as the Federal Minimum Wage, albeit at a level that called out for the *Harvester* living test to be applied afresh. The *Fair Work Act* of 2009 established the national Minimum Wage as the general minimum wage entitlement across Australia. We refer again to the publicity for the mock hearing held earlier this week. The current legislation is very much informed by *Harvester*, but, as we have argued in our submissions, the enduring principles of *Harvester*, and our modern understanding of human rights, have not been applied.

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Notes:

Several minor corrections have been made to the text read into the Fair Work Commission’s transcript on 18 May 2017.

ACCER’s written submissions in the Annual Wage Review 2016-17 were: 29 March 2017 (Initial Submission), 13 April 2017 (Reply Submission) and 12 May 2017 (Post-Budget Submission). The connections between the living wage, human rights, *Harvester* and recent decisions of the Fair Work Commission are in the Initial Submission (see paragraphs 1-39 and 149-179) and in the Post-Budget Submission (see paragraphs 22-60). These submissions are available on ACCER’s website (www.accer.asn.au) and the Fair Work Commission’s website (www.fwc.gov.au).

Brian Lawrence and Fr Frank Brennan are former members of The Victorian Bar.

An **Addendum** follows.

ADDENDUM

By way of introduction to this Addendum we draw attention to three passages in ACCER's submissions of March 2017:

“This year's wage review will mark the 20th anniversary of Australia's modern national minimum wage. It was first set in April 1997 by the Australian Industrial Relations Commission (AIRC) and was then known as the Federal Minimum Wage (FMW). In 2010 the FMW became the NMW when the *Fair Work Act 2009* came into operation. However, the antecedents of Australia's national wage are found in the *Harvester case* of 1907. The 20th and 110th anniversary of these important dates can prompt a serious discussion about the nature and purpose of the minimum wage in a globalised economy so different to 110 years ago and in a more unequal society than it was only 20 years ago.” (Paragraph 12)

“A decent standard of living for workers with family responsibilities cannot be supplied by wages alone in the contemporary globalised economy. This is the reality that has to be addressed by policymakers and decision makers, relevantly Parliament and the FWC. Families must also be supported by strong social safety nets through government services and family payments. A feature of all economically advanced economies in the second half of the twentieth century was the development of social safety nets and a range of family payments and/or tax concessions. The driving forces of these changes may have been social and political, but they had an economic dimension: they have limited the demands on the wage packet to support workers with family responsibilities.” (Paragraph 261)

“There appears to be a damaging element of resignation on the part of some policy makers that these changes [cutting the value of minimum wage rates relative to community-wide measures of median and average wages] are inevitable in a globalised economy and that there is, in a real sense, a race to the bottom. This means that, in effect, a nation's vulnerable workers will beggar, or be beggared by, the vulnerable workers of the nations with which it trades. There is more than a risk that policy makers in each of these countries might accept this attitude by cutting the wages of their own workers rather than promoting the interests of vulnerable workers. Rather than collectively cutting wages and creating a race to the bottom, the relevant national bodies, in our case the FWC, should be protecting their own workers. This requires in all economies a commitment to basic human rights, especially to a decent standard of living, by the institutions that set wages.” (Paragraph 283)

The New Protection

The economic circumstances of Australia in the early 21st century are very different to the economic circumstances at the time of *Harvester*. *Harvester* was a decision under legislation enacted as part of what was known as the “The New Protection”. The New Protection policy involved the giving of economic protection to businesses by way of tariffs on imported goods and reductions in excise duties on their products in return for minimum wage regulation. *The Age* newspaper of 9 November 1907 carried an extensive report of *Harvester* under the heading “The New Protection”.

The objective of The New Protection policy of the early 20th century to protect the living standards of working people cannot be achieved in the early 21st century through the same governmental policies. Tariffs cannot be relied on, although they continue to have *some* role in job and industry protection.

The protection of living standards now has to be supported by the social safety net, which needs to include targeted support for low paid workers and their families. Decisions which set minimum wage rates have to take into account relevant social safety net payments. The social safety net protects the vulnerable and promotes the common good. By contrast, at the time of *Harvester* workers and their families did not have a social safety net and were utterly dependent on the wage packet.

This new system does not lessen the need for the Fair Work Commission to set fair wages, in particular, the National Minimum Wage, and the right of workers to receive fair wages. If the wages set by the Fair Work Commission are seen by the Parliament as too high given the prevailing economic circumstances, the response should be by way of an adjustment to the social safety net which will take pressure off the wage packet to support decent standards of living. There is a discussion of the social safety net, globalisation and wages in paragraphs 243 to 283 of ACCER's March 2017 submissions.

Some biographical information

The opening of ACCER's submissions to the FWC referred to the historical context of the *Harvester* decision and to the role played by Henry Bournes Higgins. *Harvester* is reported as *Ex parte McKay* (1907) 2 CAR 1. In the following sections we provide more information about Justice Higgins and the two barristers who appeared on behalf of the principal unions in opposition to the application made by H. V. McKay.

Henry Bournes Higgins



A short biography of Henry Bournes Higgins (1851-1929) is in the Australian Dictionary of Biography at <http://adb.anu.edu.au/biography/higgins-henry-bournes-6662>. The entry records that, although he had grown up in the tradition of free-trade liberalism, he came to see the need for government intervention in economic affairs:

“In the 1890s his analysis of 'the social problem' led him to assert the need for a more positive state role in the economy. Consequently he supported the Factories and Shops Act, passed in 1896, providing for the trial introduction of a general minimum wage in some of the trades worst hit by the depression. The Act paved the way for the wages board system and stimulated Higgins's interest in industrial relations.”

The biography demonstrates why *The Catholic Press* commentary, quoted above, continued with the following praise: “In a word, he has been a thorough, true Irishman, fearless and unfaltering, never self-seeking, utterly disregarding the opinion of the social or club world, in awe of which so many of our people stumble.” He was, for example, an opponent of the Boer War and for many years a supporter of Home Rule for Ireland. His opposition to participation in the Boer War and his support for Home Rule were partly to blame for his defeat in the Victorian elections of 1900, when his Geelong electorate turned against him. In March 1901 he won the Melbourne Northern seat in the Australian House of Representatives standing as an independent. This electorate covered the predominantly working class suburbs of Carlton and Fitzroy. In 1905 Higgins moved a resolution in the Commonwealth Parliament urging Britain to grant Home Rule. *The Catholic Press* article also noted:

“He has for years lectured on Irish and literary subjects for the members of the Sodality of the Blessed Virgin at St. Patrick's Cathedral, Melbourne. He is an intimate personal friend of his Eminence Cardinal Moran [Sydney], his Grace Archbishop Carr [Melbourne], and his namesake, the Bishop of Ballarat [Bishop Joseph Higgins].”

“When [in the 1897 Constitutional Convention] Patrick Glynn [another Irishman and a Catholic lawyer, from the South Australian delegation] succeeded in introducing 'Almighty God' into the preamble [of the proposed Constitution], Higgins carried an

amendment, which became section 116, preventing the Commonwealth from making any law prohibiting the establishment of, or free exercise of any religion, or the imposition of any religious observance or test.”.

Frank Gavan Duffy



It is often overlooked in commentaries on *Harvester* that another Irishman, Frank Gavan Duffy KC, appeared for the Agricultural Implement Makers' Society and four Ironworker unions which opposed the employer's application. At the time Duffy (a Catholic) was Chairman of The Victorian Bar. It is worthy of comment that the unions would seek out counsel of such standing. Perhaps they anticipated that the case would have great importance to wage setting.

Six years after *Harvester* Frank Gavan Duffy was appointed a judge of the High Court of Australia to replace Justice O'Connor, became a knight in 1929 and Chief Justice of the court in January 1931 at the age of 78, there being no limit on tenure at that time.

Frank Gavan Duffy was born in Dublin in 1852, a son of Charles Gavan Duffy (1816-1903), whose mother's maiden name was Gavan, which explains that name being given to many members of the family.

H B Higgins and Frank Gavan Duffy, as members of the Bar would have known each other very well. H B Higgins was the Chairman of The Victorian Bar in 1905-6 and, following his appointment to the High Court, was succeeded in that position by Frank Gavan Duffy who held the position until his appointment to the High Court in 1913. However, their activities had overlapped for many years. In 1883, for example, they were both involved in public meetings and fundraising in support of the forthcoming Irish Parliamentary elections.

Shared Grief

Henry Bournes Higgins' only child, Mervyn Bournes Higgins, was killed in action in Egypt on 23 December 1916. A memorial to Captain Mervyn Higgins prepared by the Victorian Supreme Court and the Victorian legal profession provides further evidence of the closeness

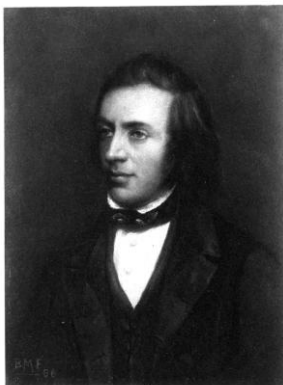
of the Duffy and Higgins families: “Like Desmond Gavan Duffy, he had worked as an Associate to his father on the High Court”. It also records that Mervyn’s parents never recovered from the death of their son, with H B Higgins writing: “My grief has condemned me to hard labour for the rest of my life.”

The Duffy and Higgins families were also united in grief: Second Lieutenant Desmond Gavan Duffy was killed in action in France on 15 November 1916, age 27. Desmond was a barrister at the NSW Bar, practising from Denman Chambers in Phillip Street, Sydney. A memorial to Desmond Gavan Duffy also appears in the Victorian Supreme Court, which includes a poem written by Frank Gavan Duffy

Memorials prepared for Captain Higgins and Second Lieutenant Duffy can be accessed at <http://ww1scvstories.com.au/stories.html>

The end of 1916 must have presented very dark days in the High Court, as the war had been, and would continue to be, for many thousands of families throughout Australia. One of the features of the all-volunteer Australian Forces in that war was the egalitarian nature of the relationship between officers and men, in which the sons of unskilled labourers shared deep comradeship with the sons of the professional and wealthy; and, we can say, High Court judges. A critical requirement for that kind of comradeship was a genuine perception of fair treatment within society. *Harvester* had played a part.

Charles Gavan Duffy



Charles Gavan Duffy 1893

Frank Gavan Duffy’s role in politics, Irish affairs and the law cannot be understood without reference to his father role in the same matters. Frank Gavan Duffy’s father, Charles Gavan Duffy, was an Irish lawyer, publisher and political activist. He was a member of the House of Commons from 1852 to 1855, representing New Ross, County Wexford. Charles and his family left Ireland in November 1855 and settled in Melbourne where he initially practised as a barrister. His introduction into Victorian politics was rapid and he became a minister in the O’Shanassy Government in 1858. A dispute with O’Shanassy (also an Irishman and a

Catholic) saw him leave the ministry in 1859, but he returned as a minister in the O'Shanassy Government of 1861 to 1863. He became Premier of Victoria in June 1871, but his Government fell in June 1872. He was knighted in 1873 and became Speaker of the Legislative Assembly in 1877. In 1880 he retired to Nice, France.

Charles Gavan Duffy was twice widowed and married for a third time in 1881. A son of his first marriage, John Gavan Duffy (born 1844) became a member of the Victorian parliament in 1874. Frank Gavan Duffy and Charles Cashel Gavan Duffy were sons of his second marriage. Charles Cashel Gavan Duffy was also a lawyer engaged in aspects of public administration, including, clerk of the House of Representatives (1901-17) clerk of the Senate (1917-20). Frank Gavan Duffy's eldest son, Charles Leonard Gavan Duffy (1882-1961) was appointed judge of the Victorian Supreme Court in 1933 and knighted in 1952.

Among the children of Charles Gavan Duffy's third marriage was George Gavan Duffy (born 1882). In 1917, when practising as a solicitor in London, he acted for Sir Roger Casement at his trial for treason. Following Casement's execution George Gavan Duffy was called to the Irish Bar. He was elected to the House of Commons in 1918, but, along with fellow members of Sinn Féin, refused to attend Westminster. He was one of the signatories to the Anglo-Irish Treaty of 1921. His time in politics was short and, having failed to be elected in the general election of 1923, he returned to the Irish Bar, where he practised until his appointment in 1946 as President of the High Court of Ireland, the second highest court in Ireland. Another of the children from the third marriage was Louise Gavan Duffy, who was well known for her involvement in nationalist politics, the Gaelic revival, and the women's suffrage movement in Ireland. She joined Cumann na mBan (The Irishwomen's Council) on its foundation in 1914 and was made joint secretary. Her role in the Easter Rising of 1916, during which she was at the GPO, when it was under siege by the British, is recounted in her Wikipedia entry.

John Andrew Arthur



Frank Gavan Duffy's junior counsel in *Harvester* was the brilliant young barrister John Andrew Arthur. Although only 32 at the time he had appeared in important High Court cases. Tragically, seven years later he died while holding the office of Minister for External Affairs in the Fisher Government. The Australian Dictionary of Biography concludes with the following assessment:

“Allowing for exaggerated estimates of a man's worth which follow an untimely death, there seems to have been every indication that Arthur was destined for an outstanding career. He was regarded as one of Labor's most brilliant recruits, and there were suggestions, even before his entry into Federal politics, that he would eventually be appointed to the High Court.”

As Frank Gavan Duffy's junior, John Arthur took an active role in the opposition to Mr McKay's application. At the conclusion of the sixteenth day (28 October 1907, at transcript page 540) Frank Gavan Duffy closed the evidence on behalf of the unions, with addresses from counsel to start the next morning. Following the conclusion of the address by counsel for the applicant on the following day, John Arthur advised that owing to “an affectation of my learned leader's throat, he is unable to address” the Court. For the rest of that day and for part of the next day John Arthur addressed the Court (transcript pages 559-92). The newspaper reports of his submissions to Justice Higgins no doubt further enhanced his standing in the profession and among trade unions, in particular.

John Andrew Arthur (1875-1914), was born on 15 August 1875 at Castlemaine, Victoria. His father was a goldminer and, accompanied by his family, worked at various locations around Victoria. John Arthur's academic brilliance gained him secondary school and university scholarships. His first degree was a Bachelor of Arts in 1895, followed by a Master of Arts (1897), Bachelor of Laws (1898) and a Master of Laws (1901). The Australian Dictionary of Biography records that at university “he showed a deep interest in social questions”. He became a tutor at Queen's College, the Methodist College at the University of Melbourne, in logic and philosophy, political economy and history, and law, prior to his admission to the Bar in 1901. The published material does not disclose his early religious upbringing, but we know that he was buried according to the rites of the Methodist Church. This adds more weight to the view that the Australian Labor Party, like the British Labour Party, owes more to Methodism than Marxism.

John Arthur stood as the Labor candidate for the seat of Bendigo in the Federal elections of 1913. He narrowly defeated Sir John Quick, who had held that seat since Federation. The Australian Dictionary of Biography comments that he entered Parliament “as one of the most

widely admired and promising politicians the young Commonwealth had seen”. The entry continues:

“Following the double dissolution in 1914, Arthur easily held Bendigo. But the combination of heavy professional responsibilities as counsel for the Australian Tramways Employees' Association in a case before the High Court and the demands of the election campaign seriously strained his health. He knew his kidney complaint would be fatal, but was determined 'to die in harness'. An enforced rest following the election, which had brought his party into government, was broken by his attendance at the caucus of 17 September that elected him to the new cabinet. He was sworn in later that day as minister for external affairs before returning to his sick-bed. In the following weeks his health worsened; he lapsed into a coma and died on 9 December 1914, aged 39, at his home in The Avenue, Parkville; he was survived by his wife, two daughters and two sons.”

John Arthur was buried from Queen’s Hall in the then Australian Parliament in Spring Street Melbourne (see picture below) and was buried in the Coburg cemetery. The pall bearers were the Prime Minister, Mr Andrew Fisher, the Attorney-General, Mr William Morris Hughes, the President of the Senate, Senator Givens, the Minister for Defence, Mr Pearce, Sir John Forrest MHR, Mr Groom MHR, Mr Glynn MHR and Mr Watt MHR.



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