BOOK REVIEWS

The Principles of Unemployment Law by Rohan Price (Sydney: LBC Information Services, 1996) pages i–xxv, 1–157, bibliography and index 158-68. Price $35 (softback). ISBN 0 455 21433 6.

Structural unemployment has been a feature of western capitalist countries for over two decades, yet books on unemployment law remain less common than those on employment law. It is tempting to welcome Rohan Price's *The Principles of Unemployment Law*[1] for this reason alone. I would like to be able to say that Price's book could become the core text for students and teachers wishing to explore this relatively neglected field, yet his approach is so haphazard that, despite his good intentions, he hardly does justice to his subject. It is, sadly, an opportunity missed, for even Price's cursory treatment reveals the host of important policy, legal and theoretical issues surrounding this area, some of which I will go on to explore.

At around 150 pages, *The Principles of Unemployment Law* attempts to cover a startling amount of ground. Chapter one gives some historical and policy background to Australia's current unemployment law. Chapter two examines what were, at the time of Price's writing (March 1996), the two main benefits for the unemployed, the Jobsearch Allowance ('JSA') and the Newstart Allowance ('NSA'). The focus here is on testing the search for work, the principal substantive issue in determining eligibility. The merits review process that claimants for unemployment benefits may invoke is also introduced. This is further explored in chapter three, where Price considers whether the Administrative Appeals Tribunal has actually developed any principles of administrative equity in this area or, conversely, whether it sees itself as merely the 'guardian of public money'.[2] Chapter four provides a valuable introduction to the case management program for the long-term unemployed put in place by the Labor Government's *Working Nation* strategy and established under the Employment Services Act 1994 (Cth). The Coalition has since indicated it will corporatise the Commonwealth Employment Service and tender out case management services, but the features of the new system reviewed by Price stay in place as a major development in unemployment law. In his final chapter, Price broadly explores the philosophy of unemployment law, offering 'Notes Toward a Legal Theory of Work'[3] and various proposals for reform.

[1] Rohan Price, *The Principles of Unemployment Law* (1996).
[2] Ibid 83.
[3] Ibid 124.

It is an ambitious program, and one which is ultimately unsuccessful for a variety of reasons. Price seems motivated by a — justifiable — moral outrage at the way unemployed people are treated by the current regime of legal regulation, yet the lack of a serious engagement with the debates that are shaping social policy both here and overseas means that the book can hardly be recommended as either a classroom text or as a primer for a non-legal audience. In the course of the book, Price touches on a number of contentious issues, such as post-modernism and the eclipse of class politics,[4] and the preoccupations of labour law academics.[5] However, unless Price is willing to engage with such issues at a deeper level, merely throwing them out to the reader is simply an exercise in self-indulgence.

For example, Price makes the suggestion that unemployment law and employment law should be studied together as the law regulating income[6] or, more generally, that unemployment law constitutes the 'other side of employment regulation'.[7] He puts this as a challenge to existing labour law paradigms,[8] yet it is a challenge made with little sense of the historical development of the discipline. Early exponents of the discipline — such as Otto Kahn-Freund and W Robson — did include unemployment insurance or welfare law within their ambit.[9] The 'disappearance' of unemployment law from the field of labour law is due to the post-war social accord which privileged trade unions as policy actors, and which was underpinned by what now appears as the aberration of a full employment economy with full-time contracts of indefinite duration.[10] The passing of that era has indeed provoked labour lawyers to return to the consideration of unemployment law within the wider study of the legal regulation of labour markets.[11]

The book is further marked by convoluted and sloppy prose that quickly fills up its 150 pages at the expense of the theoretical sophistication demanded by the topic. The publication is also marred by typographical errors. They are of a kind

[4] Ibid 12, 116. See also ibid 146, where Price writes: '[w]ithout reference to economic class, the discourse about rights appears to be an argument about subjective claims rather than objective entitlements', yet his own methodological preoccupation with the unemployed individual as the subject of legal regulation seems to undermine this claim. Again, for a book trying to trace the contours of a putative 'income law' (ibid ix, 151), there is little detailed consideration or analysis given to the distribution of poverty, rising inequality of market incomes, the redistributive effects of social security policies and trends in real disposable incomes. Cf Peter Whiteford, 'Income Distribution and Social Policy Under a Reformist Government: The Australian Experience' (1994) 22 *Policy and Politics* 239.

[5] Price, above n 1, 129–32.

[6] Ibid ix, 151.

[7] Ibid 124.

[8] Ibid 129–32.

[9] Richard Mitchell, 'Introduction: A New Scope and a New Task for Labour Law?' in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) vii.

[10] Ibid xi.

[11] Mitchell, 'Introduction: A New Scope and a New Task for Labour Law?', above n 9; Rosemary Owens, 'The Traditional Labour Law Framework: A Critical Evaluation' in Mitchell (ed), above n 9, 3; Christopher Arup, 'Labour Market Regulation as a Focus for a Labour Law Discipline' in Mitchell (ed), above n 9, 29.

— 'modem' for 'modern', 'befits' for 'benefits', 'an' for either 'on' or 'as' — that indicate the publishers know how to use a spellcheck program but will not do readers the courtesy of employing a proofreader. Apart from readers, lawyers and law teachers have an interest in seeing that their work is produced by law book publishers at a standard equal to that of other academic publishers.

Throughout the book, Price's coverage of legal principles does hint at broader issues that could inform his larger project. I mention this 'larger project' because it seems central to the book and is a worthy one generally, ie to rethink the position of unemployment law within wider notions of 'income law' and 'legal theory of work'. Yet despite setting himself this benchmark, Price's analysis rarely strays from the conventional. In the remainder of this review, I tease out some of the possibilities of this project. Like Price, I begin from the central substantive issue in unemployment law — testing a claimant's search for work — and suggest that administering the 'work test' necessarily entails assumptions about changing patterns of market employment and unemployment. Exploring these patterns in any detail in turn problematises conventional notions of 'work'. By rethinking the category of work, I go on to explore the rationales for a guaranteed minimum income scheme, a specific policy proposal put by Price.[12] Finally, I suggest that retheorising work and welfare needs to involve an attempt at theorising modes of social formation more generally.

I FROM 'WORK TEST' TO 'ACTIVITY TEST'

It is unsurprising that testing the search for work — the 'work test' — provides the focus for much of Price's discussion, as it is central to the definition of 'unemployment' as well as to issues of labour market incentives and moral hazard. It is what defines the unemployed as members of the labour force, setting them apart from those drawing income support for disability, retirement and sole parenthood.[13] Because the work test tries to arrive at an evaluation of an individual's subjective state — the willingness to work — it also generates a raft of tribunal decisions and case law that can become part of the content of 'unemployment law' as traditionally taught. Yet if unemployment law is conceived of as the obverse of employment law, then the crisis afflicting labour

[12] Price, above n 1, 151–3.

[13] This distinction is, however, becoming less clear. For example, whereas the sole parent pension is not conditional upon searching for work, recent policy changes suggest a move toward rethinking sole parenthood as a labour market barrier rather than the absence of a 'breadwinner'. Sole parents have been offered programs that assist labour force participation (Jobs, Education and Training ('JET') scheme) and the pension is withdrawn once their youngest dependent child reaches 16 years, forcing them into market employment or onto unemployment benefits (with eligibility dependent on the search for work). The effect of such policies can be seen in the increase in actual labour force participation rates for sole parents: 42.8 per cent of female sole parents were in the labour force in 1980 and 52 per cent in 1992: Anne Edwards and Susan Magarey (eds), *Women in a Restructuring Australia: Work and Welfare* (1995) 266. Similar policy shifts can also be discerned in the administration of disability support payments: Terry Carney, 'Disability Support Pension: Towards Workforce Opportunities or Social Control?' (1991) 14 *University of New South Wales Law Journal* 220.

law generally — especially the rise in non-standard forms of work[14] — will also precipitate change in the structure of unemployment law. It is the nature of that change that I want to explore here.

The work test is now officially an 'activity test',[15] a change influenced by the Social Security Review set up in 1985 by the then Minister for Social Security, Brian Howe.[16] The Review proposed linking increased income support payments to a restructured income test, to encourage labour force attachment, and to an activity test which expanded the work test to include activities such as training.[17] That is, income support would be integrated with labour market programs provided through the Commonwealth Employment Service. Under the new test, claimants of unemployment benefits could prove their eligibility by undertaking a range of activities which were likely to reduce labour market disadvantage other than looking for full-time work, including training or labour market programs likely to improve their prospects for finding work, or developing a self-employment venture.[18] In practice, however, the activity test remains a work test: in 1995, 95 per cent of JSA recipients and 92 per cent of NSA recipients recorded job search as their activity type.[19]

Equally important, the period after 1991 has seen a number of changes made to the income test which have tried to encourage increased labour market attachment through accessing part-time and casual work. In particular, there have been changes to the 'earnings disregard' threshold which governs the amount a person or married couple can earn before the income test is applied.[20] Also, an earnings credit scheme was introduced (subsequently abolished by the Coalition government) which allowed a credit to be offset against income from employment,[21] as was a waiver of waiting periods for clients reclaiming their allowance within 13 weeks of losing entitlement.[22] The 1993 Discussion Paper of the Committee on Employment Opportunities identified further concerns regarding disincentives and distorted labour market choices.[23] In particular, the application of the income test to the joint income of couples provided a disincentive for partners of the unemployed to seek employment, and a lack of

14 See, eg, Owens, above n 11.

15 Social Security Act 1991 (Cth) ss 513(1)(b), 522.

16 Commonwealth of Australia, Department of Social Security, Social Security Review, *Income Support for the Unemployed in Australia: Towards a More Active System*, Issues Paper No 4 (1988) ch 16.

17 Ibid 267.

18 Social Security Act 1991 (Cth) s 522(2).

19 John Powlay and Kate Rodgers, 'What's Happened to the Work Test?' in Peter Saunders and Sheila Shaver (eds), *Social Policy and the Challenges of Social Change: Proceedings of the National Social Policy Conference, Sydney, 5–7 July 1995* (1995) vol 1, 161, 165.

20 Commonwealth of Australia, Department of Social Security, *Meeting the Challenge: Labour Market Trends and the Income Support System*, Policy Discussion Paper No 3 (1993) 19 ('*Meeting the Challenge*').

21 Ibid.

22 Ibid.

23 Committee on Employment Opportunities, *Restoring Full Employment*, Discussion Paper (1993) 168, 183.

incentive for either partner in an unemployed couple to seek a low-paid, full-time job. The resulting reforms signalled a shift to individual entitlement which, it was hoped, would encourage greater and more effective job searches by both partners of a married couple.[24]

One of the factors influencing these changes was the apparent relationship between the labour force status of women and that of their husbands, in particular the fact that women with unemployed husbands were much more likely to be unemployed than women with employed husbands.[25] Yet whether this is an effect of incentives built into the income test is doubtful. There are a host of possible explanations for this relationship, from locational disadvantage[26] to the persistence of gender stereotypes.[27] Financial incentives may actually have little or no behavioural impact, a point suggested by both Australian and British studies. These show that most claimants are unaware of how the income test actually works (and generally perceive it as harsher than it actually is). Claimants' attachment to the labour force tends to be based primarily on their preference for certain types of work and, for sole parents, on the significance attached to the parenting role.[28] Claimants also tend to place more importance on the perceived sense of financial security and stability provided by benefits than the intermittently higher income that may come from accepting short-term or casual work. Hence, administrative practices, such as waiting periods on re-application for the benefit, will affect the assessment of the financial consequences and risks of accepting a job.[29]

[24] The reforms also entailed the introduction of a new Parenting Allowance (half the married rate of benefit) for spouses of JSA and NSA recipients caring for children under 16 (Social Security Act 1991 (Cth) pt 2.18) and a Partner Allowance for spouses of JSA and NSA recipients who were born before 1955 and with little or no recent work experience and no dependent children (Social Security Act 1991 (Cth) pt 2.15A). This means that those spouses under 40 without children must now satisfy eligibility conditions, usually the activity test, to become entitled to an unemployment benefit.

[25] In 1994, the wives of unemployed men had a markedly higher unemployment rate than the wives of employed men (44.1 per cent as opposed to 4.3 per cent), while having a labour force participation rate one third lower (43.7 per cent as opposed to 68.4 per cent): Bettina Cass, 'Connecting the Public and the Private: Social Justice and Family Policies' (1994) *Social Security Journal* (December) 3, 18.

[26] Ranking Australian neighbourhoods by socio-economic status between 1976 and 1991, men's employment decreased more markedly in the bottom half of neighbourhoods than in the top half, while women's employment in the bottom half fell by 40 per cent, suggesting both husbands and wives are affected by the same regional variations in labour demand: Robert Gregory and Boyd Hunter, *The Macro Economy and the Growth of Ghettos and Urban Poverty in Australia* (1995) 14.

[27] The wife might not seek market employment so as not to undermine the husband's desire to be seen as the breadwinner: Bruce Bradbury, 'Added, Subtracted or Just Different: Why Do the Wives of Unemployed Men Have Such Low Employment Rates?' (1995) 21 *Australian Bulletin of Labour* 48, 49.

[28] Anne Puniard and Chris Harrington, 'Working Through the Poverty Traps: Results of a Survey of Sole Parent Pensioners and Unemployment Beneficiaries' (1993) *Social Security Journal* (December) 1.

[29] For a consideration of British studies regarding the issue, see Eithne McLaughlin, 'Work and Welfare Benefits: Social Security, Employment and Unemployment in the 1990s' (1991) 20 *Journal of Social Policy* 485.

Reforms to the income test do, however, indicate a pragmatic recognition of labour market change, especially the fact that, between 1980 and 1993, 60 per cent of new jobs have been part-time and that there has been a decline in the probability of leaving unemployment for full-time work and an increase in the probability of leaving unemployment for part-time work.[30] It appears, then, that part-time work — or seasonal, casual, voluntary or home work, or forms of self-employment — is increasingly becoming the typical rather than atypical form of labour market participation for many people; that these forms of participation are the options presented to the unemployed; and that the take-up of such options is being encouraged by a more flexible income test. Re-entry to the labour force is now likely to be characterised by a combination of part-payment of unemployment benefits and earnings from part-time work over a lengthy period.[31] Yet, as to whether this move into part-time work constitutes a 'pathway' to full-time work, Alan Jordan comments:

> The idea that large numbers of people can make a transition from unemployment through casual or part-time to full-time work, attractive though it may be, should be regarded with some scepticism. Too little is known of the circumstances under which it occurs. The strongest justification for encouraging employment that provides less than a full livelihood is that for many it may be the only alternative to complete and permanent unemployment.[32]

If this is the case, then the retained unemployment benefit is not compensation for unemployment, but compensation for *under*employment.

Such a shift is not, however, countenanced by the administration of an activity test which still privileges the search for full-time work. While it is true that the activity test recognises a wider range of activities than the old work test, it appears that someone combining ongoing part-time work with part-payment of benefits would still fall foul of the activity test. That is, their readiness and willingness to undertake full-time work could only be shown by their stating that they will accept any suitable offer of *full-time* work: that is, a willingness to surrender secure, ongoing part-time employment (which characterises, say, the retail and hospitality sectors) for insecure full-time employment.[33]

There seems a clear policy tension between the recognition of current labour market trends through changes to the income test and the continued emphasis on full-time work in the activity test.[34] This leads me to suspect that the activity test is less about incentive — most incentive effects remain unproven in any case — than about wider issues of social organisation. The strictures of the current activity test remain the last obstacle to introducing a form of Guaranteed

[30] *Meeting the Challenge*, above n 20, 7, 9.

[31] Powlay and Rodgers, above n 19, 167.

[32] Alan Jordan, 'Labour Market Programs and Social Security Payments' (December, 1994) *Social Security Journal* 60, 71.

[33] *Meeting the Challenge*, above n 20, 20.

[34] Peter Saunders, *Improving Work Incentives in a Means-Tested Welfare System: The 1994 Australian Social Security Reforms*, Discussion Paper No 56, Social Policy Research Centre (1995) 28.

Minimum Income ('GMI'). In fact, there are already inklings of a GMI in those instances where the activity test surrenders its preoccupation with the search for full-time work by claimants living in remote areas[35] or where claimants over 50 earn at least 35 per cent of average male full-time weekly earnings from part-time employment.[36] This is a point recognised by Price, who comments, '[i]n this way, unemployment benefit takes on the character of an early retiring benefit or an additional remote living allowance'.[37] Price adds, however, that these initiatives reduce the issue to one of 'rights maximisation among sectional groups or particular cases rather [than] identification and action along the lines of socioeconomic traits'.[38] I am not sure what Price means here by 'socioeconomic traits' if these are not to include those very real labour market disadvantages suffered by older people or those living in remote areas. Further, rather than being about rights maximisation of sectional groups in the context of some sort of zero-sum game, the provisions can be seen as prefigurative of a renewed system of income support. Extending the rationale of such provisions was a possibility suggested in a policy paper of the Department of Social Security itself, which recommended 'recognition of the concept of "underemployment" as well as unemployment and the rights of underemployed people to receive income support'.[39]

It is clear that any discussion of the activity test necessarily leads into the broader issue of the merits of a GMI scheme. Before I address this, I want to consider one of the most serious shortcomings of Price's analysis.

II 'WORK' V 'WELFARE'

Price veers between discussing a potential 'income' law and talking about the possibilities for a legal theory of 'work', yet he is ultimately concerned with income rather than work in any broad sense. To talk about a legal theory of *work* would mean having regard to the experience of those traditionally excluded from or marginal to that form of civil citizenship based around the wage contract.[40] Discussion of the experience of, for example, women and indigenous Australians could have profitably informed Price's attempt to place unemployment law in a wider context that begins to transcend the work-welfare dichotomy.

The trend toward increasingly diverse work patterns mentioned in the previous section necessarily has ramifications for the framing of this work versus welfare debate, a point recognised by Price when he writes:

35 Social Security Act 1991 (Cth) s 603(2).
36 Ibid s 602.
37 Price, above n 1, 7.
38 Ibid.
39 *Meeting the Challenge*, above n 20, 20, 87.
40 The typology of political, civil and social citizenship was developed by T Marshall: see 'Citizenship and Social Class' in T Marshall (ed), *Citizenship and Social Class and Other Essays* (1950) 1. For a useful introduction to the continuing influence of Marshall's insights on current social policy debates, see Terry Carney and Peter Hanks, *Social Security in Australia* (1994) ch 5.

> New patterns of work force participation are emerging... . The increasingly part-time nature of work raises the issues of whether a person can be regarded as a member of the work force and whether or not a person is unemployed. Linear sequences of education, followed by work, family obligations and retirement are becoming outdated as new life patterns and family types come into being.[41]

Thus 'work' and 'welfare' need to be rethought as life-course stages on a continuum, rather than oppositional positions within a strictly conceived work-welfare dichotomy.[42] Yet even here Price fails to question the category of 'work' itself, a remarkably unreflective position for a book that attempts to explore a legal theory of work. This has serious consequences for how he frames current policy issues. For example, he writes:

> [A] particular group, such as women, may not reap the benefits of full-time work, because part-time work is all that is on offer. In our community, there is an increasing number of people who are neither fully employed nor fully unemployed.[43]

Yet most women are more fully 'employed' than most men. A time-use pilot survey carried out by the Australian Bureau of Statistics in Sydney in 1987 revealed that for employed married women, the time commitment to domestic and caring work was twice that of men, while for single women, the commitment to these tasks was 50 per cent greater than that of single men.[44] That is, women's putative underemployment can only be understood in the context of that other work they do in the household, a point Price fails to recognise.

For Price, women may 'not reap the benefits of full time work because part-time work is all that is on offer'[45]. On the one hand, Price is correct here to suggest that women's labour market patterns are at least partly explained by labour market opportunities. This refutes much of the talk about women's 'choices' in constructing their preferred combinations of paid employment and domestic responsibilities. There is a tendency to read any data relating to women's work patterns, together with information about women's working preferences, as illustrating the outcome of 'women's choices'. Yet aggregate figures of women's labour force participation — including those Price gives[46] — tell very little. There are neighbourhoods where employment change in the last twenty years has led to increases in women's employment and neighbourhoods where women's employment has actually fallen by up to 40 per cent.[47] Belinda Probert offers that 'it is not very plausible to suggest that these changes are a

41 Price, above n 1, 5.
42 Bettina Cass, 'Overturning the Male Breadwinner Model in the Australian Social Security Protection System' in Saunders and Shaver, above n 19, 47.
43 Price, above n 1, 13.
44 Bettina Cass, 'Gender in Australia's Restructuring Labour Market and Welfare State' in Edwards and Magarey, above n 13, 38, 53.
45 Price, above n 1, 13.
46 Ibid 12, 117.
47 Gregory and Hunter, above n 26.

result simply of women's choices'[48] but that 'it is essential to assert the historical and social construction of the choices which individual women appear to be making freely'.[49]

Cross-national comparisons bear out Probert's point. In France, Italy and Finland, there is comparatively little part-time work done by women. For example, Finland has a female labour force participation rate of 73 per cent, but only 11 per cent of those women work part-time. By comparison, 30 per cent of women in Germany's labour force work part-time, suggesting that particular policy regimes and family forms produce a different pattern of women's 'choices'.[50]

On the other hand, it is a mistake to suggest, as Price seems to, that the principal constraint on women's full-time participation in paid employment is opportunity rather than domestic responsibilities. Many women are unable to take up full-time market employment because of caring responsibilities or, conversely, those women in full-time paid employment are often those women who can avoid or shift their responsibility for caring work. The corresponding pattern of men's part-time participation rates — falling to two per cent for men between 20 and 55 years when they are most likely to have dependent children[51] — suggests full-time employment is largely predicated on this avoidance. So even if full-time jobs were on offer, would they be taken up by women? Can women reasonably exercise choice when men refuse to take up caring work? Price seems to want to place the blame for women's under-representation in full-time paid employment on *changed* social conditions — especially a restructuring of the labour market which creates a disproportionate number of part-time jobs in traditionally female fields. Yet women's part-time paid employment might in fact represent a *continuity* in social conditions:

> If we take into consideration what we know about the impact of part-time employment on family relations and the relations of work, we might argue that what is most striking is not the extent of change but the powerful continuities ... . Women have been incorporated into the labour force, but have manifestly failed to challenge seriously the culture of work which rests on a traditional sexual division of labour at home, and within which work intensification has been accepted without resistance.[52]

Price's failure to acknowledge this work intensification not only shows the shortcomings of his putative theory of work, but also turns the policy question around the wrong way. He asks: '[g]iven the prevalence of part-time jobs, should unemployment benefits top-up the difference between a person's take-home pay and average weekly earnings?'[53] Yet any consideration of women's experience — that is, the experience of the greater mass of part-time workers — should lead

[48] Belinda Probert, 'The Riddle of Women's Work' (1996) 23 *Arena Magazine* 39, 45.
[49] Ibid 41.
[50] Ibid 41–2.
[51] Cass, 'Overturning the Male Breadwinner Model', above n 42, 57.
[52] Probert, 'The Riddle of Women's Work', above n 48, 41.
[53] Price, above n 1, 13.

to the question: is the aim to compensate for underemployment (ie 'topping up') or to pay for caring work currently being undertaken?

The social security system currently exhibits an ambivalence as regards this question. There has been a historical move to explicitly recognise caring work (eg Parenting Allowance, Sole Parents Pension and Carers Pension, all of which exempt the carer from the activity test), and also a move to promote the labour market participation of women (represented by changes to the Sole Parents Pension[54] and the partial disaggregation of the couple income unit). There is now both formal gender neutrality in provision[55] and a formal equality as regards choice: anyone can choose caring work or labour market participation, and couples can reverse or share breadwinning responsibilities.

Women's labour force participation and the emergence of dual income families (provoked as much by women's aspirations for social and economic independence as by public policy[56]) strike many as a sea-change. The impact of such a change should not be underestimated, least of all in the positive effect of ameliorating growing market income inequality between families.[57] Yet it can also be argued that the trend reveals stark continuities. When both partners of a heterosexual relationship with children participate full-time in market employment, the pattern derives from an earlier period when those in full-time paid work had someone else — generally a wife — to take care of their domestic responsibilities. Women can only choose this replacement of their domestic labour where they are wealthy enough to afford such options as a nanny or a cleaner, or eating out regularly, options that depend on high incomes, high education, and a stratified labour market.[58] 'What has not changed very much, however', argue Belinda Probert and Fiona Macdonald, 'is the pattern of paid work of their male partners — a pattern of work which they now share'.[59]

So despite the policy emphasis on choice, most women do not choose between paid and unpaid work as *exclusive* activities. As Ann Orloff comments, except for women who are wealthy enough to purchase the services of others, '[n]owhere in the industrialised West can married women and mothers choose *not* to engage in caring and domestic labour'.[60]

The policy issue then becomes that of getting men to take up involvement in the practical life of the home (which would involve a reversal of the trend

[54] For a discussion of these changes, see above n 13.

[55] Sheila Shaver, 'Women, Employment and Social Security' in Edwards and Magarey, above n 13, 141.

[56] Cass, 'Gender in Australia's Restructuring Labour Market and Welfare State', above n 44, 52.

[57] Peter Whiteford, 'Labour Market and Income Inequalities' in Australian Council of Social Services, *Proceedings of the Future of Work and Access to Incomes Seminar* (1995) 10, 29.

[58] Belinda Probert with Fiona Macdonald, *The Work Generation: Work and Identity in the Nineties* (1996) 63.

[59] Ibid.

[60] Ann Shola Orloff, 'Gendering the Analysis of Welfare States' in Barbara Sullivan and Gillian Whitehouse (eds), *Gender, Politics and Citizenship in the 1990s* (1996) 81, 86.

toward longer hours of paid employment for men).[61] Current ambivalent policy responses — attempting to universalise the benefits of men's citizenship through women's labour market participation on the one hand, and recognising new forms of citizenship based on granting parity to women's traditional unpaid work on the other[62] — tend to sidestep the third option, that of universalising the responsibility of primary care work through more flexible and appropriate employment arrangements for all workers.[63]

Price also mentions the fate of Aborigines and Torres Strait Islanders, but in the context of a discussion that ultimately dismisses them as a 'sectional interest'.[64] He mentions the Aboriginal Employment Development Policy but does not consider one of its central planks, the Community Development Employment Program ('CDEP'). Yet as Australia's only 'actually existing' work-for-the-dole scheme, I would have thought it worthy of some discussion. The CDEP scheme allows indigenous communities to pool unemployment benefits so that those eligible for benefits can be paid to work on community projects. As a work-for-the-dole scheme, it is susceptible to a host of criticisms: it only funds part-time work; some participants do not receive the rent assistance they would be entitled to under an unemployment benefit; and communities' 'no work no pay' rules may mean participants receive less than they would under a Department of Social Security ('DSS') entitlement. Furthermore, there is no evidence that the CDEP leads to better employment opportunities in the mainstream labour market.[65]

If the CDEP seems such a failure as a 'welfare' scheme, how can its persistence be explained? Part of the answer is that it is also a *cultural* scheme that allows for an 'Aboriginalisation' of paid employment. Specifically, indigenous organisations can determine the type and conditions of employment that suit local needs and direct time-use patterns toward locally controlled service delivery. They can also encourage the emergence of culturally distinctive features in local economies, which are paid for by relatively secure funds.[66] While the CDEP is in some ways typical of a trend that suggests that the future

[61] Cass, 'Connecting the Public and the Private', above n 25, 15. Nancy Fraser points out that much of the current welfare debate (especially in the United States) turns on fears of 'dependency' and 'free loading', whereas 'the real free-riders in the current system are not poor solo mothers who shirk employment. Instead, they are men of all classes who shirk carework and domestic labour': Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Examination' in Nancy Fraser (ed), *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (1997) 62. See also ch 5, 'A Genealogy of "Dependency": Tracing a Keyword of the U.S. Welfare State', co-authored with Linda Gordon.

[62] Cass, 'Gender in Australia's Restructuring Labour Market and Welfare State', above n 44, 48–51, refers to this ambivalence as 'Wolstonecraft's dilemma'.

[63] Fraser, 'After the Family Wage', above n 61. This would include extending the conditions, benefits and training opportunities characteristic of full-time work to part-time work: Cass, 'Gender in Australia's Restructuring Labour Market and Welfare State', above n 44, 54–9.

[64] Price, above n 1, 117–8.

[65] Diane Smith, '"Culture Work" or "Welfare Work": Urban Aboriginal CDEP Schemes' in Saunders and Shaver, above n 19, 195, 199.

[66] Ibid 200; Tim Rowse, 'Diversity in Indigenous Citizenship' in Ghassan Hage and Lesley Johnson (eds), *Republicanism, Citizenship, Community* (1993) 47, 58–9.

of indigenous Australians lies in labour force participation (or welfare payments for those unable to achieve this), the deeper policy ambivalence — 'welfare work' versus 'culture work' — might in fact be a boon, suggests Tim Rowse, as it 'recognises and accommodates the many ambiguities and indeterminacies of the historically emergent industrial culture'.[67] That emergent culture shows just how contingent any idea of 'work' actually is in the sense of paid employment. The imposition of a white welfare regime in outback communities in the 1950s meant not only attempts to restructure and commodify Aborigines' time,[68] but also the imposition of categories expressing:

> non-Aboriginal notions of breadwinners and dependents, notions which bore no necessary correspondence to Aboriginal traditions of labour division and duties to share ... . The theoretical distinction between the deserving and the undeserving, crucial to the state's training strategy and to the later administration of unemployment benefits, was difficult to apply in practice.[69]

Forms of identity politics based on race and gender do not, as Price suggests, merely represent the dissolution of a univocal logic of class into a morass of competing sectional claims. Rather, the experience of marginalised groups suggests that many understandings of class-based discourse about, for example, what counts as 'work', are themselves often limited or sectional.[70]

III A GUARANTEED MINIMUM INCOME?

By broadening the idea of work, I want to move, in Rowse's words, to 'rethinking the rationale for public subsidy'.[71] Price's notion of a GMI is a payment 'topping up' net household income through income support products when it falls beneath a benchmark CPI-indexed household income.[72] It is difficult to see how Price's scheme, as outlined, offers anything particularly new except, perhaps, a more comprehensive bulwark against poverty by constructing a more seamless income support system than our current categorical system. The introduction of new payments to catch those who might fall through existing gaps in eligibility is, along with a renewed focus on adequacy of payments, partly the story of social security reform over the last decade, in particular the establishment of a means-tested family payment for the 'working poor' with children. A further concern with the interaction of market wages and the tax-

67 Tim Rowse, 'Rethinking Aboriginal "Resistance": The Community Development Employment (CEPD) [*sic*] Program' (1993) 63 *Oceania* 268, 283.

68 A particular focus of these attempts was the 'black stockworkers' year', then split between an 'idle' summer off-season, and intensive work at other times.

69 Rowse, 'Rethinking Aboriginal "Resistance"', above n 67, 279.

70 In this sense, a much better attempt to develop a 'legal theory of work' would look for those instances where, say, women's work erupts into legal consciousness, for example, in property division after family breakdown or common law damages for personal injury: see Regina Graycar, 'Legal Categories and Women's Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence' (1994) 7 *Canadian Journal of Women and the Law* 34.

71 Rowse, 'Diversity in Indigenous Citizenship', above n 66, 60.

72 Price, above n 1, 151.

benefit system, and improvements in the social wage has been a defining aspect of social policy under the Prices and Incomes Accord.[73]

Such policy trends represent a pragmatic response to increasing market income inequality, and to the growing phenomenon of the working poor.[74] Income transfers and social services have done an important job in alleviating (but not reversing) growing inequality.[75] Price further justifies his notion of a GMI on the basis of communitarianism,[76] but the thrust of such a policy strikes me as basically palliative rather than giving rise to new relations of social solidarity. Unless allied with wider strategies, a GMI, rather than developing a new social dynamic, merely entrenches existing divisions between currently privileged wage earners and a claimant class.[77]

Such allied strategies must allow choice between market work and other forms of activity. This partly proceeds from my discussion in the preceding section concerning the dimensions of work itself. By reconceptualising work, it is possible to argue for a more equitable distribution of that work, in particular an equitable reduction of paid working time and the recognition and support of currently unpaid work. People then gain access to their desired mix of paid and unpaid work across their lifetime, with an adequate income secured against fluctuations. Recognition of different forms of social participation — full-time or part-time paid employment (or availability for paid employment), caring for children or dependent adults, community work, sustaining neo-traditional forms of land use, education and training — widens the concept of citizenship to recognise the value of different contributions made throughout the life course.[78]

[73] Cass, 'Connecting the Public and the Private', above n 25, 11. European proponents of a GMI argue that it must be characterised by flat-rate, needs-based payments, financed from general revenue, and based on individual entitlement: Ulrich Mückenberger, Ilona Ostner and Claus Offe, 'A Basic Income Guaranteed by the State: A Need of the Moment in Social Policy' in Claus Offe, *Modernity and the State: East and West* (1996) 200, 211. The first two aspects have been features of the Australian welfare system since Federation. The third is a more recent policy innovation developed under the Labor government, suggesting that the 'Australian social security system is more adaptable than most overseas systems to the new diversity in work patterns, wages and family structures': Commonwealth of Australia, Department of Social Security, *A Common Payment? Simplifying Income Support for People of Workforce Age*, Policy Discussion Paper No 7 (1995) 17 ('*A Common Payment*').

[74] In 1994, about 15 per cent of couples with children living in poverty had a family member in full-time market work and 14 per cent of working age single people in poverty were employed full-time: Bettina Cass, 'Precarious Labour, Precarious Welfare: Choices Facing Australian Public Policy' (Paper presented at Issues in Public Sector Change Seminar, Centre for Public Policy, Melbourne, 9 September 1996) 10.

[75] National Centre for Social and Economic Modelling ('NATSEM'), *Income Distribution Report* (1995) Issue 2.

[76] Price, above n 1, 152.

[77] On the geographic dimensions of such divisions, see generally Gregory and Hunter, above n 26.

[78] I have drawn here on the discussions in Mückenberger, Ostner and Offe, above n 73; Cass, 'Precarious Labour, Precarious Welfare', above n 74; John Keane and John Owens, 'Feedback' (1988) 7(21) *Critical Social Policy* 116; John Wiseman, 'After "Working Nation": The Future of Work Debate' (1994) 6 *Labour and Industry* 1. Because the income payment would not be totally independent of work in the broad sense (ie social contribution and participation), but would depend on reciprocal obligations while protecting against poverty, it might better be called a *conditional* minimum income: see *A Common Payment*, above n 73, 42–4.

A GMI in this form signals a surrendering of the commitment to 'full employment', and, perhaps, of a concomitant 'right to work'. Yet Australia can hardly return to full employment, as we never had it; we had full *male* employment. We have not substantially lost any of the jobs in aggregate that sustained full male employment, merely redistributed them: measured by total population per capita weekly hours of employment, in the 1990s Australia has an employment base as strong structurally as it was in the late 1960s,[79] whereas there has been a significant shift from full-time to part-time jobs. Given the changing employment demographic, the Labor government's *Working Nation* implicitly admitted Australia was already a post-'full employment' society, and predicted at best a five per cent unemployment rate by 2000,[80] which was in turn predicated on an annual growth rate of four and a half per cent.[81] Not only is 'full employment' therefore unlikely, it might be socially undesirable given ecological barriers to continued 'growth' and the fact that historically the commitment to full employment has strengthened hierarchical divisions between masculine and feminine spheres and worked to destroy traditional forms of life not regulated through the labour market.[82] Equal to the 'right to work' must be the right of all workers to periodically withdraw from the labour market without unfair financial penalty;[83] this, as I argued in the previous section, is a precondition for gender equity.

I have tried to stress the importance of placing discussion of a GMI in the context of theorising work itself. Outside of this context — as compensation for existing levels of unemployment, for example, or as a subsidy for low market wages — a GMI appears as just another welfare expenditure item. In light of a supposed 'crisis' of the welfare state, it thereby appears neither economically feasible nor politically sustainable. It is probably time to shift the terms of this 'crisis' rhetoric away from the distractions of the fiscal perils of an ageing population and Australia's global competitiveness[84] to the more salient issue in Australia, the future of work itself.

IV THE FUTURE OF WORK AND THE POSSIBILITY OF POLITICS

In the previous section I suggested two aspects of the practical politics of a GMI which I felt were absent from Price's discussion. First, that both the form and rationale that a GMI might take are variable and need to be carefully thought

[79] John Freeland, 'Re-conceptualising Work, Full Employment and Incomes Policies' in Australian Council of Social Service, *The Future of Work* (2nd ed, 1995) 8, 37.

[80] Paul Keating, Commonwealth of Australia, *Working Nation: The White Paper on Employment and Growth* (1994) vol 1, 1.

[81] Saunders, above n 34, 1–2.

[82] Mückenberger, Ostner and Offe, above n 73, 208–9.

[83] Keane and Owens, above n 78, 120.

[84] Each of these concerns has become a staple of arguments for rolling back welfare spending: see, eg, National Commission of Audit, *Report to the Commonwealth Government* (1996). For a critique of this 'crisis' rhetoric in the Australian context, see Deborah Mitchell, 'The Sustainability of the Welfare State: Debates, Myths, Agendas' (1997) 9 *Just Policy* 53.

through. Second, that many existing provisions and trends in Australian social security are themselves prefigurative of a GMI.

But if I read Price's final chapter correctly, he is concerned with the possibilities for political action more generally. It comes through partly in his decrying of 'sectional interests and minority groups'[85] and his reaffirmation of a class-based trade union politics.[86] I feel it important, however, to push his analysis further. That is, is it enough to ask how traditional political actors can respond to the changed world of work when the changes themselves might have destroyed the grounding conditions for that type of action?

'The working class is not the homogenous group which it was during the Industrial Revolution'[87] argues Price, suggesting there is a growing tendency for much trade union politics to be about the promotion of sectional interests and division. Yet neither was the nineteenth century working class a homogenous group. It too was characterised by an elite of skilled workers; what was notable about the Industrial Revolution was that it was precisely this elite group which founded a labour movement. The reason they did so may be because an industrial work ethic, based on the dignity of labour, allowed for forms of solidarity based on either the shared experience of skill and productive identity opposed to the parasitic employer, or the shared experience of domination and arbitrary power.[88] The shared belief in the dignity of industrial work — potential or actual — produced the main characteristics of labourism for the first half of this century: a belief in industrial progress based on integration and hierarchy; a clear separation between the private and the public; strong work-based cultures and identities; a clear distinction between the masculine and feminine worlds; and, in Australia, a quest for racial purity.[89] Each of these ideologies is now open to widespread debate and there is little to be gained by returning to them.

The threshold question for any consideration of the future of class or trade union politics is whether this traditional grounding of socialist politics in forms of industrial solidarity, mutuality and co-operation has, under post-industrial forms of work — or post-industrial culture more generally — become attenuated into forms of association predicated on a heightened individualism.[90] The decentralisation of production and developments in communication and transportation technologies vitiate the need for face-to-face contact in the workplace. Outside the workplace, living spaces are dispersed through low density suburbanisation, making a collective face-to-face culture increasingly improbable.[91] The debate here is not one between Taylorism and autonomous work practices:

[85] Price, above n 1, 118–9.
[86] Ibid 143–7.
[87] Ibid 145.
[88] Kevin McDonald, 'On Work' (1993) 2 *Arena Journal* 33, 39.
[89] Ibid 35.
[90] Geoff Sharp, 'Reconstructing Australia' (1988) 82 *Arena* 70.
[91] Stanley Aronowitz, *The Politics of Identity: Class, Culture and Social Movements* (1992) 236.

these co-existed in the nineteenth century and they co-exist today.[92] It is, rather, about modes of self-formation, a point which Price does not appear to recognise. Instead, Price offers one 'high tech' path out of joblessness, advocating job creation schemes that focus on the communications sector. The internet, he suggests, provides a 'global forum for creativity, human excellence and business'.[93] The fact that the internet does away with the need for mutual presence is, according to Price, a point in its favour: '[t]he buyer [of an internet service] cannot see a person's wheelchair, that a person is a woman or an Aboriginal. The service is judged by the merits of the service, rather than costed according to the characteristics of its provider.'[94] The goal of establishing jobs that abolish fundamental forms of face-to-face interaction sits oddly, to say the least, with Price's goal of reviving a communitarian class politics. In fact, to set up as the ideal workplace, interactions where an Aborigine can at once provide a service yet be neatly rendered invisible to the consumer of the service is chilling in the current climate where government attacks on Aboriginal entitlements draw support precisely because of the lack of day-to-day reciprocal interaction between indigenous and settler Australians.

This is not to say that changes in social formation do not present their own possibilities for political action. The diminishing demand for industrial labour, the increase in tertiary education and intellectual training, the growth in underemployment and intermittent employment, all lead to an inversion of the industrial work ethic, a break in the link between production and socialisation and a conception of wage labour as an episode in life rather than an identity.[95] There is an opportunity here for social movements, including the labour movement, to construct counter models of flexibility around the work day and the life course that offer an alternative image of freedom and the good life.[96]

[92] In this way, the term 'post-industrial' is a misnomer if it conjures up non-Taylorised work practices. Whereas Taylorism — the detailed division of labour tasks into replicable, component parts to produce standardised mass products — characterised the industrial factory system, it remains prevalent in the new service industries (eg fast food) and in the field of information technology, which depends on the Taylorised production of its basic components and, increasingly, of its system software: Dennis Hayes, *Behind the Silicon Curtain: The Seductions of Work in a Lonely Era* (1989).

[93] Price, above n 1, 147.

[94] Ibid 147–8.

[95] Paolo Virno, 'Do You Remember Counterrevolution?' in Paolo Virno and Michael Hardt (eds), *Radical Thought in Italy: A Potential Politics* (1996) 241, 244–5.

[96] McDonald, above n 88, 41. Such struggles are not new, and have been characteristic of the labour movement since its inception. In the early days of industrialisation, the right to intermittent work was perceived as an important freedom for most craft workers, unfamiliar with permanent, continuous work throughout the year. The imposition of a welfare regime — as we saw in the case of Aboriginal workers — involved the simultaneous invention of 'unemployment' and 'employment', with the latter meaning full-time continuous employment. William Beveridge saw the new labour exchanges in early twentieth century England precisely in terms of abolishing this category of intermittent worker: André Gorz, *Critique of Economic Reason* (1989) 197, 213–4. Most historical struggles to shorten the working week have been motivated, however, by the desire to increase men's leisure time, rather than to redistribute the burdens of paid and unpaid work. Price approaches the issue of labour time and work redistribution by making the policy proposal that workers in an enterprise work a shorter week in return for accepting a new employee on the payroll: Price, above n 1, 144. The acceptance of a shorter

Against such aspirations, much of the recent rhetoric of workplace 'flexibility' now attempts to forge a new form of work discipline based on this taste for individual autonomy and entrepreneurial self-sufficiency:

> What is valued in and demanded of the single worker no longer includes the 'virtues' traditionally acquired in the workplace as a result of industrial discipline. The really decisive competencies needed to complete the tasks demanded by post-Fordist production are those acquired outside the processes of direct production ... In other words, professionalism has now become nothing other than a generic sociality, a capacity to form interpersonal relationships, an aptitude for mastering information and interpreting linguistic messages, and an ability to adjust to continuous and sudden reconversions.[97]

The shift is seen in the fate of the work test itself. Just as the old work test was the expression of the traditional industrial work ethic, so the new activity test valorises the new entrepreneurial subject. The Organisation for Economic Co-operation and Development ('OECD') has promoted the idea of the 'Active Society', where modern economies are dependent on 'widespread entrepreneurial initiative' and obsolete manufacturing sectors are being replaced by 'new dynamic, world-oriented, local economies' reliant on the 'mobilisation of ... human resources, not the attraction of massive, outside investments'[98]. The goal of the welfare state is to 'generate a labour market which is responsive to the requirements of an active society'.[99] The activity test's emphasis on programs likely to improve a person's prospects for finding work reinforce an emerging duty of labour market readiness. The aim seems to be to produce a legal subject at once disciplined *and* flexible. The legal regime now moves from objective, pre-ordained, mass norms of entitlement to personalised contracts between claimants and the state, with recipients who have been unemployed for longer

working week with a consequent drop in wages has generally been a defensive position by the labour movement. That is, it is done to preserve existing employment levels and rarely leads to employment growth at an enterprise: see, eg, the case studies in Hugh Compston (ed), *The New Politics of Unemployment: Radical Policy Initiatives in Western Europe* (1997). One reading of the Prices and Incomes Accord would see it as a similar proposal to Price's, albeit at a macroeconomic level: workers accepted falling real wages in return for jobs growth. Price, however, makes only passing mention of the Accord, merely citing it as an example of 'centralised economic planning which has worked': Price, above n 1, 151. Given the fact that he offers no opinion as to what it was intended to do — whether in terms of jobs growth, productivity, real incomes or the social wage — it is difficult to know what to do with his comment that it 'worked'.

97 Virno, above n 95, 249. The emphasis on a generic sociality can be linked to wider social phenomena: the emphasis on self-improvement and 'performance', and the preoccupation with therapy and mood enhancing drugs such as Prozac. 'A key feature of the contemporary system is that the achievement of the things that are universal prerequisites for happiness (love, work ... play, expression) must increasingly be achieved through the use of a developed personality. The networks of others — from abiding partnership, to friends and colleagues — must be assembled and maintained through a sort of psychological entrepreneurship, and the "optimal" personality is one which can achieve this with the minimum of difficulty . ... The obligation to personal entrepreneurship constructs a complete division between the society and the self; most — especially women — will internalise social failure as self-hatred and depression; some — especially men — will project it out and make it a general enemy': Guy Rundle, 'Pure Massacre' (1996) 23 *Arena Magazine* 2, 3.

98 James Gass, 'Toward the "Active Society"' (June-July, 1988) 152 *OECD Observer* 4, 7–8.

99 Ibid.

than 12 months being obliged to enter into 'Activity Agreements'[100] and those adults unemployed for longer than 18 months being required to enter into a Case Management Agreement.[101] The terms of such agreements may require a range of activities to be undertaken by the benefit recipient, including job search, vocational training, labour market programs and rehabilitation. The salient issue from a legal perspective is how the new emphasis on individualised agreements represents a diminished role for traditional merits review. The jurisdiction of both the Social Security Appeals Tribunal and the Administrative Appeals Tribunal to remake agreements has been removed, leaving them with a choice to either confirm agreements or send them back to the bureaucracy for renegotiation, without presuming to intervene more directly in the personalised negotiations between individual clients and their case managers.[102]

V CONCLUSION

I have considered the issues of the activity test, the nature of work, the rationale for subsidy and the politics of class in some detail, mainly because *The Principles of Unemployment Law* fails to do so. Or, rather, they are raised in the book but not discussed sufficiently. Here I might have committed the cardinal sin of the reviewer: critiquing not the book Price has written, but the book I think he should have written. Yet I have proceeded on the basis of a sense that Price did not merely intend his book to be a coverage of the substantive law of unemployment but a manifesto of sorts, calling for a new way of discussing unemployment law. I have attempted to show where I think this call could lead. More work needs to be done; until it is, teachers and students seeking texts in this area may be better served by the already published works by Terry Carney and Peter Hanks,[103] and Peter Sutherland.[104]

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100 Social Security Act 1991 (Cth) s 593.

101 Employment Services Act 1994 (Cth) ss 38–9.

102 Terry Carney, 'Welfare Appeals and the ARC Report: To SSAT or not to SSAT: Is that the Question?' (1996) 4 *Australian Journal of Administrative Law* 25, 34–5.

103 Carney and Hanks, above n 40.

104 Peter Sutherland (ed), *Annotations to the Social Security Act 1991* (3rd ed, 1996).

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