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**Title:** Procedural Matters In Australian National Minimum Wage Determination: Lessons For Cambodia

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# PROCEDURAL MATTERS IN AUSTRALIAN NATIONAL MINIMUM WAGE DETERMINATION: LESSONS FOR CAMBODIA

**VICHHRA MOUYLY**

## **I. INTRODUCTION**

A system of laws and institutions has been created by many countries around the globe to ensure that fair and reasonable wages are provided to employees.<sup>1</sup> The minimum wage has been used as a vehicle to assure that workers enjoy a decent living standard due to an assumption that labour free markets are not perfect in determining wage.<sup>2</sup> While the employer still has power in the wage bargaining process including, greater flexibility in the deployment of resources, greater power in setting working conditions as well as determining wages for the employee, an individual employee has little opportunity to bargain over the terms and conditions of the job and is vulnerable to unfair treatment such as very low wages. Due to these circumstances, state intervention through the setting of the minimum wage has been adopted in many countries.

Among those, Australia and Cambodia are not excluded. In Australia, the minimum wage has a long history, since 1907,<sup>3</sup> when the federal government passed the *Excise Tariff* in 1906. This concept has been applied broadly to a range of sectors. In contrast, Cambodia did not legislate minimum wage until 1997, when the *Cambodian Labour Law* was passed,<sup>4</sup> with the first minimum wage decision delivered in the same year for only the garment and footwear industry,<sup>5</sup> although the *Cambodia Labour Law* states that minimum wage shall be determined for all working industries.<sup>6</sup>

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<sup>1</sup> Rohan Price and John Kong Shan Ho, 'Implementing a statutory minimum wage in Hong Kong: Appreciating International experiences but recognising local conditions' (2011) 40(2) *Common Law World Review* 95, 95.

<sup>2</sup> Ibid.

<sup>3</sup> David H. Plowman, 'Protecting the Low Income Earner: Minimum Wage Determination in Australia' *The Economic and Labour Relations Review* 252, 255.

<sup>4</sup> *Cambodian Labour Law* art 104.

<sup>5</sup> Chandararot Kang and Liv Dannet, 'Study on Minimum Wage for Cambodia's Garment Industry' (Research Report, Cambodia Institute of Developing Study and Community Legal Education Center, 2009) 9.

<sup>6</sup> Ibid.

There are considerable differences between Australia and Cambodia in relation to minimum wage decisions. In Australia under *the Fair Work Act (Cth) 2009 (FWA)* the Minimum Wage Panel (MWP)<sup>7</sup> of the workplace relations' tribunal,<sup>8</sup> namely, the Fair Work Commission (FWC)<sup>9</sup> has the power to determine the national minimum wage by following the minimum wage objective criteria that are stipulated under the *Act*.<sup>10</sup> In Cambodia, this authority has been given to the Minister in charge of labour,<sup>11</sup> who is a political party member, after receiving a recommendation from the Labour Advisory Committee (LAC).<sup>12</sup> The LAC is a tripartite institution, which consists of representatives from government bodies, employees and employers' organisations.<sup>13</sup>

This tripartite setting, however, creates various questions surrounding the qualifications and capacity of those representatives, as well as the transparency of the decision-making processes. The *Cambodian Labour Law*,<sup>14</sup> together with a regulation that stipulates the composition and function of the LAC,<sup>15</sup> does not provide any guidance about the qualifications of the committee members. More importantly, the detailed explanations for minimum wage decisions are not published. As a result, around 450,000 employees working in the garment and footwear sector<sup>16</sup> have limited if any understanding of why their minimum wages have been set this way. This lack of transparency creates distrust in the wage setting process and results in employees in this sector frequently striking to demand wage increases,<sup>17</sup> which in turn disrupts the productivity of the

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<sup>7</sup> *Fair Work Act 2009 (Cth)* s 617 (2).

<sup>8</sup> Fair Work Commission, (2013) <<http://www.fwc.gov.au/>>.

<sup>9</sup> Ibid.

<sup>10</sup> *Fair Work Act 2009 (Cth)* s 284.

<sup>11</sup> *Cambodian Labour law* art 107.

<sup>12</sup> Ibid.

<sup>13</sup> Indian Institute of Management Amsterdam Institute for Advanced Labour Studies, Wageindicator Foundation, 'Minimum Wage Report, Cambodia' (Report, 2011) 3.

<sup>14</sup> *Cambodian Labour Law*.

<sup>15</sup> Royal Government of Cambodia, *Sub-decree on the composition and functions of the Labour Advisory Committee*, 47 HNKBK, 21 May 2006.

<sup>16</sup> International Labour Organisation, 'Action-oriented research on gender equality and the working and living conditions of garment factory workers in Cambodia' (Research Report, 2012) 2  
[http://www.ilo.org/asia/whatwedo/publications/WCMS\\_204166/lang--en/index.htm](http://www.ilo.org/asia/whatwedo/publications/WCMS_204166/lang--en/index.htm)

<sup>17</sup> Kang, above n 5, 9.

industry. Most recently in May 2013, approximately 4,000 workers were organised by trade unions to strike in demanding increased minimum wages.<sup>18</sup>

This paper aims to examine and assess the current procedural matters and criteria utilised by the MWP of the FWC when determining national minimum wages in Australia. It also aims to use these examinations to provide a range of recommendations to improve Cambodia's current system of fixing the minimum wage.

In order to address these aims, this paper starts by dissecting the concept of a national minimum wage, with consideration as to why Australia adopted a minimum wage in the first place. It then reviews the current procedure for national minimum wage fixation under the *FWA* including the nature and role of the decision makers, some specific criteria in determining the national minimum wage, and the process of interaction between interested parties in this review process. To limit the scope of this paper only the national minimum wage at the federal level is examined.

The paper then examines minimum wage setting within the context of Cambodia and seeks to identify what Cambodia can do to improve the current minimum wage fixation process by focusing on the disadvantages for women, who account for roughly 90 percent of the total workforce in the garment and footwear industry.<sup>19</sup> This paper concludes with a range of proposed reform options for consideration, which is contended to provide fruitful insight for Cambodia.

## **II. The Australian System of National Minimum Wage Determination**

### ***A. The principle of the right to life***

In Australia, the concept of minimum wage setting has a long history. It first appeared in 1890 when Sir Samuel Griffiths,<sup>20</sup> who was Premier of Queensland

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<sup>18</sup> Gregory Pellechi and Elizabeth Joseph, 'Garment workers, police clash in Cambodia', *The CNN* (online), 03 June 2013 <http://edition.cnn.com/2013/05/31/world/asia/cambodia-garment-workers-strike>.

<sup>19</sup> International Labour Organisation, above n 16.

<sup>20</sup> Plowman, above n 3, 253.

and the first Chief Justice of the High Court of Australia,<sup>21</sup> presented a Bill to the Parliament concerning right to life.<sup>22</sup> The Bill explained that the right to life was equally available to all people and that wages should be established to ensure that everyone could live in accordance to a decent living standard.<sup>23</sup> In his presentation to Parliament, Sir Griffiths also emphasised that the state should set the level of minimum wage to ensure the proper distribution of wage for labour.<sup>24</sup>

However, it was not until 1896 that legislation was established to create Wages Boards, regulating working hours and wages for workers in various specific industries<sup>25</sup> across Australia in Victoria, South Australia, Tasmania, and Queensland, followed by New South Wales in 1905. The newly established Wages Boards were granted jurisdiction to fix wages as well as piece rate work. During that time, minimum wage determination had appeared as a significant matter in Australia. In addition to the Minimum Wage Bill the importance of the right to life concept was also raised in the wage protection scheme at the federal level.

### ***B. A new minimum wage protection scheme***

The notion of federal minimum wage protection emerged in Australia in the early nineteenth century,<sup>26</sup> in response to the Commonwealth Government's concern about wage payment, particularly in the agricultural sector.<sup>27</sup> Alfred Deakin, the second Prime Minister of Australia, raised this concern in his memorandum to the Parliament regarding the low payment that employers in this industry paid to their labourers.<sup>28</sup> Therefore, it was suggested that the Commonwealth Parliament establish a law to give benefits to both employers and labourers, which provided employers with tax exemptions where they paid labourers a fair and reasonable

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Australian Trade Union Archives, *Wages Boards*, 12 December 2002  
<http://www.atua.org.au/biogs/ALE1462b.htm>.

<sup>26</sup> Plowman, above n 3, 254.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 253.

wage.<sup>29</sup> Subsequently the Commonwealth Parliament passed the *Excise Tariff 1906* which imposed an excise duty on agricultural machinery<sup>30</sup> which employers were exempt from if the court declared that the employer had paid their employees a fair and reasonable wage.<sup>31</sup> Unfortunately, the term 'fair and reasonable wage' had not been identified under the *Excise Tariff 1906*.<sup>32</sup> The *Act* provided no guidance or criteria by which fairness and a reasonable wage should be determined.<sup>33</sup>

As the term had not been identified under the *Excise Tariff 1906*, in order to receive a tax exemption, employers had to submit their applications to a tribunal for its decision that employers paid fair and reasonable remuneration.<sup>34</sup> Of the 112 applications, H.V. McKay was selected to be the first case that the court needed to decide the term 'fair and reasonable' wage.<sup>35</sup> At the time H.V. McKay, who produced harvester machines, was one of the largest employers of labour in Australia. Sir Justice Higgins, the President of the Federal Conciliation and Arbitration Court<sup>36</sup> handled this case. In his decision, Justice Higgins acknowledged that it was not an easy decision to make, as his Honour noted that he was invited to present himself as an expert in a large number of technical details in order to determine the case.<sup>37</sup>

To deal with this important task of interpreting the words 'fair and reasonable' wage for unskilled labourers,<sup>38</sup> his Honour first considered the purpose of the law.<sup>39</sup> The provision for a fair and reasonable wage had obviously been designed to provide benefit to workers in this industry, who were unable to secure

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<sup>29</sup> Ibid 255.

<sup>30</sup> *Ex parte H.V. McKay* (1907)2 CAR 1, 2.

<sup>31</sup> Ibid.

<sup>32</sup> Henry Bournes Higgins, *A New Province for Law and Order : being a review by its late president for fourteen years, of the Australian Court of Conciliation and Arbitration* (Workers' Educational Association of N.S.W, 1922) 3.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> *Ex parte H.V. McKay* (1907)2 CAR 1, 2.

<sup>36</sup> Higgins, above n 32, 1.

<sup>37</sup> *Ex parte H.V. McKay* (1907)2 CAR 1, 4.

<sup>38</sup> Ibid 5.

<sup>39</sup> Ibid 3.

appropriate wages from bargaining with their employers.<sup>40</sup> The law assumed that individual workers could not access a fair and reasonable wage from their employer, and therefore it was important to have provision for a tax exemption under the *Excise Tariff Act 1906*.<sup>41</sup> His Honour noted that he could not think of any standard to set the fair and reasonable wage, other than the normal needs of the average unskilled employee as a human being living in a civilized community to support himself, a wife and three children.<sup>42</sup>

At that time, the minimum wage had been determined in response to a traditional family structure where a breadwinner husband supported a wife and between two to three children.<sup>43</sup> Justice Higgins' decision on the meaning of fair and reasonable wage has been used as guidance in Commonwealth minimum wage determination for sixty years.<sup>44</sup> Although it seems now that Higgins' principle of minimum wage determination is out of date due to shifting family structures and the transformation of traditional gender based roles in Australian society, his legacy remains important in wage determination in ensuring that employees are able to earn sufficient wages for work performed to secure a decent living standard. It is also important to note that, court had a jurisdiction in determining minimum wage, not the Commonwealth government.

After considering the important history of minimum wage fixation in Australia, this paper now turns to the national minimum wage determination under Australia's current system. It focuses on the nature and the role of decision makers and criteria in determining the national minimum wage. It is then completed with the interaction process between interested parties in this wage review process.

### ***C. Overview of the current national minimum wage in Australia***

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Anna Chapman, 'Work/Family, Australian Labour Law, and the Normative Worker' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 82.

<sup>44</sup> Plowman, above n 3, 255.



In Australia, under the *FWA*, a national minimum wage review must be conducted by the MWP<sup>45</sup> of the FWC. This determination applies to employees who are not covered by awards or other agreements which include individual and enterprise bargaining agreements; who are not junior employees, employees under training arrangements or employees with a disability<sup>46</sup> as such groups are covered under a special national minimum wage order.<sup>47</sup> National minimum wage is the wage that is guaranteed by law, which requires employers to pay their employees at least equal to this wage, or face a civil penalty.<sup>48</sup> This wage is expressed in a monetary amount per hour.<sup>49</sup> When a national minimum wage order comes into effect it remains in operation until it is replaced by the following year's order.<sup>50</sup>

### **1. Decision Maker**

In Australia the FWC, which is a national workplace tribunal,<sup>51</sup> has the power to determine the national minimum wage.<sup>52</sup> This independent body was established to exercise its functions as regulated under the *FWA*. Importantly, however, the task of performing annual wage reviews must be conducted by a specialist body currently known as MWP of the FWC.<sup>53</sup> The MWP consists of seven members, which includes a President, a Vice President, a Deputy President, a Commissioner and three MWP members.<sup>54</sup>

To be eligible for panel membership certain qualifications are required. The President and Vice President must be judges of a court, which is established by the Parliament, or have knowledge of or experience in one of the areas related to workplace relations, law, business, industry or commerce.<sup>55</sup> The qualifications required of the Deputy President are broader. She or he must be a judge, or have

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<sup>45</sup> *Fair Work Act* (Cth) s 617(2).

<sup>46</sup> *Ibid* s 295 (3).

<sup>47</sup> *Ibid* s 295 (4).

<sup>48</sup> CCH Editors, *Understanding the Fair Work Act* (CCH Australia Limited, 2<sup>nd</sup> ed, 2010) 81.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*.

<sup>51</sup> Fair Work Commission, above n 8.

<sup>52</sup> Peter Waring and John Burgess, 'Continuity and Change in the Australian Minimum Wage Setting System: The Legacy of the Commission' (2011) 53(5) *Journal of Industrial Relations* 681, 685.

<sup>53</sup> *Fair Work Act 2009* (Cth) s 617 (2).

<sup>54</sup> *Ibid* s 12.

<sup>55</sup> *Ibid* s 627.

been a judge, in a court created by a state or territory parliament, or have a high level of experience in workplace relations,<sup>56</sup> including a high level of experience that has been acquired through legal practice or in the service of a top organisation that represents the interests of employers or employees or in the service of government or an authority of government or in academia.<sup>57</sup> A Commissioner must have a knowledge or experience in one of the areas related to workplace relations, law, business, industry or commerce.<sup>58</sup> These qualifications are also applied to the three MWP members.<sup>59</sup> It is important to note that knowledge of social policy is an additional qualification for MWP members, which is not required for other panel members. This mixture of specialist and generalist expertise provides crucial elements of the decision makers' capacities to ensure that the macro-economic and social impacts of wage determination decisions are properly considered by capable decision makers.<sup>60</sup>

Nonetheless, the assessment process of those qualifications poses a concern. All members of the panel are appointed by the federal Governor-General and must hold relevant qualifications, which are assessed by the Minister.<sup>61</sup> Therefore, these appointments may be motivated by a political agenda. For example, if the labour government is in power, they are likely to appoint people who are sympathetic to workers' rights given that this is the ideology of their political party. If it is a coalition government they are likely to appoint people who are sympathetic to business and employer rights. This selection process more or less will affect the decisions of the panel. Moreover, there is no mechanism under the *FWA* to examine the Minister's assessment of the panel. This absence means there is no check and balance in the selection process.

The President, Vice President, Deputy President and a Commissioner hold their

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<sup>56</sup> Ibid s 627(2)(b)(iv).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid s 627.

<sup>59</sup> Fair Work Commission, above n 8.

<sup>60</sup> CCH Editors, above n 48, 78.

<sup>61</sup> *Fair Work Act 2009* (Cth) s 627.

positions on a full time basis,<sup>62</sup> and are appointed until they retire or resign.<sup>63</sup> By contrast, MWP members hold their office on a part-time basis<sup>64</sup> and are appointed for not more than five years.<sup>65</sup> This provides a mix of working arrangements, which is useful as it might not be necessary for all MWP to perform their work on a full time basis due to the fact that minimum wage is only required to be reviewed on an annual basis.

A conflict of interests in decision-making is also prohibited under the *FWA*. The Vice President, Deputy President and Commissioner must not hold any paid work outside his or her own office.<sup>66</sup> A similar provision applies to the MWP members, whereby they cannot hold a job that would pose a conflict.<sup>67</sup> This conflict of interests provision attempts to assure that decision makers make their decisions independent of inappropriate external influence.

It appears that Australia has a transparent system that sets out the regulation of decision makers and a provision related to conflict of interests, but the current system does not work perfectly. There is a lack of scrutiny of the Minister's decision in assessing those applications for the MWP positions. Moreover, it is far from assured that those decision makers are completely independent in their decision making process. They can be inappropriately influenced by the public, peak bodies of employers, trade unions, political affiliations, and other government policies in determining their minimum wage decisions.

## **2. Criteria for national minimum wage determination**

Section 284 of the *FWA* provides that the MWP is required to perform an annual wage review which is compatible with the minimum wage objective<sup>68</sup> and which meets the following criteria:

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment

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<sup>62</sup> Ibid s 628 (1).

<sup>63</sup> Ibid s 629 (1).

<sup>64</sup> Ibid s 628.

<sup>65</sup> Ibid s 629.

<sup>66</sup> Ibid s 633.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid s 284.

- growth; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.<sup>69</sup>

The following paragraphs briefly discuss each criterion for national wage determination under the current regime in Australia.

### **The performance of the national economy**

In the past, under the national wage policy, in order to make a determination about the national minimum wage, decision makers reflected on the national economic capacity from general economic factors.<sup>70</sup> As such it became a legitimate expectation that there would be either an increase or a decrease in wages in line with economic performance.<sup>71</sup> These indicators provided a good understanding of economic conditions that prevail at the time of the proposed changes,<sup>72</sup> 'the prospects for the future and the effect that any decision would have on the economy, particularly inflation and unemployment.'<sup>73</sup>

Decision makers not only considered the interests of persons immediately concerned, but also the interests of persons who were not directly involved in the field of industrial relations,<sup>74</sup> including the young and the old, the employed and the unemployed, as well as fixed income earners.<sup>75</sup> Economic factors are not only important historically in relation to minimum wage determination, but are also paramount for current decisions.

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<sup>69</sup> Ibid.

<sup>70</sup> Confederation of Australian Industry and National Employers' Industrial Council, *National Wage Fixation in Australia* (1979) 57.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid 51.

<sup>75</sup> Ibid.

Under the current system, many factors are taken into account in minimum wage fixation, including the economic performance of Australia, which includes economic growth of the country, productivity, business competitiveness, inflation, wages growth, labour market, the state of small businesses, award-reliant industries, future growth of the economy and structural change in the economy. These economic factors are good indicators assisting decision makers to identify whether minimum wages should be increased or decreased. Many related factors are considered, from small business concerns to the industry level, which is designed to provide an in-depth understanding of economic conditions in Australia, including external impacts for the Panel to make evidence based decisions regarding the minimum wage review.

For example, in the annual national wage review, in 2011-2012, the Panel received written submissions from different parties including the Australian federal government, the peak employer association, the Australian Chamber of Commerce and Industry (ACCI), the peak employee association, the Australian Council of Trade Unions (ACTU)<sup>76</sup> concerning the economic situation of the country as well as global economic conditions that might impact on the Australian economy. Unsurprisingly, the ACCI noted that economic activity by industry remained varied, whilst the ACTU remarked that the outlook of the economic situation was favourable.<sup>77</sup> The Australian government also commented that the Australian economy remained strong and future growth was positive, however it was cautious about the weaker outlook in intensive sectors such as manufacturing.<sup>78</sup> In the annual wage review the following year (2012-2013), that Panel was of the same view as in previous years. They concluded that the economic situation in Australia remains reasonably strong and the outlook is favourable.<sup>79</sup>

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<sup>76</sup> Fair Work Commission, *National Minimum Wage Order 2012* (2012) 14  
<http://www.fwc.gov.au/index.cfm?pagename=wagereview2012&page=nmwo>.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Fair Work Commission, *National Minimum Wage Order 2013* (2013) 89  
<http://www.fwc.gov.au/decisionssigned/html/2013fwcfb4000.htm>.

The Panel not only takes into account economic factors and related matters, but also considers the promotion of social inclusion through workforce participation.

### **Promoting social inclusion through workforce participation**

When making decisions about minimum wages, the FWC must take into account various provisions under the minimum wage objective<sup>80</sup> which include the promotion of social inclusion through workforce participation.<sup>81</sup> Different explanations were provided concerning the meaning of 'social inclusion through workforce participation', which can be found in the first decision of the annual wage review in 2009-2010.

The Australian Social Inclusion Board through their submission to Fair Work Australia in 2010 (Currently known as the Fair Work Commission)<sup>82</sup> was of the opinion that:

The promotion of social inclusion relies on the promotion of decent work, and that decent work deserves decent wages. Building a socially inclusive Australia does not involve boosting employment at any cost. Allowing real minimum wages to erode over time will not promote social inclusion. We do not accept that social inclusion is enhanced in employment terms by adopting the position that there is a trade off to be made which involves increasing employment by driving minimum wages down.<sup>83</sup>

The Australian government also provided their views on the meaning of 'promoting social inclusion through workforce participation' by stating that it is:

Ensuring that there are adequate employment opportunities for people to engage in work, particularly those who are currently unemployed; increasing the incentive for employment where possible; and once employed, ensuring that low paid work provides a decent standard of living.<sup>84</sup>

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<sup>80</sup> *Fair Work Act 2009* (Cth) s 284.

<sup>81</sup> *Ibid* s 284 (1)(b).

<sup>82</sup> *Fair Work Amendment Act 2012* (Cth) sch 8.

<sup>83</sup> Fair Work Commission, *National Minimum Wage Order 2010* (2010) 61 <http://www.fwc.gov.au/index.cfm?pagename=wagereview2010&page=nmwo>.

<sup>84</sup> *Ibid*.

The employers' group (ACCI) together with the Australian Industry Group (AIG) considered that in the context of wage review this phrase should be interpreted to focus on creating job opportunities only.<sup>85</sup> In contrast to this view, ACTU emphasised that the concept of social inclusion went beyond job creation, and was also related to participation in quality employment and the provision of decent wages.

Given the different interpretations put forward, Fair Work Australia referred to research conducted by Ms. Lucy Nelms and Dr. Constantine Tsingas of the Minimum Wages and Research Branch. Drawing on this literature review, Fair Work Australia explained the concept of 'social inclusion' to mean:

That people have the resources (skills and assets, including good health), opportunities and capabilities they need to: Learn —participate in education and training; Work —participate in employment, unpaid or voluntary work including family and carer responsibilities; Engage — connect with people, use local services and participate in local, cultural, civic and recreational activities; and Have a voice — influence decisions that affect them.<sup>86</sup>

The Panel adopted a broader definition, which included job creation, quality of employment and employment incentives for those who were seeking jobs. This interpretation was also adopted by the annual wage review panel in its 2010-2011 decision. This approach has been taken by the Panel in 2011-2012 and 2012-2013.

Other important elements that the Panel has to consider are the relative living standards and the needs of low paid employees.

### **Relative living standards and the needs of the low paid employees**

Relative living standard requires the MWP to make a comparison between those whose wages are covered by modern awards and those of other relevant groups.<sup>87</sup> The needs of the low paid employees should be determined by the level

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<sup>85</sup> Ibid.

<sup>86</sup> Lucy Nelms and Dr Constantine Tsingas, 'Literature Review on Social Inclusion and Its Relationship to Minimum Wages and Workforce Participation' (Research Report 2/2010, Fair Work Commission, 2010) 11.

<sup>87</sup> Fair Work Commission, *National Minimum Wage Order 2013* (2013) 97

of wages that should enable a full-time wage earner to pay for essential purchases that allow them to live in decent living standards and be able to engage in community life.<sup>88</sup> The Panel noted that the assessment of decent living standards might be influenced by contemporary norms of what can be constituted as a decent standard of living.<sup>89</sup>

For example, the Panel in the 2012-2013 annual wage review acknowledged the difficulty in defining the needs of low paid employees,<sup>90</sup> however, the panel accepted that if low pay is a factor that forces employees into poverty, then a decent standard of living is not met.<sup>91</sup> To deal with this matter, the panel made a comparison of hypothetical low-income families with customary measures of poverty including the impact of the tax transfer system, a survey of financial stress and material deprivation among low paid households.<sup>92</sup>

As such, relative living standards were examined carefully by the Panel. The Panel also received several submissions from different parties regarding this matter. Those submissions not only highlighted living standards within Australia, but also provided a comparison to OECD countries.

Minimum wage decisions have to be decided in a way that full time low paid income earners can survive and be able to live in decent living standards. The Panel is also required to contemplate the principle of equal remuneration for work of equal or comparable value as another element in minimum wage criteria.

### **The principle of equal remuneration for equal work or comparable value**

The principle of equal remuneration for work of equal or comparable value also requires consideration in regard to minimum wage fixation. This principle is also

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<http://www.fwc.gov.au/decisionssigned/html/2013fwcfb4000.htm>.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 99.



stated in the ILO's Equal Remuneration Convention 1951 (No 100).<sup>93</sup> However, in the Australian context, this principle has not been interpreted as broadly as is embodied in the convention.<sup>94</sup> For a variety of reasons, women are still segregated from men in the Australian labour market.<sup>95</sup> Different industries and occupations have been concentrated in terms of gender—and more often than not those that are female-dominated tend to attract much lower levels of pay.<sup>96</sup> Section 12 of the *FWA* states that the principle of equal remuneration for work of equal or comparable value is concerned with equal remuneration between men and women workers who perform identical work.<sup>97</sup>

However, the principle of 'comparable value' tends to look beyond the idea of formal equality (i.e. paying men and women the same rate for the same or a similar job).<sup>98</sup> The Australian Government in their first year submissions for the review in 2009-2010 noted that this principle has been expanded to cover the term 'comparable value' for consideration of pay equity, which is designed to give a broader perspective than formal equality.<sup>99</sup> The Queensland Government also submitted its opinion that this principle allows a broader consideration of the factors that contribute to pay inequity. Those factors may include the invisibility of women's skills, and lack of access to bargaining,<sup>100</sup> and how the way we value work is understood.<sup>101</sup> The South Australian Government offered a similar view to the Federal Government and strongly advocated for the *FWA* to include provision of equal remuneration for work of comparable value, so that the decision makers can consider gender pay equity.<sup>102</sup>

In the 2012-2013 annual wage review parties have expressed different views on how equal remuneration should be considered and the effect of minimum wage

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<sup>93</sup> Andrew Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 4<sup>th</sup> ed, 2013) 203.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Meg Smith and Andrew Stewart, 'A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the Fair Work Act' (2010) 23(3) *Australian Journal of Labour Law*, 152, 161.

<sup>98</sup> Stewart, above n 93.

<sup>99</sup> Fair Work Commission, *National Minimum Wage Order 2010* (2010) 70  
<http://www.fwc.gov.au/index.cfm?pagename=wagereview2010&page=nmwo>.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

adjustment on gender equity.<sup>103</sup> On the one hand, employers' groups stated that to promote pay equity it does not necessarily mean the Panel has to increase the minimum wage, and that the collective bargaining approach in determining wages had been proved more effective in addressing pay equity.<sup>104</sup> On the other hand, employees' groups argued that although alternative mechanisms are available to address this issue, including collective bargaining, minimum wage increases and bargaining outcomes are inextricable. Minimum wage rates can set a floor for the negotiation process, which helps to improve gender pay equity.<sup>105</sup> The Australian Government expressed that minimum wage decisions should improve wage outcomes for low-paid women.<sup>106</sup>

Finally, the Panel concluded that they would maintain a similar approach to pay equity as in previous years.

Given women are disproportionately represented amongst the low paid, an increase in minimum wages is likely to promote pay equity, although moderate changes in award rates of pay would be expected to have only a small effect on the overall differences in earnings between males and females.<sup>107</sup>

The panel also acknowledged that other mechanisms within the *FWA* provide a more direct means of addressing pay equity.<sup>108</sup> However, they still accepted that minimum wage increases play a role in promoting pay equity.<sup>109</sup>

**Providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability**

As provided in section 294 of the *Fair Work Act*, the Panel must set a special national minimum wage for employees not covered by an award or agreement including (1) Junior employees (2) employees to whom training arrangement

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<sup>103</sup> Fair Work Commission, *National Minimum Wage Order 2013* (2013) 127  
<http://www.fwc.gov.au/decisionssigned/html/2013fwcfb4000.htm>.

<sup>104</sup> Ibid 128.

<sup>105</sup> Ibid 127.

<sup>106</sup> Ibid 128.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

apply and (3) employees with a disability. This paper will not deal with this criterion because it is out of scope for this paper.

In summary, national minimum wage setting in Australia has given more emphasis to the needs of employees to live in a decent living condition rather than being concerned with what the industry needs to relinquish.<sup>110</sup> This consideration is not much different from the *Harvester* decision in 1907 to make sure that fair and reasonable wages are provided to employees so that they can make their own living. To ensure that employees can live in decent living standards many criteria have been considered including economic and its related factors, social inclusion, the needs of low-income earners, as well as the principle of equal remuneration for work of equal or comparable value. In short, there is always an attempt made by MWP to balance between the need of free enterprise to hire their employees in competitive terms and the need of unskilled labourers to earn enough so that they can enjoy reasonable living conditions.

### 3. Process

There are provisions within the *FWA* that enable the FWC to take varying courses of action in the way that it conducts the national minimum wage review. They include:

#### Timing

Generally the annual wage review is conducted from May until June, which is in the second half of the financial year.<sup>111</sup> The annual wage decision will be made and that decision will come into effect on 1 July in the next financial year.<sup>112</sup> Only in exceptional circumstances will the operation be effective later than 1 July.<sup>113</sup> Such delays only apply to the particular situation to which the exceptional circumstances relate.<sup>114</sup> Unfortunately, there is no definition of 'exceptional circumstances' specified under the *Act*.

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<sup>110</sup> Price, above n 1, 110.

<sup>111</sup> Fair Work Commission, above n 8.

<sup>112</sup> *Fair Work Act 2009* (Cth) s 287 (1).

<sup>113</sup> *Ibid* s 287 (4).

<sup>114</sup> *Ibid* s 287 (4).

## **Submissions**

It is important to emphasise that procedural fairness also has a role to play in the annual wage review. Under the current regime, interested parties can make their written submissions as well as comments to the Panel if they have any comments or concerns about the wage review.<sup>115</sup> FWC must ensure that all concerned parties, which include organisations and persons, have reasonable time to make written submissions to the FWC for consideration in the wages review.<sup>116</sup> All of their submissions need to be published<sup>117</sup> unless a person or a body claims that the submission contains confidential or commercially sensitive information, which should not be published and the FWC has to satisfy this demand for allowing this document not to be disclosed.<sup>118</sup> If the party or an organisation cannot prove to the FWC that the document is sensitive, then the document needs to be published. FWC also has the right to publish sensitive documents in a summary format, which should present sufficient information to allow a reasonable understanding for comments.<sup>119</sup> Publication must be made on the FWC's website or any other means that the FWC considers appropriate.<sup>120</sup> This whole process is designed to foster the perception of openness and transparency about how the FWC exercises and performs its power and functions.<sup>121</sup>

## **Investigation and report**

Investigation about a matter concerning wages review may be required to be conducted under the direction of the President.<sup>122</sup> After the investigation is finished, a report needs to be made for the purpose of the annual wage review.<sup>123</sup> It is designed to provide the President with the flexibility to target specific matters as well as specific groups of employees that might be vulnerable in the

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<sup>115</sup> Fair Work Commission, above n 8.

<sup>116</sup> *Fair Work Act 2009* (Cth) s 289.

<sup>117</sup> Ibid s 289(2) and Fair Work Commission above n 8.

<sup>118</sup> *Fair Work Act 2009* (Cth) s 289 (3).

<sup>119</sup> Ibid s 289 (3)(b)(i).

<sup>120</sup> Ibid s 289 (6).

<sup>121</sup> CCH Editors, above n 48, 80.

<sup>122</sup> *Fair Work Act 2009* (Cth) s 290 (1).

<sup>123</sup> Ibid.

wage decision process,<sup>124</sup> such as junior employees or employees with a disability.

For instance, in annual wage review 2011-2012, many written submissions were received,<sup>125</sup> public consultations were conducted,<sup>126</sup> research projects were undertaken to respond to the objective of the wage review.<sup>127</sup> Furthermore, all written submissions, transcripts, research reports and some additional data were made available under the FWC's website.<sup>128</sup> At the end of the review, the Panel will issue its decision and the explanation will be presented.<sup>129</sup>

### **Publication**

There is an attempt under the *FWA* to make sure that the process of the annual wage review is conducted in a transparent manner. In this regard, reports from research also have to be published on the FWC's website or any other means that consider appropriate by the FWC. There is no provision in the *FWA* to prevent that research from publications which is different from the written submissions that written by interested parties. To this extent, it is not clear whether FWC could also prevent a report from publication if they think it contains sensitive information.

The following section examines minimum wage setting within the current context of Cambodia and seeks to identify what Cambodia can do to improve the current minimum wage fixation compared to current Australian procedures.

## **III. Cambodian System of Minimum Wage Determination and its differences from Australia**

### ***A. Current minimum wage determination in Cambodia***

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<sup>124</sup> CCH Editors, above n 48, 80.

<sup>125</sup> Fair Work Commission, *National Minimum Wage Order 2012* (2012) 5  
<http://www.fwc.gov.au/index.cfm?pagename=wagereview2012&page=nmwo>

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Fair Work Commission, above n 8.

<sup>129</sup> Ibid.

In Cambodia, the minimum wage decision is made by the Minister in charge of labour and covers all employees who are employed in the garment and footwear sector. The first minimum wage in this sector was US\$ 40 per month in 1997.<sup>130</sup> This wage was increased to US\$45 in 2000<sup>131</sup> and increased to US\$ 50 six years later.<sup>132</sup> In 2010, the Government decided to increase the minimum wage to US\$ 61 and then in May 2013 it was again increased to US\$ 80 per month.<sup>133</sup> Throughout this past decade, the minimum wage has been increased between US\$5 to US\$ 19 per rise, with the review of the minimum wage in this sector being more frequent.

Minimum wage is expressed in US dollars per month, although *riel* is the Cambodian national currency.<sup>134</sup> This is perhaps because of current payment practices in this industry, which is characterized by around 93 percent of companies being foreign owned, where the American currency is used widely.<sup>135</sup> Moreover, the dollar figure is often used as the international benchmark in measuring the poverty rate, which can be used for a basis in fair wage campaigns.<sup>136</sup> However, using a dollar as a standard to set minimum wage does not always reflect the actual value of goods in domestic markets<sup>137</sup> where the *riel* is still dominant.

There is no specific time frame for reviewing the minimum wage decision, which can be varied from time to time at the discretion of the minister.<sup>138</sup> In such absence of transparent review procedures, workers use their collective influence to strike to push the government to reconsider the minimum wage.<sup>139</sup> For example, between 2007 and 2009, there were 205 strikes in Phnom Penh (the

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<sup>130</sup> Kang, above n 5.

<sup>131</sup> Vesna Nuon and Melisa Serrano, *Building Unions in Cambodia: History, Challenges, Strategies* (Friedrich Ebert Stiftung, 2010) 36.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Royal Government of Cambodia, *Sub-decree on the Organisation and functioning of the National Bank of Cambodia*, 19 AN.KR, 22 June 1992, art 2.

<sup>135</sup> Yevgeniyia Savchenko and Gladys Lopez Acevedo, 'Female Wages in the Apparel Industry Post -Mfa: The Cases of Cambodia and Sri Lanka' (Working Paper, The World Bank, 2012) 3.

<sup>136</sup> Chris Manning, 'Promoting Fair Wages, Productivity and Jobs in Garments and Footwear in Indonesia' (Report, Adidas-Salomon, 2010) 4.

<sup>137</sup> Ibid.

<sup>138</sup> *Cambodian Labour Law* art 107.

<sup>139</sup> Nuon, above n 131, 33.

capital city of Cambodia).<sup>140</sup>In a majority of these strikes, a demand to increase minimum wages was at the center of the list of demands.<sup>141</sup>

### 1. Decision Maker

Unlike the current Australian system, in Cambodia the decision of minimum wage determination is not handed down by an independent tribunal. This authority has been given to the Minister in charge of labour,<sup>142</sup> after receiving a recommendation from LAC, which is formed under Ministry of Labour.<sup>143</sup>

The Minister is a politician who is appointed by the political party when they win a national election. Because the Minister is a member of a political party, he will probably act in line with the political agenda, which does not necessarily result in judicious outcomes. Although *Cambodian Labour Law* states that the Minister's decision on minimum wage determination shall be issued after receiving a recommendation from LAC, the word 'recommendation' makes it clear that the Minister is not required to follow that recommendation. At the time of writing, the process for deciding on whether to reject or accept the LAC's recommendations is not public. Therefore, it is difficult to ascertain when a decision is required, or the criteria for making a decision. However, it is worthwhile, examining the legislative provisions regarding the composition and voting process of this committee in minimum wage determination.

*Cambodian Labour Law* states that the function and composition of the LAC is stipulated in the *sub-decree*,<sup>144</sup> which is a regulation issued by the Prime Minister who is the head of the executive branch of Government. Article 2 of the *sub-decree* states that the Committee consists of 14 members from government bodies,<sup>145</sup> seven members from employer organisations<sup>146</sup> and seven members

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<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> *Cambodian Labour Law* art 107.

<sup>143</sup> Ibid art 351.

<sup>144</sup> Ibid art 352.

<sup>145</sup> Royal Government of Cambodia, *Sub-decree on the composition and functions of the Labour Advisory Committee*, 47 HNKBK, 21 May 2006, art 2.

<sup>146</sup> Ibid.

from employee associations.<sup>147</sup> Representatives from both employer and employee organisations must represent a majority of employees or employers in the sector at the national level.<sup>148</sup> The Committee elects two vice presidents, one each from employee and employer representatives.<sup>149</sup>

This tripartite institution creates five potential concerns in relation to minimum wage determination. Firstly, either the Cambodian Labour Law or *Sub-decree* provides any guidance on the type of qualifications required for committee members. Although it can be argued that different group representatives (employers and employees) would have a much better appreciation of the conditions affecting their constituents in the workplace, there is no means of guaranteeing that the people appointed to provide input into the process have expertise in areas of concern when determining the minimum wage such as law, commerce, workplace relations, economic and public policy and the industry that minimum wage is going to apply. These qualifications are important to ensure that decision makers have a capacity to determine the minimum wage, which ultimately has an impact on the social and economic situation of the country.

Secondly, several trade unions in Cambodia are considered to be either pro-government, in opposition to government or an international community union.<sup>150</sup> Pro-government unions are influenced by both the ideology of and/or financially supported by the ruling party whereas pro-opposition party unions receive support from the opposition party.<sup>151</sup> The international community unions tend to receive financial support from the international community,<sup>152</sup> which have their own set of interests, determined by outsiders and foreign donors. For instance, many trade unions that participate in the LAC meetings are those, which are pro-government, therefore they are more likely to accept the

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<sup>147</sup> Wage indicator. org, *Minimum Wage for the Garment and Shoe Industry in Cambodia* (2013) <http://www.wageindicator.org/main/minimum-wages/cambodia/minimum-wage-for-the-garment-and-shoe-industry-in-cambodia-2>.

<sup>148</sup> *Cambodian Labour Law* art 351.

<sup>149</sup> *Ibid.*

<sup>150</sup> Nuon, above n 131, 26.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*



suggestion and decision of the government.<sup>153</sup> As indicated by the International Labour Organisation's 'Decent Work Country Program for Cambodia (2011-2015)'<sup>154</sup> the LAC's capacity will need to be improved so that they can more effectively represent their members' interests.<sup>155</sup>

Thirdly, government control over the voting process also raises concerns. In any vote, a decision is based on a simple majority with a tie decided by the President's vote.<sup>156</sup> At the moment, 14 of the 28 members are government officers, while some of the union members are also explicitly pro-government. This suggests that all votes are likely to support the government's recommendation. Nevertheless, actions have been taken by members who are not satisfied with the decision. For pro-opposition party unions, their recourse is limited to advising and organizing their members to go on strike.<sup>157</sup> International community unions will continue to call for actions from brands that source from Cambodia's garment and footwear factories, to continue to put pressure on factories' management to ensure the minimum wage is increased.<sup>158</sup> Unsurprisingly, management tries to put pressure on the government to reallocate their resources if the minimum wage is increased. To keep those businesses from moving out of the country, the Prime Minister has warned workers not to go on strike to demand for increasing minimum wage, stating that 'Garment factories are like your cooking pot. So if the workers and the factory owners have disputes it is destroying the cooking pot'.<sup>159</sup>

Fourthly, the requirement that employers and employees' organisations must have a majority of representatives in the sector at the national level poses

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<sup>153</sup> Ibid 37.

<sup>154</sup> International Labour Organisation, 'Decent Work Country Programme Cambodia (2011-2015)' (Report, 2010) 28.

<sup>155</sup> Ibid.

<sup>156</sup> Royal Government of Cambodia, *Sub-decree on the composition and functions of the Labour Advisory Committee*, 47 HNKBK, 21 May art 7.

<sup>157</sup> RFA's Khmer Service, 'Cambodia Ups Minimum Wages for workers', *Radio Free Asia* (online), 21 March 2013 <http://www.rfa.org/english/news/cambodia/wages-03212013185628.html>.

<sup>158</sup> Thorn Ath, 'Statement of Cawdu on International Labour Day 2013' (2013) *Coalition of Cambodian Apparel workers democratic union 2*.

<sup>159</sup> Cambodian Center for Human Right and Community Legal Education Center, 'A tightening noose: Briefing note on the restrictions on unions campaigning for an increased minimum wage in Cambodia' (Report, 2010) 3 <http://www.dtp.unsw.edu.au/documents/FactSheet-TradeUnionsandminwage.pdf>.

challenges. Statistics and data analyses needs to be put into consideration in order to identify whether those employers or employees are still the most representative of the sector at the national level. For the employers' side, it is relatively easy to access membership statistics as they can be found on their website; however, the number of union members has so far been difficult to ascertain because multiple unions can represent employees in a single factory and some workers join more than one union.<sup>160</sup> Importantly, lots of data are out of date.

Fifthly, the restriction of LAC membership to majority representatives at the national level, legally excludes those who are in minority unions. This requirement makes it difficult for those workers who are members of a union that does not represent the majority at the national level, to have their concerns heard. This perhaps can be improved by allowing participation from different interested parties including employers, trade unions from the minority as well as the community in general through public hearing, submission, or consultations. By promoting these opportunities, a wider source of information is gathered to assist in minimum wage fixing. This strategy is being used in the Australian system in terms of wider public consultations during the wage review process.

## **2. Criteria for minimum wage determination**

The criteria to be taken into account when setting the minimum wage are provided in article 107 of the *Cambodian Labour Law* which include:

‘Elements to take into consideration for determining the minimum wage shall include, to the extent possible:

- a) the needs of workers and their families in relation to the general level of salary in the country, the cost of living, social security allowances, and the comparative standard of living of other social groups;
- b) economic factors, including the requirements of economic development, productivity, and the advantages of achieving and maintaining a high level of employment.’<sup>161</sup>

From a direct comparison of the Australian wage-setting criteria, Cambodia does not have the following Australian criteria: (1) the principle of equal

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<sup>160</sup> Manning, above n 136, 34.

<sup>161</sup> *Cambodian Labour Law* art 107.

remuneration for comparable work value (2) social inclusion through workforce participation and (3) comprehensive range of fair minimum wage to junior employees to whom training arrangements apply and employees with a disability. The last element will not be discussed in this paper because this is covered by a special national minimum wage, which is outside the scope of this paper.

Although acknowledging that the phrase 'to the extent possible' in article 107 of the *Cambodian Labour law* perhaps already included these elements, at the time of writing there has been no explanation regarding elements that decision makers put into consideration when deciding on minimum wage fixation for the industry. Without a detailed explanation, it is unclear whether the decision makers have considered these elements. The next section will propose that these elements should be included in the ministerial decision.

### **The principle of equal remuneration for comparable work value in Cambodia**

The principle of equal remuneration for comparable work value is missing from the *Cambodian Labour Law* as one amongst other elements in deciding the minimum wage setting. This paper suggests that it be taken into consideration when determining the minimum wage.

It is important first to understand the differences between equal value and comparable value. Equal value is the same payment should be provided when both men and women perform identical work.<sup>162</sup> This explanation is expressed similarly under article 106 of the *Cambodian Labour Law* which states that 'For work of equal conditions, professional skill and output, the wage shall be equal for all workers subject to this law, regardless of their origin, sex or age.'<sup>163</sup> Comparable value provides a broader scope for examining the reasons that contribute to pay inequality.<sup>164</sup> This could be due to a long history of sex-

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<sup>162</sup> Fair Work Commission, *National Minimum Wage Order 2010* (2010) 70  
<http://www.fwc.gov.au/index.cfm?pagename=wagereview2010&page=nmwo>.

<sup>163</sup> *Cambodian Labour Law* art 106.

<sup>164</sup> Fair Work Commission, *National Minimum Wage Order 2010* (2010) 70

segregated employment sectors and different pay scales between men and women in the labour market, as well as the lower levels of education among women, which places them at a disadvantage in relation to men.

In the situation where the wage is determined by the market rate, women's pay rate is sometimes less than men's, as male jobs were traditionally compensated highly in part because they were held by men, and female jobs were traditionally compensated poorly in part because they were held by women. For example, in Cambodia the apparel sector is a female-labour intensive sector where women account for roughly 90 per cent of the total workforce<sup>165</sup> and almost always they are employed as sewing or knitting workers, which are very traditional jobs for women in that country. As a result, women's wages are comparatively less than male wages across all industries.<sup>166</sup> The principle of comparable work value is important because it will help to build a fairer community in which the value of every worker is recognized and rewarded regardless of gender, and will also encourage greater participation by women in the labour market.<sup>167</sup>

### **Promoting social inclusion through workforce participation**

When determining the minimum wage, social inclusion through workforce participation should be included in the *Cambodian labour law* among other compulsory elements. This paper proposes that this important element should be included for two main reasons.

First, the minimum wage should be set in a way that provides decent work and decent work should be paid for with a decent wage. It is not enough to provide adequate employment to those who are looking for jobs; quality employment is necessary to keep those in employment. A lack of transparency in minimum wage determination—resulting in not enough wages to live on—is one of the factors that might encourage those who are looking for a job to leave the country for more job opportunities overseas. Among those are women who are

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<http://www.fwc.gov.au/index.cfm?pagename=wagereview2010&page=nmwo>.

<sup>165</sup> International Labour Organisation, above n 16.

<sup>166</sup> Savchenko, above n 135, 13.

<sup>167</sup> Queensland Government, 'Pay Equity in Queensland' (online) 9 March 2012

<http://www.justice.qld.gov.au/fair-and-safe-work/industrial-relations/pay-equity-in-queensland>.

vulnerable to abuse and exploitation in terms of sex discrimination in overseas work as (illegal) migrants.<sup>168</sup> A minimum wage is needed to encourage workforce participation and help reduce the risk of migration workers from going to work overseas. They might not leave the country if the employers provide them enough wages to live with decent living conditions. Social inclusion through workforce participation should include both the pay and conditions that are attached to the job concerned.

Second, the concept of social inclusion attempts to provide an understanding of people who have disadvantages in participating in society, rather than just focus on productivity or outcome.<sup>169</sup> This goes beyond the result of performance, and focuses on why this result occurred. For instance, women in Cambodia tend to receive low paid work. In Cambodia, 50% of rural women are illiterate.<sup>170</sup> The reason for this high illiteracy rate is being denied access to education because of poverty as well as cultural practices, which reinforce their domestic roles as mothers and caregivers.<sup>171</sup>

The impact of not appreciating the difficulty of disadvantaged groups especially women, can perhaps be linked to different social problems in Cambodia. First, when the minimum wage is not set to ensure that employees can make purchase their basic needs, some women workers decide to become sex workers,<sup>172</sup> or force themselves to work overtime to supplement their incomes. In Cambodia, roughly 450, 000 workers are employed in garment factories<sup>173</sup> and 80% of them are women who have migrated from the rural areas<sup>174</sup> and moved to stay in the city where they need to pay for everything from food to rent and provide remittances to their families in the provinces. If the minimum wage is not enough

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<sup>168</sup> Lee Chen Chen, 'Cambodia Women Migrant Workers: Findings from a Migration Mapping Study' (United Nations Development Fund for Women, 2006) 3.

<sup>169</sup> The University of Sydney, 'Workforce Participation and Social Inclusion' (online) 23 May 2013 <[http://sydney.edu.au/business/workplaceresearch/research/themes/workforce\\_participation](http://sydney.edu.au/business/workplaceresearch/research/themes/workforce_participation)>.

<sup>170</sup> UNESCO Institute for Lifelong learning, 'Community Self-prevention Against Trafficking of Women and Children (CSPATWC) (online) <http://www.unesco.org/uil/litbase/?menu=4&programme=97>

<sup>171</sup> Ibid.

<sup>172</sup> Melanie Walsh, 'Report on the Status of Cambodian Women, Domestic Violence, Sexual Assaults and Trafficking for Sexual Exploitation' (Report, Institut d'études Internationales de Montreal, 2007) [1.1.4]

<sup>173</sup> International Labour Organisation, above n 16.

<sup>174</sup> Annuska Derks, *Khmer Women on the Move* (University of Hawaii Press, 2008) 64.

to pay for their basic needs, it may encourages them to perform more work that is available to increase their income. A minimum wage should be set in understanding the problems of those who are disadvantaged and certain mechanisms should be put in place to help improve their conditions, rather than reducing the minimum wage. This can perhaps be done by providing vocational training or education and thereby improving the labour supply.<sup>175</sup>

### 3. Process

The minimum wage determination process stated under the law differs from what actually happens in practice. According to the *Cambodian Labour Law*, the Minister in charge of labour shall issue his decision on minimum wage determination after receiving a recommendation from LAC.<sup>176</sup> In order for LAC to be able to provide a recommendation to the Minister, certain tasks should be performed including conducting a study on wages.<sup>177</sup> In practice, however, LAC has not conducted any wage study and no explanation has been given for failing to do this important task. LAC normally provides its recommendation to the Minister after having meetings or consultations on wage determination among its members.

Unlike the *FWA*, the *Cambodian Labour Law* has limited scope of public participation in the minimum wage review. Article 355 of *Cambodian Labour Law* provides for qualified officers in areas of economics, medicines, social or cultural matters to be invited to participate in LAC's meetings for consultations, at the request of the Chair- person (Minister or his representative) or one of the vice chair persons.<sup>178</sup> At the time of the writing, it is unknown whether an expert has been invited for consultations regarding minimum wage review. Moreover, this procedural restriction (only upon a request of the chair person or one of the vice- chair persons) is thought to have adverse effects on the minimum wage determination process because decision makers cannot access all the information that is important and relevant to their decisions.

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<sup>175</sup> The University of Sydney, above n 169.

<sup>176</sup> *Cambodian Labour Law* art 107

<sup>177</sup> Ibid art 357.

<sup>178</sup> Ibid art 355.

Furthermore, the details of decision making on the minimum wage remains a mystery. It is unclear under the *Cambodian labour law* whether the Minister is required to give an explanation for accepting or rejecting the recommendation from the LAC regarding his decision in minimum wage fixation. As a minimum wage decision is very important in its nature, the decision in setting this wage should be done in a more transparent manner and all relevant information that the decision maker considered when determining this wage needs to be published. In this way, the employees in the garment and footwear sector will have a better understanding about their minimum wages and accept the decision, leading to industrial peace.

#### **IV. Conclusion and critical gaps in the Cambodian policy and practice**

This paper has reviewed the current regime of national minimum wage determination in Australia by highlighting both its strengths and weaknesses in this decision-making process. It has explored the provisions that are related to decision makers, criteria in determining the national minimum wage and the interaction between the decision makers and the public. Cambodia's current regime of minimum wage fixation has also been examined along the way, focusing on the structure of the tripartite institution, and the lessons that can be learnt from Australia. After these examinations, it is evident that reform options should be considered in the minimum wage determination process in Cambodia. Recommendations are proposed as below:

- Minimum wage should be determined by an independent body rather than be the outcome of the bargaining process between the employees and employers due to the wide gap in employees' and employers' bargaining power.
- A clear and credible process in the selection and appointment of LAC should be developed. This committee should be selected with certain qualifications that are relevant to minimum wage determination decisions such as law, workplace relations, public policy, business, industry or commerce.
- Two more elements should also be included in minimum wage determination—

the principle of equal remuneration for comparable work value and promoting social inclusion through workforce participation.

- Minimum wage determination should include extensive dialogue and consultation with employers, trade unions representative as well as community (individual or organisation) who have concerns about this wage.
- Investigation and research should be conducted into matters that are related to the minimum wage determination, including those workers who claim their voices are not being heard by the wage fixing machinery.
- All committee decisions need to be published together with the detailed explanations about the reason behind this important decision. All relevant documents from parties or interested group also need to be published. This will allow the public to monitor the committee decision process and to ensure that its decision is delivered in a transparent manner.



## Bibliography

### *A Articles/Books/Reports*

- Ath Thorn, 'Statement of Ccawdu on International Labour Day 2013' (2013) *Coalition of Cambodian Apparel workers democratic union*
- Cambodia Institute of Development Study and Friedrich-Ebert\_Stiftung, 'Arguments for Minimum Wage: A Guidebook for Trade Unions' (2009)  
<http://apirnet.ilo.org/resources/arguments-for-minimum-wage-a-guidebook-for-cambodian-trade-unions>
- Cambodian Center for Human Right and Community Legal Education Center, 'A tightening noose: Briefing note on the restrictions on unions campaigning for an increased minimum wage in Cambodia' (Report, 2010) 3  
<http://www.dtp.unsw.edu.au/documents/FactSheet-TradeUnionsandminwage.pdf>
- CCH Editors, *Understanding the Fair Work Act* (CCH Australia Limited, 2<sup>nd</sup> ed, 2010)
- Confederation of Australian Industry and National Employers' Industrial Council, *National Wage Fixation in Australia* (1979)
- Chapman Anna, 'Work/Family, Australian Labour Law, and the Normative Worker' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005)
- Chen Chen Lee, 'Cambodia Women Migrant Workers: Findings from a Migration Mapping Study' (United Nations Development Fund for Women, 2006)
- Derks Annuska, *Khmer Women on the Move* (University of Hawaii Press, 2008)
- Higgins Henry Bourne, *A New Province for Law and Order : being a review by its late president for fourteen years, of the Australian Court of Conciliation and Arbitration* (Workers' Educational Association of N.S.W, 1922)
- International Labour Organisation, ' Action-oriented research on gender equality and the working and living conditions of garment factory workers in Cambodia' (Research Report, 2012) [http://www.ilo.org/asia/whatwedo/publications/WCMS\\_204166/lang-en/index.htm](http://www.ilo.org/asia/whatwedo/publications/WCMS_204166/lang-en/index.htm)
- International Labour Organisation, 'Decent Work Country Programme Cambodia (2011-2015)' (Report, 2010)
- Indian Institute of Management Amsterdam Institute for Advanced Labour Studies, Wageindicator Foundation, 'Minimum Wage Report, Cambodia' (Report, 2011)
- Kang Chandararot and Liv Dannet, 'Study on Minimum Wage for Cambodia's Garment Industry' (Report, Cambodia Institute of Developing Study and Community Legal Education Center, 2009)
- Manning Chris, 'Promoting Fair Wages, Productivity and Jobs in Garments and Footwear in Indonesia' (Report, Adidas-Salomon, 2010)
- Nelms Lucy and Dr Constantine Tsingas, 'Literature Review on Social Inclusion and Its Relationship to Minimum Wages and Workforce Participation' (Research Report 2/2010, Fair Work Commission, 2010)
- Nuon Vesna and Melisa Serrano, *Building Unions in Cambodia: History, Challenges, Strategies* (Friedrich Ebert Stiftung, 2010)
- Price Rohan and John Kong Shan Ho, 'Implementing a statutory minimum wage in Hong Kong: Appreciating International experiences but recognising local conditions' (2011) 40(2) *Common Law World Review* 95
- Plowman David H., 'Protecting the Low Income Earner: Minimum Wage Determination in Australia' *The Economic and Labour Relations Review* 252

- Savchenko Yevgeniyia and Gladys Lopez Acevedo, 'Female Wages in the Apparel Industry Post -Mfa: The Cases of Cambodia and Sri Lanka' (Working Paper, The World Bank, 2012)
- Stewart Andrew, *Stewart's Guide to Employment Law* (The Federation Press, 4<sup>th</sup> ed, 2013)
- Smith Meg and Andrew Stewart, 'A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the Fair Work Act' (2010) 23(3) *Australian Journal of Labour Law* 152
- Waring Peter and John Burgess, 'Continuity and Change in the Australian Minimum Wage Setting System: The Legacy of the Commission' (2011) 53(5) *Journal of Industrial Relations* 681
- Walsh Melanie, 'Report on the Status of Cambodian Women, Domestic Violence, Sexual Assaults and Trafficking for Sexual Exploitation' (Report, Institut d'études Internationales de Montreal, 2007)
- Waring Peter and John Burgess, 'Continuity and Change in the Australian Minimum Wage Setting System: The Legacy of the Commission' (2011) 53(5) *Journal of Industrial Relations* 681

#### B Case

- *Ex parte H.V. McKay* (1907) 2 CAR 1

#### C Legislation

- *Cambodian Labour Law*
- *Cambodia Ministerial notification on minimum wage determination for garment and footwear industry No. 017/00*
- *Fair Work Act 2009* (Cth)
- *Fair Work Amendment Act 2012* (Cth)
- Fair Work Commission, *National Minimum Wage Order 2010* (2010)
- <http://www.fwc.gov.au/index.cfm?pagename=wagereview2010&page=nmwo>
- Fair Work Commission, *National Minimum Wage Order 2011* (2011)
- <http://www.fwc.gov.au/index.cfm?pagename=wagereview2011&page=nmwo>
- Fair Work Commission, *National Minimum Wage Order 2012* (2012) 14
- <http://www.fwc.gov.au/index.cfm?pagename=wagereview2012&page=nmwo>
- Fair Work Commission, *National Minimum Wage Order 2013* (2013) 89
- <http://www.fwc.gov.au/decisionssigned/html/2013fwcfb4000.htm>
- Royal Government of Cambodia, *Sub-decree on the composition and functions of the Labour Advisory Committee*, 47 HNKBK, 21 May 2006
- Royal Government of Cambodia, *Sub-decree on the Organisation and functioning of the National Bank of Cambodia*, 19 AN.KR, 22 June 1992

#### D Others

- Australian Trade Union Archives, *Wages Boards*, 12 December 2002
- <http://www.atua.org.au/biogs/ALE1462b.htm>
- Fair Work Commission, (2013) <<http://www.fwc.gov.au/>>

- Pellechi Gregory and Elizabeth Joseph, 'Garment workers, police clash in Cambodia', *The CNN* (online), 03 June 2013 <http://edition.cnn.com/2013/05/31/world/asia/cambodia-garment-workers-strike>
- Queensland Government, 'Pay Equity in Queensland' (online) 9 March 2012 <http://www.justice.qld.gov.au/fair-and-safe-work/industrial-relations/pay-equity-in-queensland>
- RFA's Khmer Service, 'Cambodia Ups Minimum Wages for workers', *Radio Free Asia* (online), 21 March 2013 <http://www.rfa.org/english/news/cambodia/wages-03212013185628.html>
- The University of Sydney, 'Workforce Participation and Social Inclusion' (online) 23 May 2013 [http://sydney.edu.au/business/workplaceresearch/research/themes/workforce\\_participation](http://sydney.edu.au/business/workplaceresearch/research/themes/workforce_participation)
- UNESCO Institute for Lifelong learning, 'Community Self-prevention Against Trafficking of Women and Children (CSPATWC)' (online) <http://www.unesco.org/uil/litbase/?menu=4&programme=97>
- Wage indicator. org, *Minimum Wage for the Garment and Shoe Industry in Cambodia* (2013) <http://www.wageindicator.org/main/minimum-wages/cambodia/minimum-wage-for-the-garment-and-shoe-industry-in-cambodia-2>