Australian Institute of Employment Rights

# Industrial Fairness

## – the essentials

**Now is the time to lay the platform for fairness in Australian workplaces**

The Australian Institute of Employment Rights (AIER) welcomes the advances in employment rights embodied in the Government's *Forward with Fairness* policy and implementation plan.

During 2007 AIER defined the essential elements of fairness at work. We consulted extensively with the public as part of this process.

The Australian Charter of Employment Rights is the result of this work (see page v).

We are concerned that aspects of *Forward with Fairness* do not meet Australia's obligations under international law, or the standard of AIER's Charter of Employment Rights. We also believe that this gap may widen following lobbying from interest groups.

AIER hopes its Charter will inform and inspire Labor's new legislation and provide a framework for the new regulatory system. The following represents the key issues that need to be addressed by new legislation.

**We ask the federal Government to take steps to ensure that the problems we have identified are addressed in the manner we propose. >>**

## Security of Employment Now

**THE ISSUES**

ILO conventions demand that every Australian worker is protected against unfair, capricious or arbitrary dismissal without valid reason. A person's right to be treated with dignity provides one basis for protection against unjust dismissal.

Job security should not be altered or interfered with in the absence of a valid reason and a fair and due process.

A job generates not only income and livelihood, but also social contact and networks and perceptions of feeling of worth and contribution to society. This should not be able to be removed unilaterally without just cause, as it is likely to have wide-ranging effects not only for the individual worker but also for family and dependants.

Workers and employers owe each other a reciprocal duty of good faith. An employee is required to produce "a fair day's work for a fair day's pay" and the employer should reciprocate by acting fairly.

**THE PROBLEMS**

The current unfair dismissal laws are manifestly unjust. The Government should not wait until 2010 to redress this injustice. If it does so, it may correctly be charged with promoting unjust practices in relation to dismissal for longer than the Howard government did.

Job security protections are not aligned with binding ILO obligations and developed world practice if termination of employment on grounds of redundancy is completely exempted from protection, as sought by some industry groups.

Existing protections against unlawful termination of employment for prohibited reasons, including discrimination related to gender or pregnancy, have been fatally frustrated by judicial interpretations. That frustration has not yet been addressed in the proposed scheme.

**THE SOLUTIONS**

**Bring forward to 1 January 2009 the unfair termination of employment element of the legislative package.**

**There should be no exemption to the long-established fairness principles that require that selection of individual workers for redundancy be made by reference to declared criteria applied objectively through independent assessment.**

**Amend relevant provisions relating to termination of employment and discriminatory conduct for prohibited reasons in order to overcome judicial confusion and ensure that the intent of the Workplace Relations Act (the Act) is not frustrated and ensure Australia's international obligations are met.**

## Freedom of Association

**THE ISSUES**

The freedom of association – the right of a worker to join with other workers and freely associate in a union – is recognised as a fundamental human right, deeply rooted in international and Australian law. It is a right that is recognised in almost every Charter of Human Rights, including the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the US Constitution and the Canadian Charter of Rights and Freedoms. It is also a fundamental principle in various ILO conventions ratified by Australia.

The ILO's Freedom of Association Committee has stated that: "The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade union represents."

**THE PROBLEMS**

A need to design institutional arrangements, which takes account of the reduced commitment of workers to join trade unions, does not justify maintaining measures and pressures against collective representation, such as complex right-of-entry provisions.

Unions should be given access to potential and current members so they can understand these workers' aspirations and grievances. Unnecessary restrictions in this area represent a practical repudiation of freedom of association.

**THE SOLUTIONS**

**Right of entry and associated provisions should be linked to the right of workers to be effectively represented.**

**Under the Act unions should be given reasonable access to the workplace without the need for technical administrative procedures. Facilities should be made available to enable unions to promptly and effectively carry out their responsibilities. Access should include the ability to post and distribute union notices.**

**Workers' representatives should be given prompt access to representatives of the employer, who have the capacity to resolve disputes, so that they can properly carry out their functions.**

## Agreement Making and Bargaining

**THE ISSUES**

Genuine bargaining requires both sides to have equivalent bargaining power and capacity. The right to bargain collectively and the right to take industrial action are enshrined as part of the pantheon of fundamental and universal human rights.

**THE PROBLEMS**

There is confusion regarding the distinction between the right to bargain collectively and the notion that bargaining should be voluntary. The right to bargain collectively would be contradicted if bargaining is to be voluntary for any party.

Rather than facilitating a free bargaining regime, an emphasis is being put on the need to prescribe, in technical terms, a variety of matters that constrain the bargaining process. These include unnecessary prescriptions around:

- The bargaining entity (enterprise or multiple employers)
- The scope and content of bargainable matters
- The process for registering agreements

The right to bargaining collectively is contradicted by surrounding the process with controversy.

Technical requirements can be used as a loose end and exploited to frustrate or avoid the bargaining process.

### THE SOLUTIONS

**The right of workers to collectively bargain needs to be matched by a duty on employers to bargain in good faith.**

**Disagreements over exercise of the right to bargain collectively (whether about bargaining unit, the use of unions or elected spokespersons, or authority to bargain) should be reserved for the industrial tribunal to sort out without detailed legislative prescription.**

**Bargaining arrangements need to provide for multi-employer bargaining in circumstances where there is a genuine and obvious need, e.g. in relation to atypical employment, fragmented or consolidated industries, where employment conditions within an industry are set across the industry by government funding.**

**Where there is no prospect of an agreement being reached (including because of a failure to bargain in good faith) and an agreement is appropriate in the public interest, conciliation services should be provided by a tribunal that is also empowered to arbitrate an agreement as a last resort.**

**The legislation should ensure that subject to the requirement to bargain in good faith, workers have the right to take industrial action and employers have the right to respond, without complex and inflexible procedural prerequisites.**

## Good Faith Relationships

**THE ISSUES**

Even the conservative common law has evolved to formulate the implicit expectation of co-operation in employment contracts as a duty not to destroy mutual trust and confidence in the relationship. This duty is now understood to be shared by both the employer and employee.

Efforts are being made to replace references to good faith with the much narrower phrase "genuinely try to reach agreement".

**THE PROBLEMS**

Discussion around good faith has been limited to bargaining.

In terms of bargaining, the ILO consistently emphasises the importance of bargaining in good faith and the need for employers and workers to make every effort to reach agreement. There is a danger that new legislative provisions will focus on minimal formal obligations that preclude enforcement of prescribed steps and measures directed to securing agreement.

Efforts are being made to remove reference to good faith in bargaining (and elsewhere) with the much narrower, currently used phrase "genuinely try to reach agreement". This does not pick up the breadth of behaviours and attitudes captured by the term good faith and does not place an emphasis on acting in accordance with the principles of promoting trust and confidence in the employment relationship.

### THE SOLUTIONS

**Good faith requirements need to be layered throughout the Act (and in particular in the Objects) in order to promote the cultural change that is needed to rebuild trust and confidence in the employment relationship.**

**The policy commitment to provide good faith bargaining should be retained.**

**Steps and requirements concerned with the bargaining process (not the outcome) should be linked with the obligation to bargain in good faith.**

**A comprehensive list of such requirements should be tied in with a power of the tribunal to order specific steps to be taken.**

**The list of requirements should include an obligation on the parties to:**

- **meet at reasonable times and places for the purpose of conducting face-to-face bargaining**
- **state their position on matters at issue and explain that position**
- **disclose in a timely way relevant and necessary information for bargaining, including information that is reasonably necessary to support or substantiate claims or responses to claims during bargaining**
- **act honestly and openly, which includes refraining from capriciously adding or withdrawing items for bargaining and not doing anything that does, or is likely to, mislead or deceive the other party**
- **give thorough and reasonable consideration to the other's proposals, and respond to those proposals**
- **bargain genuinely and dedicate sufficient resources to ensue that this occurs**
- **adhere to agreed outcomes and commitments made by the parties**
- **respect confidences and information or proposals provided on a without prejudice basis**
- **bargain directly with the representatives of the other party and not undermine, or do anything likely to undermine, the bargaining or the authority of the representatives conducting the bargaining.**

**In addition the employer should provide:**

- **reasonable opportunities for the worker's representatives to meet and confer with employees and their delegates about the bargaining**
- **for the release of delegates to participate in bargaining**
- **reasonable facilities and resources for delegates to carry out their role in bargaining, including the opportunity to consult and to communicate with workers.**

## Fair Minimum Standards

**THE ISSUE**

Australia needs a set of fair minimum standards that meets the needs of modern workers and modern workplaces while taking account of both international standards and the rich traditions of Australia. This requires a minimum standards regime:

- that includes enforceable entitlements and obligations
- where the standards can be maintained, updated and supplemented over time
- that ensures that there is a mechanism for resolving disputes over the application of the entitlements that is speedy, not costly or time consuming and readily accessible.

**THE PROBLEMS**

The proposed national employment standards scheme (NES) falls short of our definition of the fair and minimum standards and machinery essential to ensure fairness across the labour market.

Not every worker will have entitlements under the NES, because "employees" covered will not include workers engaged under disguised employment arrangements; parts of the NES standards do not create enforceable entitlements; and some employment will not be caught within the federal system.

Minimum standards will not be maintained by an impartial tribunal independent of government. This means there is no independent mechanism that updates and reviews the standards in light of movements in community standards, or in order to encourage good practice and fair behaviour. The role of minimum standards is particularly significant for women. The pattern of minimum standards needs to keep pace with gender composition and care responsibilities of the evolving workforce. Such standards cannot be frozen in time but must lead and respond to change.

A regime of minimum standards that, at its heart, is based on a government decree means that NES will be subject to the fluctuations of the political cycle. This is disruptive for both employers and employees. Parliament's role in the minimum standards regime should not be allowed to undermine or constrain the standards established through independent tribunals.

The capacity of a party to enforce the mandated entitlements is unclear and at best obscure.

The creation of two streams (the NES and modern awards), one under the auspices of government and one under Fair Work Australia, that regulate minimum entitlements and obligations has the potential to create confusion and unnecessary complexities.

### THE SOLUTIONS

**Empower a minimum standards division of Fair Work Australia to maintain, adjust and review the NES and modern awards.**

**Provide for dispute resolution procedures that, as a last resort, can determine rights applicable to work subject to NES and modern awards. A precedent might be found in New Zealand's comprehensive reciprocal obligation of good faith. It provides protection that may be utilised at both a collective and individual level.**

**Stipulate that entitlement in the NES to a process about flexible working arrangements extends to access to an independent dispute resolution process (DRP).**

**Stipulate that upon an employee commencing employment, they are entitled to a fair work information statement that includes details of the basic terms of engagement, the actual or default scheme of minimum standards to apply to the work including the DRP process, and information about where to access details.**

**Commit to a review of the NES within the first 18 months of operation to assess whether the exclusion of workers in disguised employment arrangements promotes the use of such arrangements and causes the effective absence of protective standards for the workers affected.**

The Australian Institute of Employment Rights aims to promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework.

Our governance structures and membership include representatives of unions,employers, academics, lawyers and the general public.

Our tripartite framework, employers, employees and the public interest, based on that of the International Labour Organisation, ensures that our work has broad community support.

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## Recognising that:

improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers

## and drawing upon:

Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

### 1 Good Faith Performance

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith. They have an obligation to co-operate with each other and ensure a "fair go all round".

### 2 Work with Dignity

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:

- treated with respect
- recognised and valued for the work, managerial or business functions they perform
- provided with opportunities for skill enhancement and career progression
- protected from bullying, harassment and unwarranted surveillance.

### 3 Freedom From Discrimination and Harassment

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- race, colour, descent, national, social or ethnic origin
- sex, gender identity or sexual orientation
- age, physical or mental disability
- marital status
- family or carer responsibilities
- pregnancy, potential pregnancy or breastfeeding
- religion or religious belief
- political opinion irrelevant
- criminal record
- union membership or participation in union activities or other collective industrial activity
- membership of an employer organisation or participation in the activities of such a body
- personal association with someone possessing one or more of these attributes.

### 4 A Safe and Healthy Workplace

Every worker has the right to a safe and healthy working environment. Every employer has the right to expect that workers will co-operate with, and assist, their employer to provide a safe working environment.

### 5 Workplace Democracy

Employers have the right to responsibly manage their business.

Workers have the right to express their views to their employer and have those views duly considered in good faith. Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace.

### 6 Union Membership and Representation

Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.

Workers have the right to require their union to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference.

Every worker has the right to be represented by their union in the workplace.

### 7 Protection from Unfair Dismissal

Every worker has the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker. This right is subject to exceptions consistent with International Labour Organisation standards.

### 8 Fair Minimum Standards

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

### 9 Fairness and Balance in Industrial Bargaining

Workers have the right to bargain collectively through the representative of their choosing.

Workers, workers' representatives and employers have the obligation to conduct any such bargaining in good faith.

Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.

Conciliation services are provided where necessary and access to arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires.

Employers and workers may make individual agreements that do not reduce minimum standards and that do not undermine either the capacity of workers and employers to bargain collectively or the collective agreements made by them.

### 10 Effective Dispute Resolution

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy.

The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.

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