



**Productivity Commission Inquiry:  
The performance of the workplace relations framework**

Submission of the Australian Institute of Employment Rights

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## About the Australian Institute of Employment Rights

The Australian Institute of Employment Rights ('AIER') is an independent, not-for-profit organisation that works in the public interest to promote the recognition and implementation of the rights of employers and workers in a cooperative industrial relations framework.

It is a leader in the development of informed, contemporary and balanced ideas in the area of workplace rights. It is place of research; working with a team of leading academics, legal experts and industrial relations practitioners to undertake research and analysis that aims to offer new ideas and models for decent and efficient workplaces.

As a trainer, educator and moderator, AIER works on-the-ground with organisations, workers and their representatives to create more positive and efficient workplaces. AIER collaborates with like-minded organisations to develop and implement programs that educate and empower. It is also a resource for community organisations, educational institutions, the media and the general public.

AIER is an advocate and agitator, championing the fundamental rights of employers and workers and the public interest, and arguing for the importance of cultural change in workplaces to ensure decent and fair conditions for all.

The AIER's objectives are:

“Adopting the principles of the International Labour Organisation and its commitment to tripartite processes, the Australian Institute of Employment Rights will promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework.

In particular it will:

- (a) commission academic research
- (b) hold conferences and seminars
- (c) publish and disseminate publications
- (d) contribute to public discourse on employment issues through the media, community debates and public forums
- (e) provide training to industrial participants
- (f) provide advice and other services to industrial participants and governments
- (g) develop a Charter of Employment Rights for Australia
- (h) promote models of workplace arrangements which promote economic efficiency while respecting employment rights and standards
- (i) work co-operatively with academic and community organizations which share similar objectives
- (j) encourage the participation of members who share similar objectives.”

The AIER is an organisation independent of government or any particular interest group and implements these Objects with academic rigour and professional integrity.

The AIER includes employer and employee interests in its makeup, membership and operation. It is also fortunate to have included in its governance structure and advisory bodies representatives from the academic and legal fraternity.

AIER draws its basis for this submission from its belief that any system of industrial regulation must be founded in principles which reflect:

- (a) Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
- (b) Values which have profoundly influenced the nature and aspirations of Australian society and which are embedded in Australia's constitutional and institutional history of industrial/employment law and practice. In particular, values integral to what has been described as the "important guarantee of industrial fairness and reasonableness"<sup>1</sup>; and
- (c) Rights appropriate to a modern employment relationship which are recognised by the common law.

To this end the AIER has developed an instrument, *the Australian Charter of Employment Rights* ("the Charter")<sup>2</sup>, based on the three sources of rights identified above which we believe to be both a unique and appropriate reference tool for examining the workplace relations system. The Charter lies at the heart of AIER's work and philosophy. It has become a blueprint for assessing government policy, for legislative reform, for company practice and for education about workplace rights.

A detailed outline of the development and uses of the Charter is contained in Annexure 1. The Charter is attached in Annexure 2. An explanation of how the Charter applies in practice can be found in the Australian Standard of Employment Rights ('the Standard'). It provides a tool for Australian businesses to assess their compliance with the Charter. The Standard is at Annexure 3.

AIER has utilised the Charter in developing this submission.

## **Objectives of the workplace relations system**

There are many ways to approach the question of the performance of the workplace relations system. Any response to how the system can maximize the well being of the community as a whole will depend upon the approach taken and the objectives or prioritisation of objectives of the person or organisation seeking to answer the question.

As mentioned above, AIER takes a rights-based approach to workplace relations. We believe workplace relations laws and policies serve a social as well as economic function. We value in the words of former High Court Justice Michael Kirby, the "egalitarian principle" which he argues was provided by the conciliation and arbitration power in the Constitution. This constitutional grant of power provided "an ultimate constitutional guarantee of fairness and reasonableness in the operation of federal law with respect to industrial disputes, including for the economically weak and venerable."

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<sup>1</sup> New South Wales and Others v Commonwealth [2006] HCA 52, per Kirby J at [523] – [525].

<sup>2</sup> Bromberg, M and Irving, M [eds], *Australian Charter of Employment Rights*, 2008.

We agree with Justice Kirby that these values “profoundly influence the nature and aspirations of Australian society.” While the conciliation and arbitration power has now been rendered irrelevant by workplace relations legislation being primarily founded on the corporations power, AIER asserts the values of industrial fairness and reasonable remain important guideposts in the evaluation of our workplace relations system.

A key purpose of industrial laws, and one of the purposes of the Charter, is to redress the inequality of bargaining power between those who perform work and those for whom work is performed. Democracies around the world acknowledge the need for regulation to assist to redress this power imbalance through minimum employment standards and enabling collective representation of workers to avoid unacceptable social outcomes.

Along with fairness, a further important objective of the workplace relations system must be to encourage decent work. The ILO describes decent work as follows:

*Decent work means productive work in which rights are protected, which generates an adequate income, with adequate social protection. It also means sufficient work, in the sense that all should have access to income-earning opportunities. It marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers’ rights and social standards.<sup>3</sup>*

In many of its dimensions, of course, work directly impacts the standard of living of workers and their dependents at the micro level of society. Labor productivity is also a factor in wealth creation at the macro or economy wide level. Collectively, the work of all employed persons applied to the natural resources, knowledge and technologies available in an economy generates national income and wealth and provides the base for taxation and the delivery of public services and expenditure of all kinds.

Laws relating to employment relations, as well as contract and other relevant laws along with human resources and industrial relations policies and practices, govern the way employment functions in our society.

National policies and approaches to these matters help to determine equity of outcomes in respect to the distribution of national income and wealth. Australia has traditionally sought to intervene in the operation of workplace relations systems in a particular way to ensure a reasonably just and equitable distribution of national income.

Some, but by no means all, nations have left this endeavor largely to the “unseen hand” of the market. Even in Australia, and particularly in recent times, how these issues have been dealt with has been politically and industrially controversial. The Australian people, however, seem to value strongly notions of social justice and equity in workplace relations and have punished those political parties which have strayed too far from the national consensus around these issues.

We note the Fair Work Act itself does not clearly articulate a guiding set of principles or values. Instead, its stated objectives are a mix of vague fairness and economic productivity statements owing more to an

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<sup>3</sup> International Labour Office, Report of the Director General, *Decent Work*, International Labour Conference, 87th Session, Geneva, 1999, p 11.

attempt to negotiate around the political debates of the time of its enactment, than providing for a coherent rationale for the scheme it enacts.

Following on from our rights-based approach, AIER submits that the following principles should underpin the workplace relations system and be used in assessing its performance:

- Workplace relations laws are socially beneficial laws;
- Labour is not a commodity;
- Compliance with International Labour Standards; and
- The potential for collaborative workplaces.

We also note the Productivity Commission's repeated calls through the Issues Papers for evidence to substantiate submissions. We urge the Commission to take particular regard to the evidence it receives on the lived experience of work, whether through direct submission from workers and employers or from the numerous quantitative studies that have considered the reality of many workplaces. For example, the work of the Centre for Work + Life<sup>4</sup>, and the stories told in the ACTU's Insecure Work Report<sup>5</sup>. Given the inherent social function of work, evidence of the lived experience of people at work is an essential element in answering the questions posed by the Commission.

#### Socially beneficial laws

AIER asserts that the Fair Work Act and other relevant industrial legislation governing workplace relations are socially beneficial laws, like anti-discrimination laws, landlord and tenant laws and laws governing enfranchisement. Socially beneficial laws are part of the social contract amongst Australians. Such laws derive their importance from the fact that they regulate relations between people, in this case, workers and those they work for, and as such must serve the needs of people first.

A fair workplace relations framework not only benefits employees and employers, but benefits the broader community by

- setting decent standards for those who perform work,
- promoting social inclusion and living standards,
- assisting national economic outcomes, and
- supporting the improvement in living standards throughout the world.

When conceptualized as socially beneficially laws, certain things follow, including that citizens are not given the option of choosing whether socially beneficial legislation applies to them. There can be no opting out of anti-discrimination laws, or laws designed to protect tenants, or laws granting the right to vote.<sup>6</sup> Nor should it be permitted to opt out of a fair industrial framework including minimum standards

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<sup>4</sup> <http://www.unisa.edu.au/research/centre-for-work-life/centre-for-work-life/>

<sup>5</sup> <http://www.actu.org.au/Publications/IndependentInquiryintoInsecureWork/default.aspx>

<sup>6</sup> In the context of attempts to avoid the statutory protections in various other settings, see *Street v Mountford* [1985] AC 809; [1985] 2 All ER 289 at 299, *AG Securities v Vaughan* [1990] 1 AC 417; [1988] 3 All ER 1058 at 1067–8, S Bright, 'Beyond Sham and into Pretence' (1991) 11 Oxford Journal of Legal Studies 136 at 140-1, W Gummow, 'Form or Substance?' (2008) 30 Australian Bar Review 229.

and rights. The consequences of this approach to the issue of minimum standards at work are further discussed below.

### Labour is not a commodity

It is a fundamental tenant of labour relations that labour is not a commodity. As economist Karl Polanyi put it, the commodity status of labour is simply a convenient fiction that momentarily greases the wheels of commerce but is detrimental for society.<sup>7</sup> Work has a special importance and status arising from the fact that it is performed by human beings. As a result, work cannot and should not be treated as simply another factor of production, a commodity or input into the production process such as raw materials, energy, land or technology. Any consideration of workplace relations systems cannot proceed from the same economic assumptions that govern the efficient and productive use of commodities, as distinct from people.

The Australian Charter of Employment Rights Article 2 states:

“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.”

The principle that labor is not a commodity has a considerable history. Classical economics generally treated labor as if it was a commodity, bought and sold in the marketplace like all other inputs into the activities of firms. This concept was increasingly challenged in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.

The most important impetus to this principle was given by the establishment of the International Labor Organisation, created by the Treaty of Versailles which ended the First World War. The ILO is uniquely a tripartite organisation bringing together employers, employees and governments to set and improve core labor standards around the world.

The first principle on which the ILO was founded [and re-affirmed in 1944 by the Declaration of Philadelphia] is described as follows:

“Among these methods and principles, the following seem to the ... parties to be of special and urgent importance:

First. — The guiding principle above enunciated that labour should not be regarded merely as a commodity or article of commerce.”<sup>8</sup>

Issues Paper No 1 for this Inquiry makes passing reference to this principle when it notes “The Commission also recognizes that the ‘price’ of labour differs from the price of most other inputs into an

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<sup>7</sup> Polanyi, K. (1944). *The Great Transformation*. Foreword by Robert M. MacIver. New York: Farrar & Rinehart.

<sup>8</sup> International Labour Office, *Official Bulletin*, Volume I, April 1919-August 1920

economy. This is not only because the price (wage) offered usually affects people's workplace performance and because of the virtual exclusion of WR from competition policy, though these are distinctive features. It is also because many people's incomes and indeed wellbeing depend to a considerable extent on that price."

However, while the reference to incomes and wellbeing is important, the Commission, with respect, misses the broader point. The "price" of labour is different from all other inputs into an economy because when discussing labour we are talking about people. People have a lived experience of work, in a way that commodities or corporations cannot have. The experience of work is more than the consequence of that work in the form of income. People have rights that are not just to be "protected" in the face of economic efficiency but rights that are to be fully realised in the interests of humanity. The human rights of people are not suspended when they enter into employment.

AIER takes a similar perspective when considering the questions raised in Issues Paper No. 5 concerning the role of the Competition and Consumer Act and ACCC in workplace relations. We are firmly of the view that it is entirely appropriate and indeed necessary to continue to have a separate set of laws and institutions that manage the relationship between workers and those they work for outside of the realm of competition policy.

The reason is quite simple – because workplace relations laws can never be primarily concerned with the functioning of the economy. The workplace relations system manages relationships between people. The contract of employment is, as Mark Irving, AIER Executive member and prominent barrister specializing in employment law, has noted, the only contract [other than marriage] where at least one of the parties must be a human being. This gives employment law and workplace relations as a whole special significance and requires it to operate in a particular manner.<sup>9</sup>

Moreover, work is an activity that is central to the human experience and it performs a number of functions for individuals, their families and society as a whole. It is beyond the scope of this submission to consider all aspects of work, other than to note that it is an activity that is the basis of individual, family and social well-being on both a micro- and macro-economic level. It is an activity that most people are engaged in for a considerable portion of their lives.

Professor Ron McCallum has noted a concern that with the shift from conciliation and arbitration to workplace laws being based on the corporation power, our labor laws risk becoming "a sub-set of corporations' law and employees would be regarded as little more than an actor in the economic enhancement of corporations." In Professor McCallum's view, shared by the AIER, "For our labour laws to pass the test of 'justice and fairness at work' they must focus equally on the rights, duties and obligations of employees and of employers."<sup>10</sup>

While seemingly a fundamental concept – that people are different to widgets - it is one that seems to have gone missing in the economic rationalist discourse that dominates our contemporary discussion of workplace relations.

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<sup>9</sup> Irving, M, Speech to AIER, ALLA, Monash Law School seminar, Monash law School, 20<sup>th</sup> October 2014.

<sup>10</sup> McCallum, ""Justice at work: Industrial Citizenship and the Corporatisation of Australian Labour Law", Kingsley Laffer Memorial Lecture, April 2005.

Australian law and politics has long realized the essential human issues at the heart of regulating work. An analysis of workplace relations that does not proceed from an understanding of this concept will fail the people, workers and employers, whose relationships are regulated by the workplace relations system.

### International Labour Standards

Rights at work are a fundamental part of the code of human rights. The rights of workers were addressed as part of the Universal Declaration of Human Rights, adopted and proclaimed in 1948 by the General Assembly of the new United Nations:

#### Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.<sup>11</sup>

These rights have been further developed and specified in later Conventions on Human Rights adopted by the UN General Assembly<sup>12</sup> and from the Conventions and jurisprudence of the International Labor Organisation.

The rights established by ILO Conventions and the content of these rights have a history and a context that give them their on-going relevance and importance. The ILO was formed after World War I as part of the Treaty of Versailles and its purpose and goals were reaffirmed in the Declaration of Philadelphia after World War II. It is after the horror of these events and the social and economic context surrounding them in the last century that the ILO was founded on the understanding that universal and lasting peace can be established only if it is based upon social justice.

The ILO's fundamental principles include that labour is not a commodity; that freedom of expression and association are essential to sustained process; and that poverty anywhere constitutes a danger to prosperity everywhere. It is from within the tradition of seeking social justice, and by that avoiding the devastation that injustice wreaks, that the AIER submits the ILO Conventions remain important benchmarks for assessing the workplace relations system.

The Fair Work Act itself has as an object to take into account Australia's international obligations (s3(a) Fair Work act 2008). The legislation governing the Productivity Commission similarly requires the Commission to have regard to the need for Australia to meet its international obligations and commitments (s8(1)(j)) Productivity Commission Act 1998). The importance of international standards comes not merely from the fact there is a legislative requirement they be considered but because they are concerned with, and have been developed to provide for, the ability of people to pursue both their

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<sup>11</sup> Article 23, *Universal Declaration of Human Rights*, Office of the United Nations High Commissioner for Human Rights, accessed 24<sup>th</sup> October 2014. Emphasis added

<sup>12</sup> In particular, the *International Covenant on Civil and Political Rights*, December 1966, and the *International Covenant on Economic, Social and Cultural Rights*, December 1966.

material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

Issues Paper No 5 asks what are implications of international labour standards for Australia's workplace relations system? With respect, it is the wrong question. As the Paper notes there is no requirement for Australia to legislate in respect of its international obligations and in fact the Fair Work Act and other legislation covering industrial matter have been found by the ILO to be incompatible with some international rights and standards.

Given Australia has voluntarily adopted key ILO Conventions and such instruments provide a firm foundation from which employment rights with tripartite acceptance can be appropriately sourced, the more useful question is why does Australia's workplace relations system not more fully comply with international law.

The Commission also asks about the implications of labour standards in free trade agreements. While the US – Australian free trade agreement contains a vaguely worded commitment to international labour standards, the Chile- Australian free trade agreement contains no labour standards clause. A fair trading system would encourage international labour standards to be implemented. What is more concerning is the potential for investor/state dispute settlement provisions, like those reportedly being negotiated as part of the Trans-Pacific Free Trade agreement, to enable multi-national corporations to demand changes that would weaken Australia's workplace relations system.<sup>13</sup>

#### Collaborative workplaces and the limits of adversarial approach to workplace relations

Industrial relations in Australia, as in many other countries, has traditionally been a highly adversarial arena as employees struggled to assert their rights and achieve fair minimum standards.

AIER's supports the encouragement of more collaborative and cooperative workplaces based on recognition of employment rights and fair and equitable standards.

AIER is concerned that the current workplace relations framework and culture continues to promote an adversarial approach to workplace relations that has created confusion about the nature of rights and obligations contained within the system and a concern amongst employers and workers of ongoing instability in this area.

The Fair Work Act reinstated a number of universal rights that had been removed under the previous Workchoices legislation, therefore creating a more balanced approach to industrial regulation. At the time however, we expressed our concern that it was not the solution Australia needed. It was, and remains, our view that what was needed was a real consensus not just balanced horse-trading. Without this attempt to build real consensus, AIER warned that industrial relations would continue to be a political football and the opportunity to move towards a more mature founding for industrial regulation would be lost.

The failure to enunciate through the legislation a guiding set of principles and values is of concern. The legislation has no foundational principle or guiding philosophy. Rather, it patches a regulatory scheme around a mixed-pot assembly drawn in part from reassertion of hybrid fairness values, in part from the

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<sup>13</sup> <https://medium.com/@DrRimmer/creative-destruction-the-trans-pacific-partnership-jobs-and-labor-rights-4681f3cc85a8>

values reflected in the scheme it replaced (WorkChoices) and in part from approaches associated with an implicit assumption that the rationale for regulating the employment relationship arises from an adversarial character.

The AIER believes that the legislation's fundamental foundation upon the assumption of an adversarial employment relationship causes it to promote a functionalist adherence to legislative standards that reinforces an adversarial approach to the relationship. It also fosters an environment of rhetorical public discourse that keeps workplace relations on the front page of newspapers but does little to help employers and workers to understand their rights and responsibilities and how they could genuinely go about working towards fairer workplaces and respectful relationships.

AIER has long advocated for a new set of guiding principles founded in the concept of 'workplace citizenship' that would encourage employers, employees and their representatives to interact positively in their capacity as industrial citizens. The Charter is one articulation of this.

AIER submits that the Objects of the Act including its aim to "...provide a framework for co-operative and productive workplace relations..." will not be achieved whilst the legislation remains devoid of this guiding set of principles.

The AIER submits that the industrial parties also need to examine the role that they are playing in hindering the advancement of co-operative and productive workplace relations with a view to significantly overhauling their modus operandi.

### **A rights-based approach and its relationship to the economy<sup>14</sup>**

An important objection to regulation that provides for workplace rights is the view that such rights impose significant economic costs in the form of reduced output and employment and a negative impact on productivity.

Evidence does not support the contention that rights are costly. Most of the evidence suggests that granting workers' rights causes no loss of output or employment, while also supporting a beneficial relation between legislation providing for security of employment and the distribution of income and equity.<sup>15</sup>

Modern policy is often guided by neo-liberal (economic rationalist) ideology. With respect to the labour market, it is argued that a deregulated labour market, with no or very limited employment protection, will allow the forces of supply and demand to establish a price (wage) and conditions which will ensure that all labour that is available to work at that wage can do so.

According to this view, markets, when left alone, will achieve optimal outcomes, and so institutions, representative of this ideology, such as the World Bank and the International Monetary Fund (IMF) have pushed for labour market deregulation and increased flexibility of employment conditions and time. In

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<sup>14</sup> Much of this section is a summary of Kreisler (P) and Neville (S) 2007 *Economic Perspectives on Workers Rights in the Australian Charter of Employment Rights* (2007) Hardie Grant Books Melbourne.

<sup>15</sup> Kreisler P & Neville J (2007) *Economic Perspectives on Worker's Rights*, The Australian Charter of Employment Rights, Hardie Grant Books, Melbourne pp 127 – 144.

other words, they argue that deregulated markets can guarantee full employment under conditions that assume competitive market conditions.

A consequence of this is that regulated markets with minimum wages and employment protection interfere with the market mechanism, and so will impose costs on the economy, either in terms of job losses or in terms of higher prices. The theory behind this result is derived from neoclassical analysis and relies on markets fulfilling certain conditions, including both perfect competition and perfect information.

Perfect competition implies that all agents in the market, especially firms and employees, are so small relative to the size of the market that they cannot exert any market power. This means that they have no influence over wage outcomes, so that they are all price takers. Moreover, the information requirements of the analysis demand perfect knowledge not only of all current activity but also of the future.

No reputable economist believes that the conditions for perfect competition exist in any actual economy, but many neoclassical economists consider that departures from perfect competition are not important enough to invalidate the use of the model as a tool for analysing aggregate employment and unemployment.

The limitations of neoclassical theory as a guide to policy are well known in the literature and are particularly well articulated by Joseph Stiglitz, a former senior vice president and chief economist of the World Bank and Nobel Laureate in Economics.<sup>16</sup> Labour market analysis is widely recognised as an area where the use of neoclassical theory is likely to cause analytical problems. By reference to economic theory, there is no credible prima facie case against intervention in labour markets to set minimum employment conditions.

Initially, the OECD unambiguously opposed Employment Protection Legislation (“EPL”), arguing that labour market deregulation was a necessary condition for growth and full employment. However, after strong theoretical and empirical criticism, it has recently reversed its position. In 2004 the OECD Employment Outlook stated that:

*The net impact of EPL on aggregate unemployment is therefore ambiguous a priori, and can only be resolved by empirical investigation. However, the numerous empirical studies of this issue lead to conflicting results, and moreover their robustness has been questioned...The impact of EPL on overall employment and unemployment rates is ambiguous ... Overall, theoretical analysis does not provide clear-cut answers as to the effect of employment protection on overall unemployment and employment ... no clear association can be detected between EPL and unemployment rates.<sup>17</sup>*

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<sup>16</sup> Stiglitz, J, *Whither Socialism?*, MIT Press, Cambridge Mass., 1996.

<sup>17</sup> Organization for Economic Cooperation and Development (OECD), *OECD Employment Outlook*, OECD Paris, 2004, pp. 63 & 80.

As summarised by economist Richard Freeman:

*“Studies of minimum wages ... of employment protection legislation ... and of diverse other social protection programs ... find little or no impact of these institutional intervention on economic efficiency”.*<sup>18</sup>

Lack of labour market flexibility as the major cause of unemployment in Europe was the new orthodoxy of the 1990s, especially among the OECD and neo-liberal economists. However, the empirical studies supporting this orthodoxy have been shown to be so flawed that even the OECD, as an institution, was forced to back down. Again Freeman summarises very succinctly what happened:

*“The OECD Jobs Study came down strongly in favour of deregulation and active labour market policies, but succeeding analyses by the OECD have highlighted the weakness of that case. Countries with very different regulatory practices and policies have surprisingly similar outcomes.”*<sup>19</sup>

There is now strong agreement that deregulation of labour markets and the increased labour market flexibility that ensues are not associated to any significant extent with increased levels of employment or falling unemployment. However, they are associated with a deterioration in the distribution of income. In Freeman’s words:

*“The bottom line is that employment protection legislation alters the distribution of work but not its volume.”*<sup>20</sup>

The OECD itself has commented:

*High union density and bargaining coverage, and the centralisation/co-ordination of wage bargaining tend to go hand-in-hand with lower overall wage inequality. There is also some, albeit weaker, evidence that these facets of collective bargaining are positively associated with the relative wages of youths, older workers and women. On the other hand, the chapter does not find much evidence that employment of these groups is adversely affected.*

*No robust associations are evident between the indicators of wage bargaining developed in this chapter and either the growth rate of aggregate real wages or non-wage outcomes, including unemployment rates.*<sup>21</sup>

Another argument against regulation for rights for workers is the “conventional wisdom” that predicts that lower labour standards will be more attractive for foreign direct investment (FDI), which will increase domestic employment and output in the longer term. Some argue that, by increasing the cost of employing labour, workers’ rights make countries less competitive and therefore less attractive to foreign investors. This view has been criticised on the basis that employment rights may increase the

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<sup>18</sup> Freeman, R, (2000) “Single peaked vs. diversified capitalism: the relation between economic institutions and outcomes”, National Bureau of Economic Research Working Paper 7556, 2000, p. 18 <http://www.nber.org/papers/w7556>.

<sup>19</sup> Ibid., p. 22

<sup>20</sup> Ibid.

<sup>21</sup> op. cit., OECD, p.130

productivity of workers through their impact on education, skills acquisition and firm loyalty, as well as being associated with higher economic growth. There is no credible empirical evidence to support the “conventional wisdom”. In fact, the empirical evidence “suggest[s] that FDI tends to be greater in countries with stronger worker rights”.<sup>22</sup>

In short, providing rights for workers do not seem to have any significant negative impact on employment or efficiency, but they do have a significant (positive) impact on equality and the distribution of income.

As suggested above, the evidence overwhelmingly supports the view that greater flexibility in labour markets, especially that which occurs by reducing the power of trade unions, increases earnings inequality. Again the OECD itself has pointed this out:

*[Our] analysis confirms one robust relationship between the organisation of collective bargaining and labour market outcomes, namely, that overall earnings dispersion tends to fall as union density and bargaining coverage and centralisation/co-ordination increase. It follows that equity effects need to be considered carefully when assessing policy guidelines related to wage-setting institutions.*<sup>23</sup>

Income inequality and other undesirable social effects that may flow from increased flexibility may reduce productivity. This is particularly the case as empirical evidence suggests that workers care about social justice and that their incentive to work is influenced by their perception of how they are being treated. More generally, casualisation is likely to reduce the commitment of workers to firms and hence reduce productivity. This may have serious effects on international competitiveness, so “it is likely that [freedom of] association rights would increase output and competitiveness by raising productivity”.<sup>24</sup>

There is a large body of evidence supporting the association between stronger workers’ rights and higher economic growth as well as improved distribution of income. There are many reasons for this, including improved possibilities for the development of human capital, reductions in industrial unrest, improved firm loyalty and reduced labour turnover.

The provision of reasonable protections to workers, such as those contained in the Charter, is unlikely to impose costs on the economy in the form of reduced employment, output or efficiency. Neither the theoretical nor the empirical evidence supports the case for any loss in output, efficiency or employment resulting from these rights.

In fact, there is significant evidence suggesting that the reverse may be true. It is reasonable to suppose, and the empirical evidence confirms, that workers “care” about just conditions and equity, and they react adversely to perceived unfairness and inequality. In addition, there is evidence of a link between better employment rights and improving economic performance through improvements in labour productivity associated with better education and skill acquisition— and in increased foreign direct investment, among other factors.

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<sup>22</sup> Kucera, D, “Core labour standards and foreign direct investment”, *International Labour Review*, vol. 141, nos 1–2, 2002, p. 34.

<sup>23</sup> *op. cit.*, OECD, p. 166.

<sup>24</sup> Martin, W, and Maskus, K, “Core Labor Standards and Competitiveness: Implications for Global Trade Policy”, *Review of International Economics* 9 (2), 2001, p. 317

In *The Precariat: The New Dangerous Class*<sup>25</sup> Professor Guy Standing has analysed a phenomenon that he describes as the emergence of a "precariat". There is sufficient substance and cogency in Standing's analysis to warrant it being drawn to the attention of this Inquiry. Our purpose is not to endorse the specifics of Professor Standing's reasoning or contentions; rather it is to demonstrate that there is abundant evidential material supportive of a view that now is not the time to tie the hands of Australian regulatory institutions and associated representative institutions from dealing with issues about job security and employment security that go to the very heart of fairness in the workplace.

## **An Australian approach to workplace relations**

The "Australian settlement" at Federation was based on a number of fundamental policy platforms, including the regulation of industrial relations by 'conciliation and arbitration' overseen by independent tribunals advised by representative bodies of employers and employees. This was envisaged as a social good contributing to a more egalitarian society with strong social justice intentions and outcomes, as well as providing the means of settling industrial disputes other than by strikes and lockouts.

The Issues Paper No.1 reflects briefly on the history of workplace relations in Australia. It is important to reflect on the history of the system, and the influences, experiences and thinking that precipitated the development and key changes of the system. The Paper notes the significance of the 1890s strikes which led to the development of conciliation and arbitration and the Harvester judgment as the first articulation of the importance of minimum wages and other standards.

These two events were intimately linked. In 1915, Justice Higgins outlined the social imperatives that underpinned the development of a minimum wage in Australia. In his essay "A New Province for Law and Order" in the Harvard Law Review he identified the elements of the 'living wage' for working men and their families:

*One cannot conceive of industrial peace unless the employee has secured to him wages sufficient for the essentials of human existence. This, the basic wage, must secure to the employee enough wherewith to renew his strength and to maintain his home from day to day.*<sup>26</sup>

As a society we are still dealing with the implications of that formulation, for example, in the persistent existence of a gender pay gap. The exclusion of many Aboriginal and Torres Strait people from coverage of our labour laws, including the denial of wages for most of the 20th century, has adversely affected their material wellbeing and is related to the disadvantage and poverty experienced today.<sup>27</sup>

We note with some surprise that the Productivity Commission in its Issues Papers does not specifically raise questions as the ongoing barriers faced by women, and particular minority groups within the workplace relations system and the consequences of these barriers for participation and economic productivity. We discuss these concerns in more depth later in the submission.

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<sup>25</sup> Bloomsbury Academic 2011 ISBN 978 -1-84966-351-9

<sup>26</sup> Justice Higgins, "A New Province for Law and Order", Harvard Law Review, Vol 29, No 1, 1915.

<sup>27</sup> Human Rights Law Centre, "Human Rights Action Plan", <http://www.humanrightSACTIONPLAN.org.au/nhrap/focus-area/aboriginal-and-torres-strait-islander-peoples>

There have been dramatic changes in employment and the Australian economy since Federation: the increase in women in the workforce, both full time and part time; the decrease in adult men in full time work (men working full time are now less than half the workforce); and the rise of casualisation and other forms of precarious work.

There have also been significant changes at a social level. Income and wealth inequality has been increasing in recent times. In Australia the top twenty per cent of income earners have just over 5% more income than the lowest twenty per cent, while on a calculation of wealth the disparity is 71 times more.<sup>28</sup>

The ACTU has pointed to a decline in the share of national income going to labor and a 'decoupling' of the link between productivity growth and the earnings of employees.<sup>29</sup>

The ACOSS report "Poverty in Australia 2014" has found that despite being wealthy country, poverty, including children living in poverty, is increasing in Australia. Almost 14% of Australians in 2012 lived in poverty as measured by 50% of medium income, including over 17% of children. One third of people living poverty rely on wages as their main source of income.<sup>30</sup>

The implications of growing inequality have been exercising the minds of politicians and policy makers. It should be a consideration of this Inquiry.

Australia has traditionally sought to influence the outcomes of economic activity to ensure socially just and equitable shares of enterprise and national income and productivity gains accrue to employees. This assists not only individual employees but also households generally and to provide the means by which all Australians provide for themselves and their families adequate means of financial support, housing, education and social inclusion as well as decent community infrastructure and facilities.

In contrast to the social ideals at the forefront of the industrial relations system at the beginning of the 20th century, much of the contemporary debate about industrial relations is viewed primarily through an economic lens. Industrial relations law, policies and practices are predominantly evaluated in relation to their impact on productivity, competitiveness and economic efficiency. The focus on such economic indicators is underpinned by the theory that increased economic performance leads to higher living standards.

As noted above AIER takes a different approach and believe an equitable, values based approach will also bear fruit in other respects, including in the generation of economic wealth.

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<sup>28</sup> Australia21, "Advance Australia Fair? What to do about growing inequality in Australia", <http://www.australia21.org.au/wp-content/uploads/2014/06/Final-InequalityinAustraliaRepor-21.pdf>, January 2014.

<sup>29</sup> Matt Cowgill, "ACTU Working Australia Paper - A Shrinking Slice of The Pie", <http://www.actu.org.au/Images/Dynamic/attachments/7852/Shrinking%20Slice%20of%20the%20Pie%202013%20Final.pdf>, 2013.

<sup>30</sup> ACOSS, "Poverty in Australia 2014", [http://www.acoss.org.au/images/uploads/ACOSS\\_Poverty\\_in\\_Australia\\_2014.pdf](http://www.acoss.org.au/images/uploads/ACOSS_Poverty_in_Australia_2014.pdf)

## Decent work

AIER submits that an appropriate framework with which to evaluate the workplace relations system is its capacity to provide for decent work. Decent work is a concept that is relevant to all aspects of workplace relations the Commission is seeking comment on including minimum wages and standards, bargaining and its corollary, industrial action, and general protections. In particular decent work is important in relation to the changing nature of work, which is leading to greater insecurity and precarity in employment around the world as well as in Australia. It was surprising that the Issues Papers did not seek to explore this phenomenon more directly, given the emphasis in the terms of reference for the inquiry on adapting over the long term to changes in the global economy.

In an enlightened democratic society, given the impact of work on individuals and community, people should be afforded the opportunity to experience decent work. The concept of decent work as a policy, legislative and practical framework for regulating work relationships is gaining purchase around the globe.<sup>31</sup>

In his report to the 87th Session of the International Labour Conference, the Director-General of the ILO noted the issues inherent in the concept of decent work:

*The ILO is concerned with decent work. The goal is not just the creation of jobs, but the creation of jobs of acceptable quality. The quantity of employment cannot be divorced from its quality. All societies have a notion of decent work, but the quality of employment can mean many things. It could relate to different forms of work, and also to different conditions of work, as well as feelings of value and satisfaction. The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market.*<sup>32</sup>

Central to this concept of decent work is the notion that work should be performed in an environment of freedom, equality and security. Workers' experience of insecurity at and of work undermines the ability to obtain decent work.

In recent years the common law has increasingly recognised that workers have an interest in performing work, not just being paid. This is because the benefits of work for an employee can include satisfaction of performing the work, the opportunity to keep the worker's "hand in", and the opportunity to develop experience to ensure employability in other fields. As the English Court of Appeal has noted: "As social conditions have changed the courts have increasingly recognised the importance to the employee of the work, not just the pay".<sup>33</sup>

The United Nations Universal Declaration of Human Rights states that "Everyone who works has the right to just and favourable remuneration ensuring for himself and his [sic]family an existence worthy of human dignity".<sup>34</sup>

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<sup>31</sup> Owens R (2002) Decent Work for the Contingent Workforce in the New Economy 15 AJLL 209

<sup>32</sup> ILO, <http://www.ilo.org/public/english/support/lib/century/index6.htm>, accessed 27th October 2014

<sup>33</sup> William Hill Organisation Ltd v Tucker [1999] ICR 291, see also Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539 at 566.

<sup>34</sup> [www.ilo.org/public/english/bureau/inf/download/ecosoc/decentwork.pdf](http://www.ilo.org/public/english/bureau/inf/download/ecosoc/decentwork.pdf)

The European Union (EU) Charter of Fundamental Rights (2000) proclaims that “Human dignity is inviolable. It must be respected and protected.” The EU Council has also adopted a policy on decent work. Recent European Foundation studies have focused on five key dimensions:

- quality of work and employment
- ensuring career and employment security
- maintaining the health and well-being of workers
- developing skills and competencies and
- reconciling work–life balance.<sup>35</sup>

Definitions of dignity usually stress notions of worth, esteem or honour, which are bestowed by others. This includes feelings of pride and self-respect. These definitions denote an abiding sense of respect from others as well as a corresponding sense of *self-respect*. Work can enhance or diminish dignity.

AIER’s Charter notes:

*Dignity at work refers mainly to the employment relationship in which work is conducted and the need to protect against abuse or disadvantage arising from the nature of that relationship. That aspect raises issues such as fair wages and just conditions or work, freedom of association, fair bargaining processes and protection from unfair dismissal. It refers also to work as a place of social interaction in which all participants have a rights to protection against unsociable behaviors such as discrimination, harassment or bullying.*<sup>36</sup>

AIER is concerned that the notion of dignity at work, including a respect for employment security, have been lost in public policy frameworks and public discourse around work in Australia.

The validity of achieving dignity at work as a regulatory/policy setting was clearly challenged by the adoption of the “Workchoices” legislation. The public repudiation of Workchoices, has meant that no political parties have been prepared to publicly endorse that policy, however there has not been a declared abandonment of the neo-liberal philosophy that underpinned it.

Recent calls from various employer groups to increase Australia’s productivity by regulating to reduce labour standards demonstrate that neoliberal philosophy is still dominant here. To emphasise the point by example, dignity at work includes the capacity to *effectively* participate in determining the terms and conditions of work. This involves the rights of freedom of association, union recognition, collective bargaining, the right to strike and the right to be consulted and participate in decision making. These are all rights that in recent times have been highly contested either in public discourse or indeed in matters before courts and the tribunal.

The UN International Covenant on Economic, Social and Cultural Rights prescribes equal opportunity for everyone to be promoted in their employment to an appropriate higher level, subject to no

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<sup>35</sup> [www.eurofound.europa.eu/areas/qualityofwork/index.htm](http://www.eurofound.europa.eu/areas/qualityofwork/index.htm)

<sup>36</sup> AIER Charter of Employment Rights, pp. 21-22.

considerations other than those of seniority and competence.<sup>37</sup> This depends on all workers being provided with opportunities for skill enhancement and career progression.

Accumulating personal human capital is not only an economic right of individuals recognised by the UN covenant; it is also in the longer-term economic interests of employing enterprises to maximise the opportunities for training, development and promotion of the people who work there. Retaining a highly skilled workforce should facilitate the quality of output as well as the competitiveness, productivity and innovation of enterprises.

However, some employers are tempted to adopt “low-road” strategies. These can involve adopting short-term mindsets, minimizing investment in the skill formation of their workforce and attempting to purchase enhanced skill from the external labour market. The pressure to maximise short-term financial returns tends to induce employers to adopt these strategies.

Through the examination of the concept dignity at work, and through the Charter in general the AIER has established a set of indicators that reflect key elements of the decent work agenda. This concept of decent work establishes a framework more expansive than that which has been traditionally the domain of labour law and industrial relations legislation.

The AIER therefore submits that all parties including governments, social parties and in fact individual employers and workers adopt the ILO definition of decent work as their policy objective and framework and utilize this for the development of appropriate new forms of industrial regulation, policy, cultural change and educative initiatives and on the ground practice.

### Precarious employment

The provision of decent work remains a challenge. The last thirty years have seen profound changes in the way work is performed in Australia. New forms of working relationships that do not easily fit the traditional mould have proliferated, among them engagement through labour hire companies and the use of self employed contractors.

The growth in atypical modes of employment is an international phenomenon. As the ILO stated in its 2006 *Report on the Employment Relationship*:

*The profound changes occurring in the world of work, and particularly the labour market, have given rise to new forms of relationship that do not always fit within the parameters of the employment relationship. While this has increased flexibility in the labour market, it has also led to a growing number of workers whose employment status is unclear and who are currently outside the scope of protection normally associated with the employment relationship.*<sup>38</sup>

In 2000 a meeting of experts of the ILO recognised this problem and stated that recent transformation in the way work was being performed resulted in situations in which the legal scope of the employment relationship did not accord with the realities of working relationships. The Experts found that this had

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<sup>37</sup> [www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)

<sup>38</sup> International Labour Conference, 95th Session, 2006 Report V(1) *The employment relationship*, para 6

resulted in a tendency whereby workers who should be protected by industrial laws were not receiving that protection.

While in Australia employment remains the norm, employment takes a variety of forms: full- and part-time as well as casual and temporary wage and salary earners, as well as self-employment [some professions, trades] independent contractors, sole-traders, small business operators and the like.

The ACTU's 2012 Insecure Work report defines insecure work as "poor quality work that provides workers with little economic security and little control over their working lives. The characteristics of these jobs can include unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of security and/or uncertainty over the length of the job; and a lack of any say at work over wages, conditions and work organisation."

The report went on to find:

*The internationalisation of Australia's economy over the past 30 years has undoubtedly improved living standards in Australia. At the same time however, the changes that have occurred in our economy and society have also seen unprecedented growth of insecure work – poor quality jobs that provide workers with little economic security and little control over their working lives.*

- *Almost one quarter of all employees in Australia (23.9% or 2.2 million workers), and one fifth of the total workforce, are engaged in casual employment.*
- *Fixed-term employment accounts for just over 4% of all employees, heavily concentrated in a few sectors such as education.*
- *Over one million workers in Australia (9% of the workforce) are independent contractors. Many contractors are in reality economically dependent on a single client, and a significant number of contractors are pressured into sham contracting.*
- *Up to 300,000 workers are employed through labour hire agencies, with little or no job security.*<sup>39</sup>

The issue of insecure or precarious employment has implications for those relying on such forms of work as well as for our society as a whole. The ACTU Insecure Work inquiry heard evidence of people in insecure work having lower standards of living and financial independence. Insecure workers often have trouble securing loans for housing or cars, have difficulty in the private rental market, find their relationships are placed under pressure, and have increased health concerns.

Insecurity is not just a feature for those in precarious or contingent relationships. Insecurity can be experienced by those who have a permanent or ongoing relationship. For example, workers who are not engaged in decision making or consulted about change often feel insecure and experience anxiety when changes are introduced in their workplace. The balance between the expectations of the worker and what they bring to the relationship and how they are treated in the workplace is often referred to as the psychological contract. Kein and Wilkinson note:

*The psychological contract is based on the belief that "hard work, security and reciprocity are linked. From an employee's perspective, the psychological contract guarantees job security, fair*

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<sup>39</sup> Howe, B [Chairman] The report of the Independent Inquiry into Insecure Work in Australia,

*wages benefits, and a sense of self worth for doing the job well. The employer obtains and retains dedicated workers who perform their jobs well, are satisfied in their jobs and are committed to the organization.”<sup>40</sup>*

Insecurity arises when the psychological contract is shaken or broken.

A useful framework for considering these issues is that developed by Burgess and Campbell utilising the work of Guy Standing. This work identifies eight forms of insecurity that impact on workers in today’s workplaces

- Employment insecurity—when workers can be dismissed or laid off or put on shorter time without difficulty
- Functional insecurity — when workers can be shifted at will or where the content of the job can be altered or redefined
- Work insecurity — when the working environment is unregulated polluted or entails other things making it dangerous to continue
- Income insecurity — when earnings are unstable, contingency based or not guaranteed or near poverty
- Benefit insecurity — when access to standard benefits is limited or denied
- Working-time insecurity — when hours are irregular and at the discretion of the employer or insufficient to generate adequate income
- Representation insecurity — when the employer can impose change and need not, or may refuse to, negotiate with the workers’ representatives; and
- Skills reproduction insecurity — when opportunities to gain and retain skills through access to training and education are limited.<sup>41</sup>

As noted above these aspects of insecurity can be experienced by all workers. However the AIER acknowledges that they are more likely to be present and more acutely felt for workers in particular circumstances including those that are engaged precariously or contingently, those in workplace where representation is not available to workers and those whose employment conditions are not “settled” collectively.

### Labour hire

It is indisputable that a significant number of employers have in recent years elected to source their workforce requirements through entities specifically established to operate as providers of labor.

Commonly referred to as labour hire suppliers, these entities are the actual employers of casual and temporary employees who effectively deploy them into the workplaces of the host employer.

This growing trend in Australian workplaces not only represents an intentional shift of the risk from the entity to the otherwise applicable employer but can be argued seeks to revert to the classification of labor as an input or commodity to the economic functioning of an enterprise.

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<sup>40</sup> Kein C & Wilkinson A (2011) The Broken Psychological Contract: Job insecurity and Coping, Business Perspectives, Fall (2010/Winter2011) pp22-26 at p.24

<sup>41</sup> See Owens R (2002) Decent Work for the Contingent Workforce in the New Economy 15 AJLL 209

The shift from an arbitration based industrial relations system to a system underpinned by enterprise bargaining has contributed to the rapid growth of labour hire companies. The use of third party employees by an employer reduces the ability of workers on site to collectively bargain at the enterprise level. This creates an incentive for host employers to outsource their labour obligations to third party providers.

The vast majority of labor hire employees are casual not permanent employees and are expected to be available to work on assignment often at short notice and with little or no security of employment, which further reduces their ability to bargain for wages in any meaningful way.

Labor hire suppliers are both large and small. Some are global operations and whilst others are domestic, often supplying employees in niche markets. As an industry they are unregulated and as entities require little capitalization.

IBIS World's Temporary Staff Services in Australia Industry Report indicates that there are 5406 businesses providing temporary staff solutions and the industry as a whole is worth \$19.3 billion dollars.<sup>42</sup>

There are little to no barriers of entry for companies entering the labour hire industry. The company with the largest market share is Skilled Group Limited but their market share accounts for just 8.9% of the overall industry. Skilled, a company which turns over \$1.7 billion per annum, compete for market share with companies with very little capital providing less than 50 workers to one or two workplaces.

The lack of any sort of barriers to entry means small players can come in and undercut larger operators on price and simply shut up shop if they lose business and can no longer financially sustain themselves. The current industrial laws protect some different types of workers but not others. We need to recognise that the current way our industrial laws are framed, protecting employees recognised as such under common law, and not other workers, institutionalizes discrimination against a growing number of workers.

#### Difficulties of classifying the employment relationship

The common law and parliaments have used the concept of employment to distinguish between those workers who merit protection from the inequality of bargaining power and those who do not merit that protection. Many laws that protect employees provide limited protection to labour hire workers and virtually no protection to self-employed contractors. In Australia the emphasis given within our system to the concept of the male bread-winner and the concept of standard employment as the norm has also meant that part-time and casual workers have suffered significantly because of the limitations enshrined within the law.

If one of the purposes of industrial laws is to protect people who perform work, who are vulnerable to exploitation and who suffer as a result of an inequality of bargaining power, the current laws exclude a range of workers that logic and fairness suggests should be protected.

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<sup>42</sup> Paul McMillan, "IBISWorld Industry Report L7862 Temporary Staff Services in Australia", May 2011.

From the mid-nineteenth century through the twentieth century the concept of employment was developed by the common law and a distinction was recognised between employees and independent contractors. Parliaments commonly adopted this distinction and conferred the protection of industrial laws on employees but left independent contractors relatively unregulated. Over time it has become increasingly difficult to distinguish between employees and independent contractors, with courts and industrial commissions using various tests to define the distinction.

At times the difference was thought to lie in the issue of control: an employer could control what, where, when and most importantly how work was performed by employees, whereas independent contractors were relatively free of control by the principal contractors.

At times the test was variously stated as: is the worker integrated into the employer's organisation? Or is the worker in business on his or her own account? Or is the essence of the contract for the supply of the work and skill of the worker? Or is the worker part and parcel of the employer's organisation? Or is the worker engaged to produce a given result?

The current approach adopted by Australian courts is a multifactor test: it permits courts to consider a wide range of indications, none of which is determinative in itself. Courts have recognised that there is no magic touchstone; the search for a single distinguishing factor is futile. In the words of Justice Deane in the High Court, the distinction between employment and other relationships *"has become an increasingly amorphous one as the single test of the presence or absence of control has been submerged in a circumfluence of competing criteria and indicia"*.<sup>43</sup>

One problem with an ambiguous distinction between employees and independent contractors is that employers can often avoid laws meant to protect employees. They do this by structuring their relationship with the worker so as to avoid recognising the worker as an employee and instead categorising the worker as though she or he is self-employed. This is often achieved by the contract between the employer and the worker expressly stating that the relationship is not an employment relationship. Such contractual declarations of intent are not conclusive, but courts often place great weight on them when determining whether the relationship is one of employment.

Another means of avoiding obligations imposed by laws intended to protect workers is to interpose another entity between the employer and the worker. For example, the employer may arrange for a labour hire agency and not the employer to engage the worker directly. Alternatively, as a condition of obtaining the job, the employer may insist that the worker become a "one person company" that the employer then engages under a supposed commercial contract.

The effect of these legal devices is to avoid industrial laws, awards and in some cases collective agreements, that should apply given the true nature of the relationship between the worker and the business receiving the benefit of the worker's work.

The ILO has focused on the issue of contracts that conceal, distort or disguise the true nature of a relationship between employer and worker. The 2006 Report on the Employment Relationship defines a disguised employment relationship as

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<sup>43</sup> [1986] HCA 1; 160 CLR 16 at 49)

*one which is lent the appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law.*<sup>44</sup>

The 2006 recommendation accords with the 2003 ILO Resolution on the Employment Relationship, which declares that “*all workers, regardless of employment status, should work in conditions of decency and dignity*”. The approach adopted corrects the tendency recognised by the ILO Meeting of Experts on Workers Needing Protection for workers who should be protected by industrial laws not to be afforded that protection due to limitations on the legal scope of the employment relationship.

#### AIER’s proposed solutions to classification

In the last few decades parliaments in Australia have adopted a range of solutions to deal with the problem of the inadequacy of the common law meaning of employment.

One solution is to deem specified classes of workers to be employees for the purposes of particular laws.

Another solution, adopted in payroll tax legislation, is to treat contractors who personally perform work as employees, even though the contractor may be engaged through a one person company. In the United Kingdom many industrial laws apply to “workers”, not just employees. The Canadian Labour Code extends certain benefits to dependent contractors. While useful, these laws have not addressed the problem in the comprehensive way that is proposed here.

The solution adopted in the Charter is that it grants rights to employers and workers. A “worker” means an employee and includes a dependent contractor. Where, by reason of the use of an agency or labour hire arrangement, a triangular relationship exists which disguises the true employer of the worker, the Charter extends to the true employer.

The Charter adopts a relatively simple yet comprehensive definition of “worker”. A person is a worker within a business that takes the benefit of the worker’s labour (“the employer”) if the person meets two or more of the following indicators:

- the person is subject to the control of the employer in relation to how the work is performed
- the person usually works for the one employer and only that employer
- the person is treated as, or portrayed to others as, part of the employer’s organisation
- the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer
- the person has regularly worked for the employer over a three month period
- the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade)

**and** the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer. Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a

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<sup>44</sup> International Labour Conference, 95th Session, 2006 Report V(1) *The employment relationship*

range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.

As noted above, the Charter will also apply to dependent contractors. Dependent contractors personally perform work under a contract and are directly or indirectly economically dependent on one principal contractor. For the purposes of the Charter, the principal contractor is regarded as the employer. This includes: contractors whose sole or predominant source of income is earned from one principal contractor (most outworkers will fall into this category); workers who personally perform work for an entity (such as a company, partnership or trust) where the entity's sole or principal source of remuneration is payment for the work provided by the worker. This point deals with one of the interposed entity problems: the fact that the services of the worker are provided to the principal contractor, through a one person company.

There is a third problem. This involves addressing conduct that disguises the reality of a relationship by masking the identity of the real employer. Such a situation usually occurs where a worker is engaged by the true employer through an intermediary, such as an agency or an entity that purports to be a labour hirer. Recent Australian experience suggests that the use of this kind of device is not confined to small fly-by-night operations but is used from time to time by major corporations. Its detrimental effect on workers is threefold and potentially very severe.

Firstly, it enables the true employer to avoid direct responsibility for the payment of the worker's wages and other entitlements, denying workers access to the wealth of the business which has taken the benefit of their work.

Secondly, by this device the true employer is able to distance itself from wage claims or other grievances raised by the workers whose labour it takes the benefit of. The imposition of an intermediary "employer" means that workers are unable to collectively bargain with and take action against the true employer; are unable to join with regular employees of the true employer for collective bargaining, thus weakening the collective; and are unable to take up grievances directly with the true employer despite the source of the grievance being the conduct of that entity.

Thirdly, because agreements usually impose obligations only on the particular employer(s) named by those instruments, those obligations can be avoided by the named employer devolving the role of employer to an intermediary not named by those instruments.

The law should apply to the true employer despite the imposition of an intermediary or third party "employer". A test is required to distinguish between legitimate third party arrangements where the business taking the benefit of the work should not be regarded as the employer and illegitimate third party arrangements designed to avoid employment obligations, in which case the business is to be regarded as the true employer.

The traditional common law tests have proven difficult and a test directed at the purpose of the use of the intermediary is likely to provide a more appropriate dividing line. The test proposed acknowledges that agency and labour hire arrangements can be used for legitimate purposes by the end user business because, in a wide range of circumstances, such arrangements generate economic efficiencies that have nothing to do with the avoidance of labour costs or employment obligations.

The Charter adopts the following test for determining whether a worker is a worker of the entity that gets the benefit of the worker's work (the true employer) in circumstances where a third entity purports to be the employer. A worker is a worker of the true employer, where the person meets two or more of the following indicators:

- the person is subject to the control of the true employer in relation to how the work is performed
- the person usually provides work in the business of the true employer and only that business
- the person is treated as, or portrayed to others as, part of the true employer's business organization
- the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the true employer
- the person has regularly worked for the true employer over a three month period
- the person uses equipment or other facilities needed to perform the work provided by the true employer (other than the usual tools of trade)

**but not** where the third entity which is contracted to provide the person's labour to the end-user business has a contract with that business which provides a commercial return to the third entity and which by reason of the provision of the labour under the contract, as compared with the use of direct employees, provides the end user business significant and genuine economic efficiencies unrelated to the comparative cost of employing that person's labour directly and unrelated to any intent on the part of the end user business to undermine the capacity of workers working in its business to collectively bargain together.

The changing nature of work is posing significant policy challenges for governments and civil society in Australia and around the world. There are numerous choices to be made about how our workplace relations laws and policies can be configured to meet these challenges. The AIER believes the concepts of dignity and decent work must be central the policy outcomes.

### **Decent work – the safety net of minimum wages and conditions**

In AIER's submission, 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.

Charter Right 8 states

*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.*

This requires a minimum standards regime:

- that includes readily 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
- where the power position of one party cannot be used to undermine the system of regulation and the attainment of fair minimum standards.

The current legislation and framework falls short of our definition of the fair and minimum standards and machinery essential to ensure fairness across the labour market because:

- not every worker has entitlements under the NES, because “employees” covered does not include workers engaged under disguised employment arrangements
- parts of the NES standards do not create enforceable entitlements
- then NES minimum standards are not maintained by an impartial tribunal independent of government.
- 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
- there is limited capacity of a party to enforce the mandated entitlements.

As discussed above, AIER believes that all workers regardless of employment status should have access to a series of minimum standards to enable workers to be justly rewarded for their work, to ensure fairness across the labour market (especially for vulnerable workers) and to enable employees to live a fulfilling life and attain a fair balance between work and the rest of their lives. Too many workers engaged precariously or contingently do not have this access in Australia.

A consequence of seeing workplace relations laws as socially beneficial is that citizens should not be given the option of choosing whether socially beneficial legislation applies to them. Nor should they be permitted to opt out of a fair industrial framework including minimum standards and rights. Industrial parties should not be able to avoid the protections afforded by the system by choosing to categorise their relationship as one that is not of employment.

The gap in access to fair minimum standards for workers other than those engaged in standard employment relationships represents a form of discrimination against those who not in such relationships. To the extent that a purpose of labour law and regulation is to provide protection particularly to those most vulnerable in the workforce this objective is not being met for these workers.<sup>45</sup>

The extent to which Australia allows for the “opting out” of minimum entitlements through mechanisms such as the no disadvantage test or better off overall test and via the exclusion and qualification on some groups of workers (casuals, fixed term, those of employed by organisations of a particular size and via qualifying periods) is unique and should be reviewed.

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<sup>45</sup> Tham J-G (2007) *Towards an Understanding of Standard Employment Relationships under Australian Labour Law* 20 AJLL pp123-158.

AIER submits that Australian labour law needs to be recast in the following ways

- By rethinking work relationships, consciously acknowledging the impact of the bread-winner model on our industrial regulation and practice and committing to overturning the impact of this. In particular to address the discrimination that has resulted for women workers.
- By recasting our law so that every worker has access to a suite of minimum entitlements/rights on a pro rata basis. There should be no ability to contract out of these. This also means that mechanisms to qualify for rights or benefits such as continuity of service, number of hours worked, periods of service or methods of engagement should also be discarded.

Whether a worker is an employee governs the provision of a range of social, economic and industrial benefits. Employers and employees cannot ordinarily contract out of those benefits. The contract of employment cannot derogate from the terms and conditions of an industrial instrument which operates with statutory force.

The parties cannot contract out of NES entitlements or entitlements in industrial instruments. An estoppel cannot be relied on to defeat an entitlement of an employee to an entitlement stipulated in an industrial instrument or the Act. This is because those rights are conferred as a matter of public policy and an estoppel cannot arise when it is inconsistent with a statutory purpose.

Similar public policy considerations apply when the employer seeks to 'opt out' of those benefits by simply entering a contract whereby a worker states he or she is not an employee. The significance afforded to express terms should depend in part on whether the issue arises as a matter only of private concern or also has a public element. Whether or not the worker desires to be an independent contractor, and whether or not that desire is well informed, should not be determinative, just as a well-informed desire to work for less than the wages set in a modern award is not a sufficient reason to avoid the benefits of the Fair Work Act.

#### The Minimum wage and penalty rates

Workplace standards, including the level of minimum wages, are an important factor in delivering socially just incomes in Australia. While only a minority of employees are minimum wage or award dependent employees, the minimum wage and minimum award wages remain important policy settings.

We note the Commission's comments regarding the capacity of the minimum wage to effectively target poverty and inequality, taking into account length of time spent on the minimum wage and the degree of non-market income that is included in the household income. We would make two points in relation to this issue. Firstly, we reiterate the importance of regulation that acknowledges the human aspect of work. The minimum wage continues to play an important role in providing for a level of dignity and decency at work. Secondly, we would urge the Commission to take into account evidence of the lived experience of minimum wage and low-paid workers. The ability to live on casual or part-time jobs paying minimum or award wages is an essential consideration for assessing the efficacy of the minimum wage.

In relation to the broader issues of inequality, we note the comments of the Fair Work Commission Minimum Wage Panel, in their 2014 decision, noting that the Panel takes into account the needs of the

low paid, relative living standards and promoting social inclusion as well as economic indicators in their annual reviews:

“ [57] The real weekly earnings of full-time workers have become progressively less equal over the past decade—for each decile, the lower the earnings, the lower the rate of growth in earnings—although this rising inequality has become less pronounced in the past five years. No party disputed the fact that the distribution of earnings has become more unequal in Australia over recent decades and the Panel acknowledges that annual wage review decisions have a role to play in ameliorating inequality.

[58] While real earnings have generally increased over the past decade, earnings inequality is increasing. Over the past five years, the rate of growth in average earnings and bargained rates of pay have outstripped growth for award-reliant workers. This has reduced the relative living standards of award-reliant workers and reduced the capacity of the low paid to meet their needs—needs being a relative concept.”<sup>46</sup>

The Panel also noted that

“[399] Single-earner families that receive the NMW or a low award rate have had declines in their equivalent real disposable income, to the point where today a couple with two children would be in poverty as conventionally measured. Households that rely on earnings as their principal source of income comprise about one-third of all families below a 60 per cent median poverty line.”<sup>47</sup>

The Commissions asks for submissions on the question of the impacts of the minimum wage on employment. As far as AIER is concerned that question has been answered by the Minimum Wage Panel, which has repeatedly found no evidence that modest increases in the minimum wage have any effect on employment. In fact there are few voices calling for a reduction in the minimum wage – the debate each year is more properly categorised as about the level of increase. We believe the current framework of an independent tribunal taking submissions and evidence from a wide range of stakeholders and taking into account a broad range of social and economic factors has served, and will continue to serve, Australia well.

These calls come alongside other calls for reductions in or removal of other remuneration such as penalty rates. Penalty rates form part of the minimum standards for many workers through the award system and are particularly important for workers in insecure work. They are important for both award reliant employees and those on workplace agreements. We point the Commission to the recent study from the Work + Life Centre, “Evenings, Nights and Weekends: working unsocial hours and penalty rates”.<sup>48</sup> A notable finding of this report is that over 50% of respondents indicated they would not work non-standard hours without penalty rates. Again we urge the Commission to keep in mind the concepts of dignity and decency at work and the relationship of work to our social fabric.

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<sup>46</sup> <https://www.fwc.gov.au/documents/decisionssigned/html/2014FWCFB3500.htm>

<sup>47</sup> Ibid

<sup>48</sup> [http://www.unisa.edu.au/PageFiles/34117/PenaltyRatesReport\\_Oct2014%20Final\\_R1.pdf](http://www.unisa.edu.au/PageFiles/34117/PenaltyRatesReport_Oct2014%20Final_R1.pdf)

AIER expects that the current inquiry will hear many calls for reductions in workplace standards in the interests of productivity and economic growth. AIER does not support reductions in minimum wages, minimum employment standards or awards in the name of improving economic 'efficiency' or economic growth. AIER believes that reductions in standards and incomes are counter-productive for workers, the economy and society as a whole.

AIER believes that a fair and equitable workplace relations framework based on fair employment rights for both employers and employees and the provision of decent, secure work and working conditions is essential to the creation of strong economic and social outcomes.

## **Decent Work – the bargaining framework**

Right 9 of the Australian Charter of Employment Rights states:

### *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.

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.

Under the current legislation there is an emphasis on the need to prescribe, in technical terms, a variety of matters that constrain the bargaining process. These convoluted prescriptions appear to be influenced by historical legacy (the emphasis on enterprise bargaining) and/or inappropriate efforts to corral or restrain worker power in 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 bargain 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.

In a number of areas the legislation is out of step with International Labour Standards in particular in the areas of Freedom of Association and Protection of the Right to Organise Convention No.87 and Right to Organise and Collective Bargaining Convention No.98.

The emphasis within the Fair Work Act on enterprise level bargaining [see s.3(f), Objects at Part 2-4 and s. 186(2)(ii) and s.229(2)] is a barrier to genuine collective bargaining . According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention 98 the determination of the bargaining level should be left as a matter for the discretion of the parties and consequently the level of negotiation should not be imposed by decision of the administrative authority.<sup>49</sup>

The Fair Work Act 2009 also restricts the contents of agreements which may be approved to those agreements which contain only permitted content, including “matters pertaining to the employment relationship”. The “matters pertaining” criteria arose from limits (or perceived limits) of the federal Government’s power over industrial relations. Using the corporations’ and other powers (and not the conciliation and arbitration power) the federal Government may now permit the making of agreements and awards that are not limited to matters pertaining to the employment relationship.

The further restriction on content bargaining by the exclusion of “unlawful terms” (s.186) is unnecessary. Consistent with International Labour Standards workers should be able to pursue any matters that are connected to their economic and social interests that can be progressed through work.

The ILO’s Committee on Freedom of Association has called on the Australian government to review collective bargaining provisions:

*Further recalling that measures taken unilaterally by authorities to restrict the scope of negotiable issues are often incompatible with Convention No.98, and that tripartite discussion for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties the Committee requests the Government to ...review these sections, in full consultation with the social partners...<sup>50</sup>*

AIER submits that it would now be appropriate for the legislation to be reviewed to remove these restrictions on content and that a tripartite process of determining guidelines for collective bargaining be adopted.

The Commission asks for opinions on productivity improvement clauses and the government’s proposal to mandate discussion of productivity in agreement-making. The AIER’s view is that content should be matter for the parties. The government should not mandate particular areas of discussion in the same way it should not restrict what can be negotiated. Giving preference the productivity clauses while denying workers the ability to negotiate over their job security is valuing abstract economic notions above the rights of people to act in their social and economic interests.

AIER is concerned there is the potential within the legislation for collective bargaining for employers to enter into agreements with employees directly even where a union exists and/or is involved in bargaining.

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<sup>49</sup> Article 4 of Convention 98

<sup>50</sup> CFA Report Australia (Case No. 2698) Report No.357 (Vol.XCIII, 2010, Series B No.2) para 220

The ILO Committee of Experts on Freedom of Association has noted that s.172 of the FWA could “place employees, and organisations of employees, on equal footing with respect to the conclusion of agreements that are not greenfields agreements” – this being outside of the scope of Collective Agreements Recommendation (No.91) that stresses the role of worker’s organisations as one of the parties in collective bargaining and that direct negotiation between the undertaking and its employees, bypassing representative organisations, where these exist, might in certain cases, be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted.<sup>51</sup>

The confusion about the role and status of workers organisations in bargaining under the Fair Work Act is a matter that has been the subject of substantial litigation. Much of this litigation has been brought through the ss228(1)(e)-(f), and specifically in relation to submitting agreements to ballot and direct dealing and communication with employees.<sup>52</sup>

FWA has found that there is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot.<sup>53</sup>

AIER submits that the legislation does not protect the role of workers representatives in the bargaining process in the way that is recognised under International Labour Standards. This has allowed employers to utilise direct dealings and balloting as a tactic to frustrate bargaining and go around the union/s.<sup>54</sup>

AIER believes that the flexibility given to FWA under the legislation to determine the question of majority support where this is in dispute is both uniquely Australian and an appropriate way of avoiding the potential for complex litigation in this area. Whilst research in this area is only tentative given the time lapse since the commencement of the legislation there is at least some evidence that provisions such as majority support determinations have facilitated collective bargaining in organisations previously resistant to it including for example Cochlear, Telstra, IBM.<sup>55</sup>

AIER is concerned that little has been done to assist the parties with the cultural shift to good faith bargaining. To date government funds have been directed to employer associations and to the ACTU to assist in the roll-out of education initiatives aimed at raising awareness of the provisions of the Fair Work Act.

At the time the legislation was introduced AIER raised concerns that without the development of good faith relations as an Object, and good faith provisions being layered throughout the legislation good faith bargaining would become about technical adherence to minimal formal obligations (or in fact on developing ways to get around these requirements) and little more. The case law demonstrates this.

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<sup>51</sup> Ibid para216

<sup>52</sup> For a detailed summary of comparative good faith bargaining regimes see Forsyth A (2011) The Impact of ‘Good Faith’ obligation on Collective Bargaining Practices and Outcomes in Australia, Canada and the USA, *Canadian Labour and employment Law Journal* 16:1

<sup>53</sup> CFMEU v Tahmoor Coal Pty Ltd [2010] FWA 3510 at para [30]

<sup>54</sup> Examples include Rio Tinto and recent BHP tactics in bargaining.

<sup>55</sup> Forsyth (2011) op cit p. 25-30

AIER is concerned that there is no mechanism to review Individual Flexibility Agreements (IFAs) arising from provisions in collective agreements, and no process to remedy disputes associated with their application short of court action. Further because these agreements are not publicly available there is no ability to monitor trends within them or to gauge whether they are furthering the Objects of the Act or not.

The Commission asks whether any policy changes for industrial disputes are needed. The answer is yes if we are to fully recognise rights to freedom of association and fair bargaining.

The Fair Work Act places significant limits on employees and employers pursuing agreements. These limitations and restrictions fall most heavily on employees and unions. Employees have only limited rights to take protected industrial action in support of an agreement. For example, industrial action:

- May only be taken during bargaining periods;
- May not be taken in respect of multi-employer agreements;
- Must only be in support of approved claims;
- Must be taken only after a ballot in which more than 50% of employees must vote;
- Can only be taken with notice to the employer;
- Must only be directed at the primary employer [secondary boycotts are not allowed].

These restrictions breach international labour standards that exist to provide the conditions enabling workers, that is, over 11 million Australians, to protect and enhance their social and economic interests. For more detail on the importance of collective bargaining and the right to strike and the ways Australian laws fail to fully recognise these rights, see the AIER submission to the ALRC “Rights and Freedoms” Inquiry.<sup>56</sup>

Similarly, secondary boycotts are considered part of legitimate industrial action by the ILO’s expert committees and Australia’s restrictions have been found by the ILO to breach ILO conventions:

“The reference to ‘strike action’ within the jurisprudence of the ILO refers to all forms of industrial activities that can be undertaken by workers in order to further their interests as long as the action taken remains peaceful. Therefore in the ILO context, the phrase ‘strike action’ encompasses total withdrawals of labour, partial withdrawals of labour, work bans, secondary boycotts, go slow campaigns, work to rule campaigns (work in strict accordance with the terms of any industrial instruments) or wild cat strikes (labour withdrawals without prior authorisation from a relevant union)...

“ILO standards do not limit the concept of ‘workers interests’ solely to the interests of workers in their employment conditions at a particular enterprise. Instead ILO standards recognise a broader concept of collectivism, whereby workers should be able to take strike action in support of other workers, providing that the strike action they are supporting is itself lawful. However, sympathy action cannot be protected industrial action under the FW Act and the Trade Practices Act 1974 (Cth) [now the Competition and Consumer Act 2010] secondary boycott regime expressly outlaws sympathy action. These provisions have been criticised by the Committee of

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<sup>56</sup> <http://www.aierights.com.au/2015/03/aier-submission-to-alrc-freedoms-inquiry/>

Experts over a number of years on the grounds that general prohibitions of sympathy strikes can lead to abuse and are inconsistent with the Freedom of Association Conventions.”<sup>57</sup>

AIER submits that the secondary boycotts provisions of the Consumer and Competition Act are an unjustified and unwarranted interference with the right to strike in the circumstances where the issues pertain to genuine industrial issues and where the original industrial action being supported is lawful.

Moreover the framing of the prohibition on secondary boycotts and the "dominant purpose" defence of some conduct is anachronistic in contemporary employment settings. Labour hire, contracting out of services, and supply chain gymnastics by corporations obscurely related to primary employer were either non-existent or not of much significance when the secondary boycott legislation was framed. The retention of anachronistic wording about the relevant right/duties relationship covered by the offence exacerbates its curtailment of employee rights to take collective action to support a worker's direct economic interest against highly resourced but fragmented employment entities.

AIER believes that the role of unions in providing collective voice and fairness to employees is of central importance to both employees and employers and ultimately to the economic success of enterprises and the economy as a whole.

These roles must be strengthened not weakened as a matter of fairness and equity but also for the economic benefits that may flow as noted earlier in the submission.

AIER's approach is based on the premise that the right to form and join unions is not just a fundamental human right, but a right that brings with it important social and economic benefits to individual employees, to workers collectively and to society as a whole. Although the formal foundation for this premise is more or less intact, today in practice, it is under challenge. The right to form and join unions may be acknowledged but the exercise of it is discouraged by ideology, employer ethos and flexible work categories, structures and practices. However, AIER remains committed to the values that underpin the Charter of Employment Rights and the social and economic consequences that, in the Institute's evidence-based belief, flow from it:

“There is a large body of evidence supporting the association between stronger workers' rights and higher economic growth as well as improved distribution of income. There are many reasons for this, including improved possibilities for the development of human capital, reductions in industrial unrest, improved firm loyalty and reduced labour turnover.”<sup>58</sup>

While individual employee rights are important, it has been the collective action of employees through representative organisations that has driven improvements in standards and conditions of employment over time.

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<sup>57</sup> Shae McCrystal, Sydney Law School Legal Studies Research Paper No. 10/18 February 2010 *The Fair Work Act 2009 (Cth) and the Right to Strike*, p. 9, 13-14

<sup>58</sup> Kriesler, P and Nevile, J, *Economic perspectives on workers' rights*, in Chapter 12, AIER, *Australian Charter of Employment Rights*, op. cit. p 134

## Decent Work – employee protections

### Adverse Action

Charter Right 3 of the Australian Charter of Employment Rights states:

#### *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.

AIER members have been involved in some of Australia's most high profile discrimination cases and can attest to the costs, delays and impact on complainants and defendants that these processes currently involve. AIER is of the view that the complaints handling processes for dealing with discrimination matters needs to be more efficient and cost effect to give greater opportunity to seek remedy for work related discrimination. The current system is characterised by costly litigation, time delays and processes that involve considerable stress for all parties.

We believe there is genuine merit in considering streamlining legislation such that all work related discrimination matters come before Fair Work Australia and are able to be resolved through processes of conciliation and arbitration at this level. We can see no reason why a tribunal that can validly determine that an employee has been unfairly dismissed and craft an enforceable remedy could not also craft a remedy if it finds that the termination has been discriminatory.<sup>59</sup>

### Unfair dismissal

Charter Right 7 of the Australian Charter of Employment Rights states

#### *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 Organization standards.

AIER believes in the necessity for a legal framework providing unfair dismissal protection because of the importance of a job to a person's life. Unlike a physical asset where it is quite clear what is being taken away, with an employee's labour services it is not just an employee's income that is being deprived but

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<sup>59</sup> McCallum R (2006) *Australian Labour Law After the Work Choice Avalanche: Developing An Employment Law for Our Children*, The Julian Small Lecture, Law Society of New South Wales, 3/10/06

potentially many other interests too: an employee's dignity, autonomy, livelihood, sense of self-worth, membership of a union and place in the community.<sup>60</sup>

Whilst we recognize that unfair dismissal law represents a regulatory burden upon business, the AIER is of the view that this burden is a legitimate restraint on managerial prerogative and necessary for safeguarding the job security of individuals.

We acknowledge that the unfair dismissal provisions of the Fair Work Act 2009 represent a clear improvement upon their predecessor provisions in meeting our objectives. Under the previous system the cumulative effect of the operational reasons exemption and the exemption of employers with less than 100 employees removed unfair dismissal protection for the majority of Australian employees.

As the Fair Work Act 2009 has reinstated these rights to a large degree it is unsurprising that the number of unfair dismissal claims before Fair Work Australia have increased. It should also be noted that the transition to the national system has meant that many more employees are covered by federal legislation and therefore will be utilising the provisions of the Fair Work Act to pursue unfair dismissal matters rather than utilizing state jurisdictions as they may have done in the past.

The AIER welcomes continuing discussion as to how small business owners and individual employees can be adequately protected under unfair dismissal law. The AIER is of the view that the definition of small business under the Fair Work Act 2009 is an appropriate one and a significant improvement on the expansive definition applied under the predecessor regime.

Nonetheless, the AIER does believe that there should be greater protections built into the Fair Dismissal Code given that compliance with this Code effectively removes unfair dismissal rights for employees of small business.

This Code is currently very minimalist in design as it only requires a meeting and a warning before dismissal is valid. This does not effectively protect employees of a small business from arbitrary dismissal and may lead small business employees to believe that the requirements of the Code are best practice in this area. The Code allows for an employer to summarily dismiss an employee if they believe the employee has engaged in a single act of theft, fraud or violence. We believe that more guidance should be given to small business employers so as to assist them in developing better procedures for dismissing staff and for managing performance. This could be achieved in one of two ways.

Small business employers could receive an Accompanying Guide with the Fair Dismissal Code which outlines best practice procedures for dismissing staff and managing performance. This would provide non-binding guidance as to how small business employers could design a workplace policy for performance management and dismissal. The AIER's Standard of Employment Rights provides one example of how this could be done.

Alternatively, Fair Dismissal Code could be improved so that there are additional obligations inserted into the Code. This could require that the Code provide for a system of at least two warnings and a positive obligation upon the employer to take steps to assist the employee in improving their performance after the giving of the first warning. Ideally small business employers would be encouraged

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<sup>60</sup> John Budd, *The Thought of Work* (Cornell University Press, 2011); Frederick Meyers, *Ownership of Jobs: A Comparative Study* (Los Angeles, 1964); Wanjuru Njoya, *Property in Work* (Ashgate, 2007); Bob Hepple (1981) 'A Right to Work' 10 ILJ 65.

to devise a 'Performance Management Plan' (PMP) in consultation with the staff member whose performance is under review. This PMP could include additional training, supervision, mentoring, behavioural counseling or other arrangements that would aid and motivate the employee to perform their job to a higher standard.

The above two options would be more in keeping with the Termination of Employment Convention No. 158, Article 7 Procedure prior to or at the time of termination. In particular allowing for the worker's opportunity to defend themselves against the allegations made prior to termination.

The AIER discourages public and media perception that the unfair dismissal system allows for the payment of 'go away money' to unfair dismissed applicants. This phrase is increasingly being relied upon to make the suggestion that the system allows vexatious litigants to harass employers and receive a monetary payment for a justified dismissal. We challenge the use of 'go away money' as pejorative term that does not respect the dignity of the terminated worker.

We also challenge the public and media perception that the unfair dismissal system is a barrier to job creation. This assertion is not evidence-based and has been consistently refuted by researchers.<sup>61</sup>

## **Women's participation and experience in the workforce**

As mentioned above, we were surprised the Commission's Issues Paper did not specifically seek comment on the barriers in the workplace relations system to women's participation in the workforce and the continued discrimination women face.

We appreciate the Commission considered the issue of participation extensively in the Childcare Inquiry, however, the structure and performance of the workplace relations system continues to discriminate against women.

Historically in Australia the permanent full-time worker was the pivot around which benefits were defined and in fact around which trade unions and social policy activists agitated for industrial and social reform. The emphasis within Australia was on the male- breadwinner as the model for defining benefits and rights. A commitment to the standard employment relationship was a commitment to a mechanism designed to protect employees against economic and social risks, reduce social inequality and increase economy efficiency.<sup>62</sup> However, the definition of the standard employment relationship (male, full-time, permanent) and the privileged position afforded to those employed in accordance with it was always gendered and ignored form of engagement that sat outside of the model.

Industrial awards were, and remain still, the mechanism by which the experience of standard employment relationship workers and non-standard employment relationship workers was framed. Canadian academic, Judy Fudge, notes that given that awards until relatively recently failed to regulate part-time work, the growth in women's employment in Australia was via casual engagement. With most

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<sup>61</sup> Robbins and Voll (2005) 'The Case for Unfair Dismissal Reform: A Review of the Evidence, *Australian Bulletin of Labour*, 25 (3).

<sup>62</sup> Fudge J (2006) "*Precarious Employment in Australia and Canada: The Road to Labour Law Reform* 19 AJLL pp105-126at pp. 107 -114

part-time work in Australia being casual in nature.<sup>63</sup>

The negative consequences of insecurity arising from precarious or contingent work are disproportionately felt by women. For many women, given the double load of paid work and unpaid work (in the home) that they continue to shoulder “flexibility” has meant accepting the adversity of insecurity.

One continuing consequence of the gendered nature of our workplace relations system is the persistent gender pay gap. The current national gender pay gap is at a record high of 18.8%, or \$298 in average weekly full time earnings. It is a sobering fact that the gender pay gap is increasing 43 years after equal pay for equal work was formally established, 30 years after the Sex Discrimination Act was introduced and over a decade since State industrial relations systems began to introduce pay equity principles and successful pay equity cases were being heard and decided.

Along with the inherent discrimination that undervalues work traditionally undertaken by women, the changing nature of work and the deregulation of the workplaces relations system are key factors in the increasing gender pay gap.

It is difficult to make extensive comment regarding the impact of the low pay bargaining provisions in Part 2-7 of the Fair Work Act given that there has only been one matter heard under these provisions. In 2010 community sector workers lodged an equal remuneration case. The interim decision from 2010 community sector workers case found that work in this industry had been undervalued and that a contribution to this undervaluation has been gender - via the predominance of women working in the industry and also the historical construct of care work as “women’s work”.<sup>64</sup>

The Full Bench found “there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with workers in state and local government employment. We consider gender has been important in creating the gap between pay in the SACS industry and pay in comparable state and local government employment.”

Significantly, FWA ruled that the applicants did not need to prove discrimination in order to demonstrate the validity of the claim and that they did not need to compare social and community service workers with male workers. Although the minority judgment of Vice President Watson in the final decision suggests that this is a requirement.

The bench in this interim decision required the parties involved to identify “the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses the situation”. It called for more submissions to demonstrate what proportion of the pay gap is a result of gender and what the pay increase should be.

The Full Bench has subsequently accepted the submission made on behalf of the union applicants and the Commonwealth Government regarding a joint position on the new rates that should apply as a result of an equal remuneration order.<sup>65</sup>

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<sup>63</sup> Ibid p.90

<sup>64</sup> [2011] FWAFB 2700

<sup>65</sup> [2012] FWAFB 1000

The majority decision represents an important gain in the fight for gender pay equity, recognising the undervaluation of workers in these highly feminised industries.

Unfortunately however the federal tribunal has rejected the approach of both New South Wales and Queensland tribunals with respect to how to address and remedy the historical undervaluation of work based on gender. The Full Bench rejected the concept of establishing a set of principles as a guide for determining equal remuneration orders. Further the minority judgement of Vice President Watson has the ability to confuse the criteria that should be used in assessing applications for equal remuneration orders.

Too few matters of this kind have been pursued in Australia's industrial history because they have been seen to be too difficult to progress. This was a matter that each of the two Pay Equity Inquiries (NSW and QLD) identified as a barrier to achieving pay equity.<sup>66</sup>

There is broad agreement that women's increasing participation in the workforce is an economic good. Yet we need to consider not just the level of participation but the quality of the work, including the ability to engage in quality part time work. The level of wages, including additional compensation for unsocial hours, security of employment and work that provides for dignity are all important factors for women that are related to the workplace relations system and the issues discussed in this submission.

## **Workplace relations and economic outcomes**

As the Commission notes, the linkages between workplace relations and the economy as a whole are complex. Given the numerous factors that affect productivity and economic performance at any given time, it is difficult to determine the impact if any of particular changes to workplace relations laws or policies.

We note the comments of David Peetz:

Overall, then, what can be said? There is some evidence that industrial relations policies that enhance fairness enhance economic performance. However, although this is a trend on average, the effects are conditional; they are not consistent or universal. What can be said with more certainty is that, in any specific workplace, industrial relations can make a difference to productivity. The decisions management makes, and the relationship it has with employees and unions, will shape what happens in the workplace and can have a noticeable effect on productivity.

That is not the same as saying, though, that if IR policy is altered at the national level, it is going to have a widespread or noticeable impact on productivity. It is what happens at the workplace that matters—and some managers will make decisions under a new framework that will make things better than they would have been, and some will make things worse. Some will consult with and involve their employees, and some will exclude or exploit them. Many seek a holy grail in employment or industrial relations policy that is going to give a magic boost to the economy.

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<sup>66</sup> See (2007) QIRC Pay Equity: *A Time to Act* The report of the Inquiry to examine the impact of the Federal Government's WorkChoices Amendment to the Workplace Relations Act 1996 on gender pay equity.

But there is none—certainly not to be found in policies that aim to shift the balance of power in industrial relations one way or the other.

That does not mean that no IR policies can influence productivity. The results of research suggests that government policies to encourage or discourage unions, to restrict the extent or scope of collective bargaining or related action, or to encourage or discourage non-unionism or individual contracting, will not do a great deal in net terms to change economic performance.

Policies aimed at giving employees more say or more voice at work may well improve economic performance. This is an area where Australian policy still lags many other industrialised countries, but one largely beyond the scope of this article...

As discussed above, advocates for various policy positions often argue that changes should be made to legislation because of the impacts on economic efficiency and productivity, when often what is being sought will have little impact on economic efficiency and productivity, but will have significant implications for the distribution of power and hence income—that is, for fairness.”<sup>67</sup>

Little discussion takes place in Australian society about how we can expand employee voice in decision-making at the workplace to the benefit of all actors in our community. The AIER Charter calls for greater employee participation in decisions in the workplace. There is little evidence of any trend in this direction in Australia. We believe it is an area that deserves more attention.

We also note the comments of His Honour, Geoffrey Giudice, former president of Fair Work Australia and the Australian Industrial relations Commission, having considered the Report of the Fair Work Act Review Panel:

“In relation to productivity and its place in the workplace relations system, it is well known that Australia’s multi-factor productivity growth has been stagnating for some years and that in the last few years the recent slow growth in labour productivity has also halted. One of the Report’s central conclusions is that no link can be discerned between changes in the legislative framework and productivity growth. This is not to suggest that there is in fact no link. There are linkages between industrial regulation and productivity, but measuring the effects is difficult. There are many factors which influence productivity and at different times they pull in different directions. We simply do not have data about the interaction between the application of the Fair Work Act and movements in productivity. But one thing is clear from the data in the Report: it is not possible to increase productivity simply by changing the nature of industrial regulation.”<sup>68</sup>

We also have concerns that in the public debate productivity improvements are often mistaken for cost-cutting measures. For example in relation to the productivity benefits of collective bargaining, in

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<sup>67</sup> David Peetz, *Does Industrial Relations Policy Affect Productivity?* ABL Vol 38 No 4 2012 pp. 268-292

<sup>68</sup> Geoffrey Giudice, *The review of the Fair Work Act and its implications*, Insights, Faculty of Business and Economics, Melbourne University, VOLUME 12 | NOV 2012, pp 19-25

circumstances where management is not seriously challenged by unions, employers may simply use 'bargaining' to increase managerial prerogatives or to cut costs.

Cost cutting does not lead to reductions in the amount of labour required to produce a certain level of output, it simply lowers the cost of that labour. Cost cutting can lead to less productive workplaces since the imperative to be more efficient and productive is actually reduced. Increased managerial prerogative and diminished employee voice may simply lead to more dis-engaged and alienated workers who have no incentive or interest in making their workplaces more productive.

We also note that productivity growth appears to be unrelated to the type of regulation of each industry, e.g. as to whether it is award reliant or not. Data submitted to the Fair Work Commission in 2014, considered labour productivity by industry sector and showed that productivity had grown strongly in some award dependent industries – notably Administration and support services and Rental, hiring and real estate, while declining in other award reliant industries. Industries with higher levels of agreement coverage had mixed outcomes.

The most recent and authoritative consideration of the impact or otherwise of Australia's workplace relations frameworks on productivity is that conducted by the Panel which reviewed the Fair Work Act in 2012 headed by Professor Ron McCallum: *"Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation"*. The Panel looked at the productivity outcomes under various industrial frameworks over recent decades and formed the view that:

"The case was argued in some submissions that the productivity pattern could be explained by the differences between the particular industrial relations frameworks over the period. The panel was not satisfied that there is evidence to support this conclusion. Productivity growth accelerated under the IR Act post-1993 and the early years of the WR Act but then slowed. Labour productivity continued to grow at a subdued pace under Work Choices but multifactor productivity declined under both that framework and the FW Act. Over the past two decades labour productivity was slowest under Work Choices which arguably imposed the fewest constraints on management decisions..."<sup>69</sup>

A recent paper by the Grattan Institute *"Economic reform Priorities for Australia"* also comments on the link between changes to workplace relations and economic outcomes:

*"Direct attempts to correlate historic changes in industrial relations regimes with economic outcomes are either inconclusive or unconvincing. Most of these studies try to correlate industrial relations reforms with changes in labour productivity. However, as illustrated in Figure 2.6, too many other things affect labour productivity – particularly micro-economic reform, education, technology, and infrastructure. These factors usually swamp the impact of industrial relations on Australian labour productivity."*<sup>70</sup>

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<sup>69</sup> Fair Work Act Review panel, 2012, *Towards more productive and equitable workplaces*, page 72

<sup>70</sup> Daley J (2012), *Game-changers: Economic reform priorities for Australia*, Grattan Institute June 2012

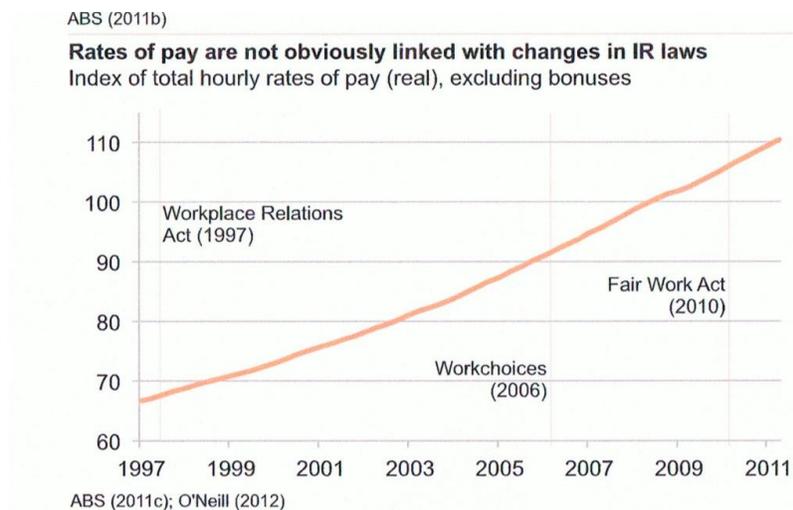
**There is no clear link between labour productivity growth and IR laws**  
 Productivity growth, % change year on year



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This is also true at the level of the firm, according to the Grattan Institute study.<sup>72</sup>

The same can be said for wages growth:



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There is often an unstated assumption that labor market deregulation always improves productivity. The tables above taken from the Grattan Report suggest that this cannot be demonstrated.

It has also been noted that:

“Since 1970 the period of the highest levels of labour productivity growth occurred under the centralized award system under the McMahon and Whitlam Governments.”<sup>74</sup>

<sup>71</sup> Ibid Table 2.6, page 24

<sup>72</sup> Ibid, *Game-changers: supporting analysis*, p. 13

<sup>73</sup> Ibid, p. 13

Further we draw the Commission attention to work by Ernst and Young who have developed a productivity scale for enterprises. This does not measure outputs as such but introduces an assessment of productivity based on asking workers what percentage of their work day is spent on productive and non-productive or time wasting activities.

By this measure, Ernst and Young estimates that 16% of the average Australian workday is wasted. The greatest contributor to this waste is “people who can’t get on with their work because of delays from a higher authority to review a decision or waiting for input from other parties”.<sup>75</sup>

Interestingly, the most productive workers according to this study – that is those who felt that they wasted the least time – were in the health care and social assistance sectors. The least productive workers were in mining. Motivation, not money and job satisfaction was a key productivity driver in this study. Older workers were also more productive. Economic uncertainty was a drag on productivity.

Treasury officials Ben Dolman and David Gruen strongly support the need to boost the performance of Australian managers as a means of lifting productivity outcomes:

“Moreover, the differences in management practices appear to matter for productivity levels: better managed firms are more innovative and have higher productivity. Regression analysis suggests that lifting management practices in Australian manufacturing firms to the average level in the US would raise the level of productivity in Australian manufacturing by around 8 per cent (Bloom, Genakos, Sadun, and van Reenen 2012).”<sup>76</sup>

AIER does not believe there is sufficient evidence to support an argument that regulating workplaces to provide decent work and dignity at work would have adverse economic consequences. In fact the evidence suggests better management, cooperative workplaces and investment in workers skills are more preferable paths to explore than lowering wages or working standards.

## Conclusion

AIER has not commented on all the questions posed by the Commission in its Issues Papers. What we have done is articulate an approach to workplace relations founded in human rights and framed around the concept of decent work.

We reiterate our submission that workplace relations cannot be viewed primarily through an economic lens or what works best for particular business entities, but must recognise the essential human nature of work. Workplace relations laws and policies regulate relationships between people. They are socially beneficial laws that should respect the dignity of the people engaged in work. The conventions of the International Labour Organisation are important benchmarks by which to assess the performance of our workplace relations system in meeting these goals.

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<sup>74</sup> Parliamentary Library (2011), *Industrial relations reforms: boosting productivity?*, September 21, 2011, accessed 21<sup>st</sup> June 2012.

<sup>75</sup> Ernst and Young (2012), *Productivity Pulse Wave 2*, May 2012. Page 7

<sup>76</sup> *Productivity and Structural Change*, Ben Dolman and David Gruen (2012) op cit., Australian Treasury 41st Australian Conference of Economists 10 July 2012, page 11.

## Annexure 1:

### The Australian Charter of Employment Rights - Overview

In 2007, the AIER published the Australian Charter of Employment Rights (attached with this submission).

The Charter is founded in principles which reflect:

- (a) Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
- (b) Values which have profoundly influenced the nature and aspirations of Australian society and which are embedded in Australia's constitutional and institutional history of industrial/employment law and practice. In particular, values integral to what has been described as the "important guarantee of industrial fairness and reasonableness"<sup>77</sup>; and
- (c) Rights appropriate to a modern employment relationship which are recognised by the common law.

The Charter's purpose is to unravel the complexity of the regulation of workplace relations and re-define it by identifying the fundamental values which good workplace relationships and good law made to enhance such relationships must be based upon.

The Charter of Employment Rights and the book which accompanies it, *An Australian Charter of Employment Rights*, is the work of eminent workplace relations practitioners from both the academic and legal communities who are independent of any stakeholders with vested interests.

The Charter has been through a rigorous assessment process. It was circulated in draft format and public comment was invited and taken during the period March to September 2007. An online survey was developed in order to receive feedback on its content. Public forums were held in Sydney and Melbourne.

The Charter was circulated to a large (in excess of 2000) number of human resources practitioners via the Australian Human Resource Institute (AHRI) publication HR monthly.

Formal consultations regarding the content of the Charter were held with representatives of every major Australian political party.

In his report from the NSW Government Inquiry into options for a new National Industrial Relations system, Professor George Williams, developed a set of principles that he believed should found a new national system. Williams cited a number of Australian and overseas sources used to develop the principles and gave particular emphasis to AIER's Charter of Employment Rights.

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<sup>77</sup> *New South Wales and Others v Commonwealth* [2006] HCA 52, per Kirby J at [523] – [525].

The Charter has become a blueprint for assessing government policy, for legislative reform, for company practice and for education about workplace rights. AIER recommends the Charter be used in this manner by this Inquiry as a blueprint of factors that would need to be in place in order to promote more security in Australia's workplace relationships.

The Institute encourages all Australian workplaces to adopt and apply the Charter. To assist in this, the Institute has published the *Australian Standard of Employment Rights*, which converts the ten Charter rights into a practical form that can be applied in every workplace.

Our experience tells us that the Charter is being used on a daily basis as a resource by practitioners, managers, tribunal members, academics and even teachers who are utilising the Charter's companion resource for secondary schools, Workright, to inform 14 and 15 year old students about their rights and responsibilities in the workplace.

## **Annexure 2:**

### **The Australian Charter of Employment Rights**

**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 Organization 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.

## **Annexure 3:**

### **The Australian Standard of Employment Rights**

**Recognising that:** improved workplace culture requires workers and employers to recognise their pivotal role as industrial citizens.

**And building upon:** the Australian Charter of Employment Rights, this Standard has been framed as a statement of the reciprocal rights and responsibilities of workers and employers in Australian workplaces which have received the distinction of being a 'Charter-Accredited Workplace'.

#### **1. Good faith performance**

- A. Employers and workers do not seek to mislead, deceive or trick each other but always seek to act in an honest and trustworthy manner.
- B. Employers and workers do not abuse any powers or discretions granted to them in the employment contract.
- C. No person in or associated with the workplace is subjected to harassment or humiliation so as to cause psychological harm or distress.
- D. Workers and employers act in good faith during termination of the employment relationship. Workers are dismissed only for a reason relating to their performance or conduct, or for operational business reasons. Workers are willing to serve the notice period required in their contract if they decide to terminate their employment.
- E. Employers and workers do not maliciously damage the reputation of the other.
- F. Employers do not seek to place an illegitimate restriction on the freedom of workers to pursue their careers once their employment relationship is over.

#### **2. Work with dignity**

- A. Employers and workers are committed to recognising and affirming the dignity of every person in the workplace.
- B. There is no bullying and harassment in the workplace.
- C. The employer regularly invests in the skill formation of workers and appropriate career paths are developed within the workplace.
- D. Surveillance of the workplace only occurs with the consent of workers and when used for a legitimate purpose.
- E. Every person in the workplace is committed to treating others with respect.

#### **3. Freedom from discrimination and harassment**

- A. The employer is committed to achieving a workplace that is free from discrimination and harassment based on protected attributes.

- B. The employer makes non-discriminatory decisions about all work related matters by giving every worker and job applicant fair access to all workplace opportunities and benefits.
- C. The employer has a clear set of policies and procedures for addressing and managing the risks arising from discrimination and harassment in the workplace. This includes:
  - i) preparing and distributing a written policy on discrimination and harassment
  - ii) ensuring that there is in place a protective investigation process which deals with complaints promptly and properly
  - iii) maintaining thorough records and (subject to legal requirements) guaranteeing confidentiality
  - iv) promoting the policy throughout the business
  - v) providing training on operation of the policy to all workers, including those in leadership positions
  - vi) if possible, appointing trained discrimination and harassment contact officers
  - vii) reviewing work practices and regularly monitoring and evaluating the workplace culture to ensure compatibility with appropriate standards
  - viii) guaranteeing that no worker will be victimised for making a complaint or for supporting someone who has done so
  - ix) ensuring that all parties to the complaints process are permitted to have a support person, advocate, union official or other similar representative accompany them to any interviews or meetings
  - x) providing a worker who has suffered discrimination or harassment in the workplace with access to counselling services or other employee assistance programs
  - xi) dealing with perpetrators in a manner proportionate to the severity of their behaviour
- D. All workers are committed to achieving a workplace that is free from discrimination and harassment based on protected attributes.

#### **4. A safe and healthy workplace**

- A. The employer is committed to making safety part of the lifeblood of the business by minimising exposure to health hazards and taking all steps to minimise deaths and injuries in the workplace.
- B. The employer has a systematic, proactive and comprehensive risk management process to ensure the achievement of a safe and healthy workplace.
- C. There is consultation with workers about major changes to safety and health measures as well as changes to work that may have safety or health implications.
- D. Workers are given the opportunity to be represented in dealings with their employer concerning health and safety issues.
- E. There is adequate information, instruction, training and supervision given to workers to enable them to perform their work in a manner that is safe and without risks to health.
- F. The workplace is free of bullying, stress, abuse and anxiety that is detrimental to the worker's mental health.

- G. All workers are committed to achieving a safe and healthy workplace and to cooperating with management about workplace safety measures.

**5. Workplace democracy**

- A. Both employers and workers reject adversarial workplace relations and commit to seeking mutually beneficial outcomes.
- B. The employer does not have a blanket managerial prerogative but is committed to managing the business in a responsible manner.
- C. Both employers and workers are committed to engaging in constructive dialogue. As part of this, workers are allowed to express their views in the workplace and have their views considered in good faith by their employer.
- D. In the case of business decisions that have significant implications for workers such as workplace restructuring, workers have the opportunity to participate in the decision-making process by being provided with information and meaningful consultation.
- E. Workers are committed to cooperating with and supporting the employer's right to responsibly manage their business.

**6. Union membership and representation**

- A. Workers are not discriminated against or treated detrimentally for joining or being a member of a union or on account of their union activities.
- B. No job or other employment benefit is offered on the condition that the worker is not a union member or relinquish the right to union representation.
- C. The employer does not refuse to recognise a union or punish its members for participating in lawful industrial activity.
- D. The employer recognises that the right to collectively bargain is an integral aspect of union membership.
- E. The employer does not restrict the role of the union in representing workers within the workplace.
- F. Workers and their unions exercise their right to collectivism, responsibly, in good faith and with regard to their ongoing employment relationship and the dignity of every person in their workplace.

**7. Protection from unfair dismissal**

- A. The employer has a systematic and comprehensive risk management process to managing dismissals or terminations of employment in the workplace.
- B. The employer has a legitimate reason for termination of employment when that termination relates to the worker's conduct.

- C. Prior to termination and where possible, an employer should warn the worker about conduct or performance matters so that the worker has a reasonable opportunity to rectify the conduct or improve performance.
- D. Workers who are being dismissed are entitled to procedural fairness in the dismissal process.
- E. Where a worker is terminated because of the employer's operational requirements, the termination is to be treated as a redundancy, and procedures for determining and dealing with redundancies are followed.
- F. The employer is committed to respecting the dignity of all those involved in the termination process.

#### **8. Fair minimum standards**

- A. The employer is committed to complying with fair minimum standards imposed externally to the workplace.
- B. The employer, in consultation with workers, is willing and committed to providing fair standards that build upon the legislative minimum and which are tailored to the needs of the workplace.
- C. The employer respects the need of workers to live a fulfilling life and to attain a fair balance between work and the rest of their lives. In recognising this, the business is committed to developing policies on flexible work practices, parental leave, working hours and workloads, and other conditions within the workplace.

#### **9. Fairness and balance in industrial bargaining**

- A. Workers have the right to bargain collectively.
- B. All parties involved in bargaining for workplace agreements act in good faith and with due regard for the dignity and integrity of all persons in the workplace and relevant third parties.
- C. Workers have a right to use representatives of their choosing in the bargaining process.
- D. Workers have the right to use lawful industrial action as part of the bargaining process. Employers have a right to respond to this.
- E. The use of statutory individual agreements does not undercut collective agreements and is not used as a mechanism to avoid or undermine collective bargaining with workers.

#### **10. Effective dispute resolution**

- A. The process of dispute resolution is clearly documented and accessible to all workers, offering both formal and informal options.
- B. The employer has a well-designed dispute resolution process that aims to:
  - i) Guarantee timeliness, confidentiality and objectivity
  - ii) Be administered by trained personnel
  - iii) Provide clear guidance on the investigation process
  - iv) Guarantee that no worker is victimised or disadvantaged for making a complaint
  - v) Be regularly reviewed for effectiveness

- vi) Guarantee that the worker can participate in the dispute resolution process without any loss of remuneration
  - vii) Graduate from informal to formal measures
- C. The dispute resolution process is procedurally fair.
- D. The process of dispute resolution allows the worker and the employer to be represented. Full access to relevant records and information as to the dispute resolution process is provided to the worker and their representative.
- E. If the dispute cannot be resolved at the workplace level, the dispute is referred to an independent and impartial body that has the power to resolve the dispute.