

A new workplace relations architecture

Summary

The current workplace relations system and related laws are failing to provide a fair go for people who work and those seeking work. The AIER is embarking on a project to develop a new architecture for Australia's workplace relations system. This is a bold project that will look to reconfigure industrial relations, human rights and health and safety laws and regulation. A new architecture is needed to ensure all people who engage with work and those seeking work in Australia do so in ways that can provide dignity and economic security, ensure physical and mental safety, and creates conditions for social cohesion and a prosperous economy.

The AIER is a tri-partite organisation whose overall objective is to ensure a “fair go all round” for all actors in the workplace relations system – workers and those seeking work, employers, and the self-employed. We believe that is best achieved from a principles-based approach, and not the compromised ad hoc approach of the current system.

In our view a paradigm shift in how we regulate work is needed for workers, employers, business, the economy and our society. Our project will seek to map out the key elements and features of a comprehensive system of regulating work.

Snapshot of the current work environment and its implications

Australia (and the world) is facing profound and rapid changes in the way work is organised and conducted. There are profound structural shifts occurring to work and successive governments have failed to provide legislative protection to cope with these changes to work and access to work that they themselves have promoted and encouraged. We are witnessing the embedding and acceleration of deeply concerning trends in Australia, including

- Rising insecure and precarious work in various forms (casualisation, contractors, ‘uberisation’, supply chains) along side the challenge of automation and virtualisation of work;
- Increasing underemployment (recent ABS statistics indicate 1.1 million Australians are underemployed);
- Barriers to workforce entry and participation for the young in particular;
- Large scale exploitation, particularly of workers with vulnerabilities eg young, temporary foreign workers, people with a disability;
- Historically low wage growth;
- Workplace cultures that are hurting workers at the scale of an epidemic through discrimination and bullying;

- Gender pay equity and other inequities remaining high;
- The historic safety net is being reduced and widely avoided with near impunity;
- The collective power of workers across the economy is in major decline;
- Businesses are also struggling with people retention, skills development and the rapid pace of change;
- Australia has a poor management culture reflected in international ratings.

The implications of these trends affect both individual workers and their families and our society as a whole. They also adversely affect business and the economy. Social and economy-wide implications include:

- Increasing wealth and income inequality which research shows is both detrimental to society and the economy;
- Job, economic and social insecurity;
- Consequential broader impacts as consumer spending and investment fall;
- Declining mental and physical well-being both directly from the experience of dangerous work cultures and by the effects of inequality.

Premises – why do we regulate work?

The AIER's work proceeds from the following premises as to why regulation of work is necessary:

- Human dignity, social and economic justice and the well-being of society requires a fair distribution of economic resources and investment;
- There is an inherent power imbalance between employers and workers (capital and labour);
- To ensure dignity and a fair go all round for people who work (social cohesion);
- To provide the conditions for a certain standard of living (material needs) for our community;
- Protect people's physical and mental health and safety;
- Work is a core component of many people's lives and their relationships (we spend a large part of our lives at work). In the words of John Paul II in *Laborem Exercens*, it is the key to the social question;
- Research has demonstrably shown that fair and safe workplaces are vital to prosperous and strong businesses and economies.

The Charter and Standard

The AIER's Australian Charter of Employment Rights and the Australian Standard of Employment Rights provide a principles-based approach which guides all our work. The Charter consists of 10 principles many of which are reflected below in the discussion on the approach we are taking to this project. However, there are two principles in the Charter that underpin all the others and are crucial to the project of developing a new architecture:

- Good faith – captures the principle of the “fair go all round” that has been essential to the regulation of work since the inception of Australia’s industrial relations system. It is the expectation that employers and workers will co-operate with each other so that each can enjoy the mutually expected benefits of their working relationship.
- Dignity – that all people have the right to a dignified life, including when they are working along with all other parts of their lives. Dignity and meaningful work encompasses meeting material needs as well as the ability to participate fully and equally in society, free from discrimination.

AIER's approach to a developing a new architecture

The AIER is undertaking an ambitious project. The situation confronting Australia is beyond tinkering around the edges with minor reform or compromising for politically palatable solutions. We believe that only a wholesale reimagining of how we regulate work, within the context of its structural, physical, social and economic environment, can provide a pathway to fairness in this time of significant and rapid change. This does not involve relegating to the past important principles or structures but it does involve reconceptualising principles and structures for an uncertain future.

We propose to explore the elements of a new architecture through various modules. The first will focus on the overall approach we are proposing and its underlying principles. Taking the Charter of Employment Rights as a basis we will explore the broad rights and obligations of those who provide work and those that undertake work. These obligations will provide the overarching framework for the regulation of work and all people involved in work.

The following modules then focus on key elements that a regulatory system needs to address. Module 2 will look at the question of the state, either legislatively or via other mechanisms, setting minimum standards of work. The content of the standards, how they are set and to whom they apply are key issues. Module 3 will focus on workplace democracy. We will explore frameworks for workers to collectively pursue their interests and for means of promoting genuine collaboration or engagement within enterprises.

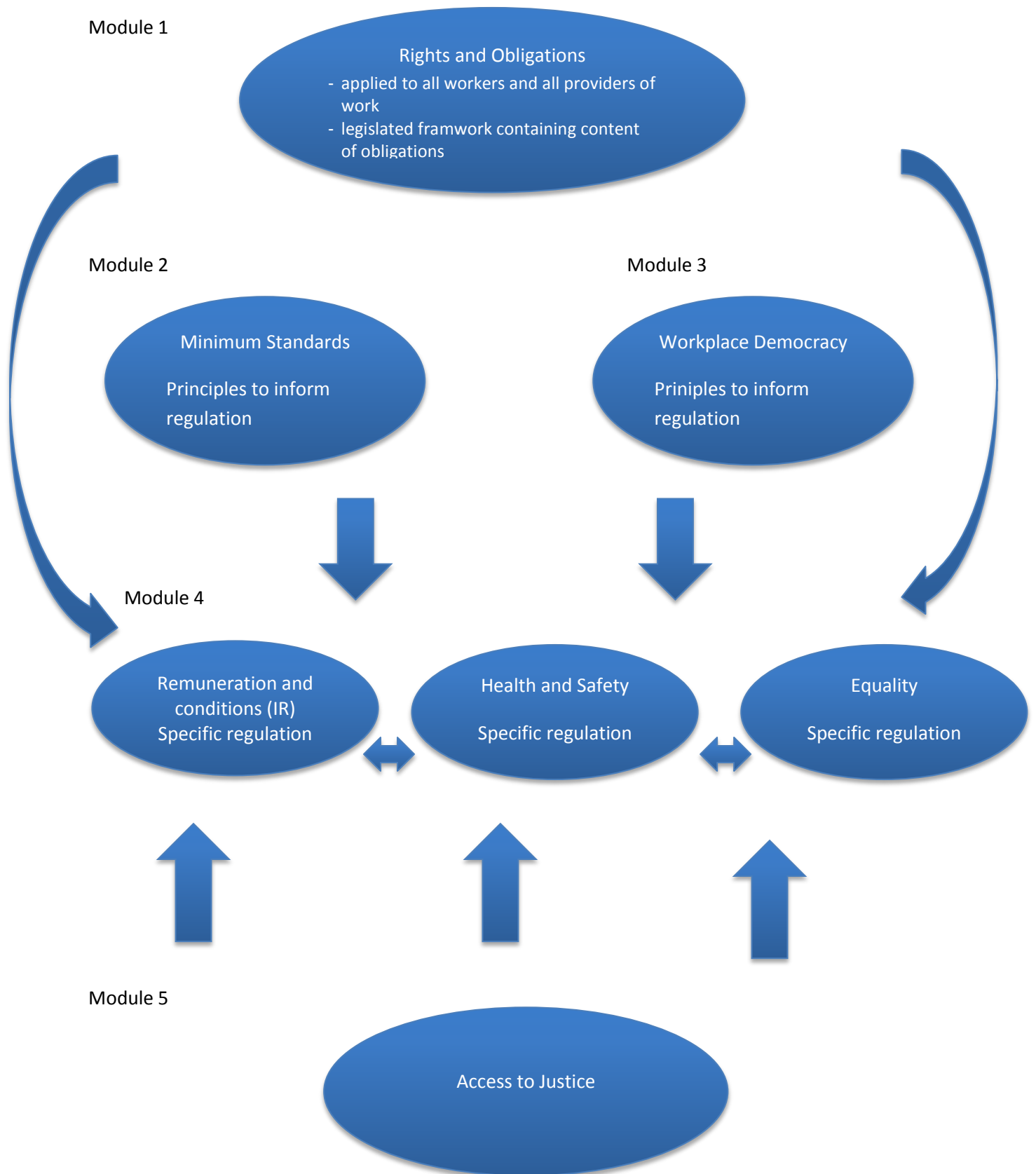
Module 4 will explore how the above propositions can be reflected in specific regulation of work in relation to its different aspects, that is, remuneration and conditions; health and

safety; and providing for equality. Finally, Module 5 will look at how people within the system can access justice when obligations are not met; minimum standards are avoided; workplace democracy processes are undermined; health and safety is put at risk; and equality is being denied. We will consider options for the best models for dispute resolution and for accessing justice.

For each of the modules we will publish a discussion paper exploring the various issues and questions relevant to each, including how the different modules relate to each other and can come together in a cohesive system that meets the objectives outlined above. The papers will be developed with input from various practitioners, academics and other stakeholders with interest and expertise. We will also look to develop other materials to encourage discussion and debate on the ideas we are proposing.

The 2017 Ron McCallum Debate will focus on the possibilities of a new workplace relations architecture and its accompanying discussion paper will be the first major paper of the project.

PROPOSED PROJECT MODULES



Module 1: Rights and Obligations

Module 1 will focus on the big picture fundamental changes to the structure of the system that underpin the ambitious and robust approach we are proposing. The current system of workplace regulation involves a set of detailed and complex rules that are routinely subverted or avoided and have no chance of keeping up with the pace of change in the economy. In place of a complex system of rules that overprescribe what can and cannot be done, we are proposing all work-related regulation come under a framework of broad rights and obligations. The system would include an overall general obligation of all participants to meet the objectives of the system, primarily to take all reasonable steps to ensure fairness.

The framework would be based on the following:

- Everyone with a stake in work is enlisted in creating a fair go all round in a democratic way.
- All forms of work must be captured – Obligations will not be able to be avoided or rights refused because of unregulated and poorly regulated arrangements such as contracting. These have largely escaped coverage under the *Fair Work Act*.
- Regulation of work must be rationally synchronised – embed industrial, equality and human rights and OHS together. This is a challenge but we can explore frameworks that can apply to them all while keeping specific regulation (including relevant existing legislation), and codes of practice. The Charter and Standard could be included as part of the framework.

One approach would be to consider what a model contract for the performance of work would contain? What are the obligations of those performing work and those providing work in contractual terms?

The key questions to be answered are the content of the rights and obligation and where the onus lies. A challenge with such a model is to consider how it will operate flexibly and where the accountability lies.

We envisage an overarching set of broad obligations; the devolution of responsibility, founded in democratic practices; and focus on workplace culture as a means of providing equality, addressing discrimination, the increasing gender pay gap, bullying and other mental health implications of poor workplace practices.

Module 2: Minimum requirements

Minimum standards and minimum obligations are vital, necessary and intrinsic. The minimum wages and conditions built up over decades need to be protected and built upon to provide for the objectives of the system.

- How do we set a minimum safety net of wages and conditions? What should they consist of? Currently they are set via a mix of legislation (with too many loopholes) and awards (at risk of reduction of minimum standards).
- Are all workers covered by minimum standards? How do we define who works?
- How are the standards enforced? Do we incorporate a concept of wage theft?
- How do the minimum standards relate to other aspects of the regulatory system?
- Other means of providing economic security if minimum standards of work cannot such as a universal basic income.

Module 3: Workplace democracy

A key feature of the last 40 years of neoliberalism has been the decline of organised labour. The capacity of workers to organise collectively in their interests has been deliberately attacked and reduced. Workers organising will look different in an economy no longer organised vertically like the old industrial economy, but the principles of freedom of association remain fundamental to fairness.

Workplace democracy will be reflected through:

- Freedom of association as a fundamental right that is essential to achieving fairness, including a system of collective bargaining that empowers workers across the economy and the right of workers to take industrial action in their economic and social interests. This will include looking at:
 - What freedom of association should really mean in present day Australia?
 - Does it include freedom from association?
 - Consideration of bargaining and related activities across and within sectors (moving from enterprise to sectoral bargaining) given the increasingly horizontal organisation of work;
 - Should trade unions be able to make agreements covering only their members?
 - Do all workers have the same freedom of association rights (eg contractors)?
- Other mechanisms for workplace democracy such as work councils or cooperatives. While linked to unions, work councils or committees enable direct participation by workers in decisions that affect their work. These councils or committees could also operate to address at a corporate or workplace level society-wide issues such as global warming. With the decline of organised labour, what other mechanisms can enable workers to collectively act in their economic and social interests at work? Are there new avenues to explore in relation to economic democracy and cooperativism or other means of people owning and controlling their workplaces and work?

Module 4: Specific regulation relating to remuneration and conditions; health and safety and equality

Once we have explored the broad framework of rights and obligations and considered the necessary minimum standards and means of ensuring workplace democracy, the next step is how these ideas can be reflected in more specific regulation relating to industrial matters, health and safety, and equality including freedom from discrimination.

There are elements of the existing regulation that we will want to retain. We are not proposing that elements of the regulation of work that has developed over the past century be abandoned, but rather consider what elements remain relevant and what changes are necessary to ensure the intention of regulation is achieved in the face of the changing nature of work.

The questions for this module are what elements of specific regulation are needed across these three areas, what is important to retain of existing laws, and how these elements relate to the broad obligations and to each other in meeting the objectives of the system.

Module 5: Access to justice

A key failing of the current system is the denial of justice due to complex processes and high costs. For example pursuing discrimination complaints through the federal court system is expensive and time consuming. We will look to explore options for facilitating equal access to less formal justice, minimising the current unfair fight situation where those with resources can play the system. In partnership with others who work on broader access to justice issues, we will seek to develop innovative models for providing fairness via improved access to justice. Issues that we will explore include:

- A low cost system with a focus on resolving issues, through conciliation and arbitration.
- A strong central tribunal with the ability to resolve all work-related disputes.
- The use of private arbitration instead of court processes.
- Across the board penalties at the level in OHS law (eg \$3m etc)
- Administration and enforcement, including education and best practice functions
- Role of courts – supervisor role and criminal sanctions
- The degree to which remedial measures may be affected by limitations or locus of constitutional powers.