

A CHARTER OF EMPLOYMENT RIGHTS

By Mordy Bromberg SC & Robert Durbridge, Executive Director,
Australian Institute of Employment Rights

Date: November, 2006

A CHARTER OF EMPLOYMENT RIGHTS

Mordy Bromberg SC & Robert Durbridge

1. The Australian Institute of Employment Rights (“AIER”) is an independent think tank formed by respected professionals engaged as labour rights advocates, employers and their representatives, unions, academics and industrial relations practitioners. The AIER commissions authoritative research in conjunction with academic institutions and provides public advocacy in support of employment rights. The AIER operates on the premise that core employment rights and productivity and efficiency are not mutually exclusive but are in fact complimentary.
2. One of the AIER’s priorities is the development of a Charter of Australian employment rights and standards. Employment is at the heart of the rights of citizens in democratic societies and work on a Charter setting out contemporary rights and standards is seen as an important step towards a fair and appropriate industrial relations system.
3. The AIER’s role in fostering a Charter is not to dictate a result but to encourage discussion and a high level of public discourse in a wide range of forums. The process must be participative and must reach out to wide sections of the community in its development of a set of rights and standards for Australia. Whilst the process will require research and academic rigour in both identifying rights and substantiating their

inclusion in a Charter, the development of a Charter must involve a high level of consultation. The process must bring both interest groups and members of the general public with it. Where possible, common ground and consensus should be found. Community forums should be convened as well as conferences and seminars targeted at unions, employers and other interest groups.

4. The AIER has convened a forum in association with the Australian Labour Law Association's Annual Conference in Brisbane on 22 September 2006. The forum is intended to launch a debate on the rights which should underpin employment as the basis of reform of industrial relations law in Australia. This paper is intended to provide a discussion starter for the process of formulating a Charter of Employment Rights for Australia.

WHY A NEED FOR REFORM?

5. The AIER does not support the changes made to Australia's industrial relations system by the federal government's WorkChoices amendments. The new federal industrial relations system fails to take a balanced approach to the needs of employers and employees. It is a market driven approach in which the inferior bargaining position of an employee bargaining alone is not properly recognised. The legislation pays lip service to freedom of association. It allows unions to be formed and protects against direct discrimination of union members but the priority and preference given to individual bargaining at the expense of collective bargaining undermines the collectivization of employees in a union and defeats its primary purpose - of facilitating collective bargaining as a means of redressing the inequality of bargaining strength between an employer and an employee bargaining alone. Accordingly freedom of contract has largely replaced freedom of association. Whilst this is represented as enabling freedom of choice, the reality is that the capacity to exercise choice is only available to the strong and powerful.

6. At the same time, institutional supports, such as resort to compulsory conciliation and arbitration through the Australian Industrial Relations Commission have been removed. In that way both of the traditional mechanisms for redressing inequality - collective bargaining and independent compulsory arbitration - have either been removed or diminished to such an extent that fair minded employers and employees should and do regard the system as unbalanced and in need of reform. There is a widespread public perception of unfairness and an historic opportunity exists for those sentiments to be harnessed into the development of a reformed set of employment rights and standards for Australia.

WHY A RIGHTS BASED APPROACH TO REFORM?

7. There can be no doubt that achieving reform will require a multifaceted approach. A rights based foundation for reform ought not be seen as the only tool, but is it an appropriate tool? Alternatives exist. For instance, rather than identifying and promoting a set of rights advocates for reform may instead promote particular institutions. The restoration of the Australian Industrial Relations Commission is an obvious example. Alternatively, we could promote an industrial relations model, a set of laws or policies, without identifying the underlying rights upon which the model is based.
8. Whilst a rights based approach should not be regarded as exclusive of other mechanisms for reform, we think that a rights based approach has an appropriate role. Rights are the stuff of social change in the sweep of history. They motivate and justify social action. The concept of rights carries with it a moral imperative, it tends to assert something higher and something universal. Once established and widely acknowledged, rights tend to endure. They become a recognised part of the fabric of society and often attain bi-partisan status and are free from attack every time the complexion of government changes in Canberra.

9. Institutions are often more open to attack. Unions are vilified as serving the interests of union bosses not their members. The Industrial Relations Commission is portrayed as a “third party” interloper meddling in the affairs of others. It is said to be part of an “industrial relations club”. Attempts to defend it are pilloried as being the work of self interested individuals seeking to preserve self interested privileges. Even when governments fear the backlash of abolishing popular institutions they will set about to denude them of their powers, as we have seen with the Australian Industrial Relations Commission.
10. The promotion of reform by advocating a particular model or set of laws tends to introduce rigidities and complexities. The promotion of a draft set of industrial laws is unlikely to be well understood by many in the wider community. The identification of rights, as opposed to the formulation of a comprehensive system, allows for public accessibility and is more likely to gain public understanding and support. Once established, rights are difficult to abolish or amend. Legislation is more liable to amendment particularly where the rights which underpin the system have not enjoyed popular recognition or acknowledgment. Many of the rights which Australian workers had for over 100 years were implicit in the provisions of the system of conciliation and arbitration now abolished. If those rights had been made explicit and enjoyed popular acknowledgement, the system which they underpinned may have been far more defensible.

WHOSE RIGHTS SHOULD A CHARTER DEAL WITH?

11. The world of work brings together a range of participants no longer defined by common law notions of employers and employees. Dependant contractors are a category of workers not recognised as employees but often subject to the same economic disadvantages that have spurned the recognition of employee rights. The recent federal Independent Contractor Bill will remove those workers from rights and protections accessible to employees. Should a Charter identify a set of rights for workers as distinct from employees alone? If so, how are

dependent contractors to be identified and how is the broader concept of “worker” to be defined? In this respect the title of “employment rights” is too confining. It may be more appropriate to speak in terms of a Charter of Workplace Rights.

12. If a Charter of Rights is to be the basis for a reformed industrial relations system, it will also need to deal with rights of employers. Employers are also entitled to have rights appropriate to a fair and balanced system recognised and protected.
13. Historically, the Australian statutory industrial relations system has determined industrial disputes by awarding binding rights of employees and duties of employers. Those rights and duties were an overlay to a common law system framed predominantly to identify rights and powers of employers relative to their employees. It is the common law that has accorded employers the benefit of the obligations of good faith and fidelity which are required of employees. Those obligations upon employees provide employers with an enforceable capacity to ensure that employees act in the best interests of their employer and its business.
14. The bifurcation in the source of protections - for employers the common law and for employees the statutory industrial relations system - is problematic. Employers may have an interest to protect the common law but may see little interest in protecting an industrial relations system primarily pitched at protecting employees. A statutory industrial relations system might find a greater level of bipartisan support if it became the exclusive vehicle by which protections to both employers and employees were provided. Employers are more likely to support a Charter of Rights if the Charter was even handed and provided due recognition to appropriate employer rights.

HOW ARE RIGHTS TO BE IDENTIFIED?

15. There are a number of obvious starting points in the process of identifying an appropriate set of workplace rights. A wide range of

values and principles have already been identified and enshrined as rights by domestic and international law. The most obvious source of workplace rights is to be found in the tripartite (employer, employee and government representation) processes of the International Labor Organisation (“ILO”). The Constitution of the ILO, the ILO’s *Declaration of Philadelphia*, the ILO’s *Declaration of Fundamental Principles and Rights at Work* and the numerous Conventions and Recommendations of the ILO provide a rich source of universally accepted workplace rights and standards. Australia’s long and proud history of involvement with the ILO and the fact that it has ratified most and certainly all of the core Conventions of the ILO provides a sound basis upon which it can be argued that rights identified by the ILO ought be appropriately enshrined in a Charter of Rights and observed by Australian law. Other international instruments where workplace rights are to be found include the *United Nations Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*. A range of international instruments of the European Union enshrine workplace rights. These include the *Council of Europe’s Social Charter*, the *European Community Charter on the Fundamental Social Rights of Workers* and the *Charter of Fundamental Rights of the European Union*.

16. The UK Institute of Employment Rights (“the IER”) formulated a Charter of Workers’ Rights (set out below) based on the contention that international treaties ratified by the UK, should be complied with. Paul Munro¹, a Vice President of the AIER, has a work in progress for the online publication New Matilda to which we have been given advance access. In it he has said of the IER’s approach, “*taken together, those instruments might have been thought to be a firm foundation from which to derive fundamental values or universal and absolute standards adopted across the civilised world*”.²

¹ Formerly a Senior Presidential member of the Australian Industrial Relations Commission and currently a Vice President of the AIER.

² “Starting Draft Statement: Rights to Decent Work Within An Economically Efficient and Socially Fair Industrial Relations System”, Paul Munro, pending New Matilda publication, at [15].

17. Many of the rights recognized by ILO and other international instruments have traditionally enjoyed recognition in Australia's industrial relations system although in most cases their existence has been latent rather than patent. Some, like the obligation to encourage collective bargaining are no longer acknowledged despite the protests of the ILO that Australia is in breach of its international treaty obligations.
18. Yet there are other rights which have traditionally been enshrined in Australia's industrial relations system and have had an iconic status in our system, whilst not being recognised at an international level. Australia's conciliation and arbitration system was largely unique and (beyond New Zealand) was not reflected in the experience of other industrial relations systems. The right to compulsory conciliation and arbitration for the resolution of industrial disputes is not reflected in international instruments but is a right which endured over 100 years of recognition in Australian law and practice. Despite the recent loss of that right, there are very strong arguments for its restoration. Other iconic Australian based rights and standards deserve consideration as appropriate sources for the identification of workplace rights. For instance the right to a living wage, the right to limits to the working day and week, the industrial principle of a "fair go" and the idiom "a fair days work for a fair days pay".
19. Legal rights recognised and enforced by the common law must also be considered and assessed. Some are clearly to be rejected as products of a bygone era. Others may be regarded as the foundation for appropriate protections for employers.

A START

20. The Institute of Employment Rights in the UK has made a useful start although the approach it took was to focus only on workers rights. The IER derived its charter of 10 workers' rights in the main from settled international instruments. Elements of that charter might usefully be

transposed into a first working draft for a scheme of rights appropriate for consideration in Australia.

21. The UK Institute's Charter was the subject of wide consultation among unions and labour rights advocates in the UK and resulted in the following set of rights being put forward:

1 dignity and fair terms

Every worker has the right to dignity at work, to a fair wage and to just conditions of work.

2 health and safety

Every worker has the right to a safe and healthy working environment.

3 non-discrimination

Every worker has the right not to be discriminated against and to be treated with equality in equivalent circumstances.

4 job security

Every worker has the right to security of employment (whether in relation to closures, redundancies, transfers or otherwise).

5 income security

Every worker has the right to fair income security in retirement, sickness and unemployment.

6 union membership

Every worker has the right to form and join a trade union for the protection of his or her occupational, social and economic interests, and not to be discriminated against on grounds of union membership, participating in union activities, or union representation.

7 union autonomy

Every trade union has the right to uphold its own rule-book, to spend its funds and to conduct its activities including industrial action in accordance with its rules, free from employer and state interference.

8 industrial action

Every worker has the right to take industrial action for the protection of his or her occupational, social and economic interests (or those of any other worker) without being in breach of contract, and without threat of dismissal or discrimination.

9 union representation

Every worker has the right of individual and collective representation by a trade union, including the right to collective bargaining and to participate in decisions at work.

10 effective remedies

Every worker has the right, from the outset of his or her employment, to effective remedies to enforce his or her rights, including adequate rights for workers' representatives to inspect and to obtain information.

22. Paul Munro in preparing his “Starting Draft” for New Matilda,³ asked for comments from a number of experts including members of the AIER Executive. His draft accepts that elements of the IER’s Charter might usefully be transposed into a first working draft for a scheme of rights appropriate for consideration in Australia. He believes however, and we agree, that Australian circumstances and priorities will need to be taken into account in developing a set of “rights to fair and decent work and related duties”. The rights Paul has identified in his draft include each of those identified by the IER but with some modification and are supplemented with other rights of employees that acknowledge the reciprocal rights of their employer (see 1 and 2 below). Paul drew ideas from several sources to suggest the following starting draft of “rights to decent work within an economically efficient and socially fair industrial relations system”⁴:

³ “Starting Draft: the Statement of Rights to Fair and Decent Work”, Paul Munro, [forthcoming New Matilda online publication].

⁴ The Paul Munro/New Matilda starting draft is a work in progress taking into account preliminary comments supplied by a number of people and bodies including AIER and members of its advisory group and the New Matilda Policy Advisory Group. The starting draft is without prejudice to what may eventually be determined upon by any of those consulted as their preferred or eventual position.

1 Right to and duty to provide and perform work

Work is natural and incidental to human life, necessary to self-actualising individual consciousness. It is the right and responsibility of every Australian to have, to provide, and to perform to the best of his or her ability, respectively, suitable work for periods desirable and appropriate to particular circumstances.

2 Good faith performance in work relationship

Every worker has a right and obligation appropriate to a working relationship governed by a principle of good faith performance entailing reciprocal delivery of a "fair go all round" extending to reasonable use without restraint in a subsequent work relationship of acquired human capital.

3 Dignity at work

Every worker has a right to dignity at work:

- *To be treated with respect;*
- *To utilize and improve work-related skills in the performance of work and accumulate personal human capital;*
- *To have the opportunity to express views on work-related matters that affect the workplace;*
- *To aspire to available progression within the enterprise;*
- *To enjoy job satisfaction that comes from work being recognised and valued.*

4 Fair terms

Every worker shall be accorded a fair wage and just conditions of work over reasonable and safe hours, having regard to all relevant considerations including publicly declared standards arrived at, maintained and revised through dynamic participative processes that engage actors at local and national levels and provide for continuous evaluation.

5 Effective dispute resolution process and remedies

Every worker, from the outset of his or her working relationship, has the right and obligation to participate in effective dispute resolution processes and remedial action to interpret, adjust and if necessary to enforce respective rights and duties through a process that includes adequate rights for the worker's representative to inspect, to obtain information, and to discuss issues; and where appropriate reciprocal resort to an independent, readily accessible and expert tribunal.

6 Health and safety

Every worker has the right to a safe and healthy working environment.

7 Non-discrimination

Every worker has the right not to be discriminated against on prohibited grounds and to be treated with equality in equivalent circumstances or in the work value of equivalent human capital;

8 Job security

Subject to exceptions consistent with ILO standards, every worker has the right to security of employment so far as it may be assured by protection against unfair, capricious or arbitrary dismissal or detrimental treatment without valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker.

9 Income security and social wage

Every Australian has the right to fair income security in retirement, sickness and unemployment supported by a social wage related to the needs and circumstances of the case, provided through governmental or pro-social activity by those who constitute our society.

10 Union membership

Every worker has the right to form and join a trade union for the protection of his or her occupational, social and economic interests. The worker has the right to require the relevant union to uphold its Constitution and Rules, to spend union funds and conduct activities, including affiliations, participation in community wide engagement and

lawful industrial action in support of its interests, in accordance with the union's rules free from employer and governmental interference.

11 Collective bargaining and industrial action

Every worker has the right to bargain collectively in pursuit of an individual or collective agreement about the work relationship and, without being in breach of contract, and without threat of dismissal or discrimination, to take industrial action to protect their occupational or economic interests to secure agreement about matters that are or are reasonably related to work relationship matters, being industrial action in accordance with legislated procedures enabling exercise of the right in a manner consistent with ILO standards binding on Australia.

12 Union representation

Every worker has the right of individual and collective representation by a trade union, and to be represented by it in the workplace at the appropriate level of dispute resolution and consultative process.

WHERE TO FROM HERE?

23. We should recognise that we have an historic opportunity to involve wide sections of the community in the development of a reforming set of rights and standards for Australian workplaces: the first time this has occurred since Federation. If we are to go forward we will need the assistance of many hands and will require funding. We should ask workers, employers, universities, law firms, unions and others to become sponsors of the process. We need to enfranchise citizens in a widespread consultation process. This will involve conferences, seminars, community meetings and much public advocacy. Additionally, a cogent, researched based justification for the rights identified will need to be formulated. That research should look at both social justice and economic considerations. If there is an economic

case for a Charter, as the IER identified,⁵ it needs to be convincingly articulated and put in an Australian context.

24. The Australian Institute of Employment Rights will form a steering committee to develop and guide the process. Interested individuals willing to contribute to the process are encouraged to identify their interest and participate by contacting Robert Durbridge at AIER by email: robert.durbridge@buseco.monash.edu.au. Contributions to the debate will be added to the resources available on the Institute's website at www.aierights.com.au

⁵ A Charter of Workers' Rights: Institute of Employment Rights: KD Ewing and John Hendy QC (September 2002) ISBN 1 87371980 at Chapter 2.