

# Inquiry into Options for a New National Industrial Relations System

A submission by the Australian Institute of Employment Rights

Date: 15 October, 2007

1. The Australian Institute of Employment Rights ("AIER") supports the establishment of a new national industrial relations system based on the principles contained in the Australian Charter of Employment Rights (the Charter"). The Charter is a back to basics attempt to define the rights of employers and workers by identifying the fundamental principles on which fair and balanced workplace laws and workplace relationships should be based. The Charter, and the book which accompanies it, is the collaborative work of eminent workplace relations practitioners. More information about the AIER, the Charter, the principles on which it is based, and the co-operative and consultative process followed in creating the Charter are included in Annexure A to this submission. Annexure B is the Australian Charter of Employment Rights.

### **Agreement about the principles**

2. This submission is based on the proposition that any new truly national industrial relations system necessarily requires co-operation between the Commonwealth and the States and at least a consensus as to the broad shape of the fundamental elements of the system. Identification of those fundamental elements must be the starting point. It is suggested that a mechanism be found to assist the Commonwealth, the States, and perhaps the key stakeholders to reach agreement as to those foundational elements. A lasting industrial relations system based on co-operation and consensus should be founded on principles reached by co-operation and consensus.
3. The principles identified in the Issues Paper are worthy, but are broad and may be thought to be insufficiently detailed to identify the essential

elements around which a consensus may be built. The Charter provides a more detailed statement of principles and exemplifies the kind of document around which agreement as to the foundational elements of a national industrial relations system can be based. In that respect, the Australian Charter of Employment Rights can be used as a starting point for the principles which will form the foundation of a national system based on State and Commonwealth consensus.<sup>1</sup>

### **Establishing a Nexus with the Agreed Principles**

4. It is further suggested that once a set of principles is agreed there be a firm nexus established between the agreed principles and the constitutional or other mechanism adopted to put in place and maintain national industrial relations laws.
5. There are six models for a national industrial relations system referred to in Chapter 3 of the Issues Paper. The Australian Institute of Employment Rights makes no submission as to the preferred model to be adopted.
6. Once the Commonwealth and the States have agreed on a set of principles, it is necessary to adopt a mechanism that binds the Commonwealth and the States to adhere to those principles. As to the options outlined in Chapter 3 the Institute submits as follows:

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<sup>1</sup> Any system that reconciles existing State and Federal workplace laws should universally apply those rights and responsibilities that are held by employees, employers and persons performing work according to other arrangements under the State systems (but not so held by those under the existing Federal system) that are supported by the principles established in the Charter, such as the various statutory rights to apply for remedies in relation to unfair dismissals and unfair contracts.

- (a) As to the referral options, the referrals could be made by the States subject to the conditions that there be a strong governance model and subject to the condition that any Commonwealth laws comply with the principles agreed between the Commonwealth and the States.
- (b) If a text based referral was agreed to, the agreed principles would be used to guide the Commonwealth and the States to agree upon the text of the proposed Commonwealth legislation. A text based referral may be accompanied by an additional limited referral of power which would enable future legislative adjustments to be made, but in a manner consistent with the agreed principles.
- (c) A referral of power by reference to subject matter or subject matters could be conditioned by the requirement that the power referred is limited to enacting legislation compliant with the agreed principles.
- (d) If the referral was conditioned so that the power to legislate was a power confined to legislating in conformity with the agreed principles, compliance would be enforced by challenges to the validity of non-complying legislation. Another and perhaps a more appropriate means of achieving compliance would be to establish a mechanism whereby a Court declaration of non-compliance would trigger a rectification process. A consequence of such a declaration could be that the Ministerial Council (or other such governing body) must consider whether or not legislation needs to be amended to comply with the agreed principles and the Commonwealth would be required to implement any changes agreed. Alternatively, a declaration of non-compliance could require an amendment to the legislation within a pre-determined period. Non-compliance with

these processes would then trigger a capacity for a challenge to the validity of the non-complying legislation.

- (e) A referral based on legislation that adheres to a set of principles which conditions the referral is more likely to give a State the capacity to influence and have continued input into a national industrial relations system than is an unconditional referral. The experience of Victoria is telling in this regard. After the referral of power to the Commonwealth the financial, practical and political implications of re-establishing a dismantled State Industrial Relations system proved insuperable. This was despite the fact that the Commonwealth, in reliance on the referral of powers, implemented a system that was in many respects anathema to the principles and policy espoused by the Victorian government. A referral that acts as a blank cheque is difficult to cancel.
- (f) Option 2A, 2B and 2C. In the systems contemplated by these options there would need to be not only agreement on the principles, but also on the common text of the legislation. In such a system the agreed principles could be used to guide the Commonwealth and the States to establish the text of the legislation.
- (g) As to Option 3, any safety net in Commonwealth legislation should not only establish national minimum employment conditions (such as annual leave, minimum rates of pay and the like), but should also include enforceable national minimum rights, such as the right to freedom of association and the right to collectively bargain. As to the identification of those rights, this should be a matter for consensus and co-operation between the States and the Commonwealth. The Charter contains a statement of rights which are appropriate to form the national minimum employment rights.

**AUSTRALIAN INSTITUTE of EMPLOYMENT  
RIGHTS**

**15 October 2007**

## **ANNEXURE A**

### **About the AIER**

1. The AIER is an independent think tank. Its aim is to promote the recognition and implementation of the rights of employers and employees in a co-operative industrial relations framework.
2. It is a framework based on the recognition of the interdependence of the employment relationship and founded in principles of reciprocity and mutuality.
3. The AIER includes employer and employee interests in our make-up, membership and operation. It is also fortunate to have included in its governance structure and advisory bodies representatives from the academic and legal fraternity. A list of those involved on the AIER Executive Committee and its panel of experts is included in this annexure.
4. The AIER is therefore well placed to make submissions with respect to the elements required to achieve a fair and harmonised national industrial relations system that appropriately balances the interests of employees and employer
5. It is AIER's view that any system of industrial regulation must be founded in principles which reflect:
  - Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;

- 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>2</sup> ; and
  - Rights appropriate to a modern employment relationship which are recognised by the common law.
6. It is AIER's submission that what is needed is a foundation of principles which is comprehended by all and beyond party politics. Our systems of employment regulation, and those party to it, have suffered greatly in recent times because there has not been consensus about these founding principles.

### **Charter of Employment Rights**

7. The AIER has recently published a Charter of Employment Rights. The Charter is based on the 3 sources of rights identified above.
8. 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.
9. 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

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<sup>2</sup> *New South Wales and Others v Commonwealth* [2006] HCA 52, per Kirby J at [523] – [525].

communities who are independent of any stakeholders with vested interests. A list of those persons involved is included in this annexure.

10. 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.
11. An online survey was developed in order to receive feedback on its content.
12. Public forums were held in Sydney and Melbourne.
13. The Charter was circulated to a large number of human resources practitioners via the Australian Human Resource Institute (AHRI) publication *HR monthly*.
14. Formal consultations regarding the content of the Charter was held with representatives of every major Australian political party and with the Advisers to the current Federal Workplace Relations Minister.
15. The Charter is a simply expressed contemporary document which draws upon a range of international and uniquely Australian sources to create a template of rights and obligations which all workplaces are encouraged to adopt and observe and upon which any legislative system of industrial relations should be based. It has received widespread support.