Australian Institute of Employment Rights

The Fair Work Bill and Beyond

A discussion paper written for the Australian Institute of Employment Rights by Ms Joanna Mascarenhas, Paul Munro and Lisa Heap.

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1. Introduction

Highly credentialed Australian academic Margaret Gardener has said when considering the task of altering Australia's system of employment regulation, that we face a "Higgins moment" in Australian industrial relations: "when we can negotiate an outcome that draws on our history but can respond flexibly to the future; when we can lay down the bases of a system that should serve for many decades".[1]

The significance of the task and the opportunity it creates should not be lost.

Over the next few months, the Parliament will make decisions about the regulation of our work relationships that will shape how workers and employers think, feel and relate to one another.

This is a unique opportunity, a chance to change workplace culture and bring fairness to Australian workplaces. In AIER's view our system needs to be embedded with a commitment to promote good faith relationships and the desire to create dignity at and of work. Something akin to the ILO's 'Decent Work Agenda' adapted for Australian purposes – our *Charter of Employment Rights* is a good starting point.

Over the past 10 years the legislation, and therefore the system, has supported and encouraged aggressive/defensive behaviours from employers and an undermining of the valid role of trade unions. This has served no one well if only because it resulted in a highly politicized and polarizing response from those who opposed the policy and its outcomes. The economic crisis that is certainly in front of us justifies a strengthening not a weakening of collective and participative values.

At the last Federal election the Australian people resoundingly rejected the policy approach comprehensively identified with the Work Choices legislative package. However, elements of that package have been allowed to permeate workplace culture. Overcoming the effects of 10 years of a combative command and control approach to industrial relationships will need a sustained effort and visionary leadership from Government, from Opposition parties and from leading participants influencing labour market relationships.

[1] *ELRR* 18 (2008) May

AIER is therefore concerned that this government has not taken the opportunity to found the Fair Work Bill on principles and values that reflect a new approach.

The Fair Work Bill contains provisions which are an improvement on the current legislation however, the government has not taken the opportunity to found the system on a positively cooperative model such as that of 'workplace citizenship' , avoiding the policy and procedural hangovers from the essentially adversarial model it replaces.

Technical changes will not be enough.

Beyond the triggers and signals provided for in legislation the government needs to introduce significant initiatives to support workers and employers to make the shift to a new culture.

These initiatives include supporting organisations such as AIER who work collaboratively (and in our case from a framework of tripartism) towards substantive change. For the government to achieve its stated policy objectives there is a need to rebuild an environment of trust and partnership in workplaces and between the industrial parties. There is also a need to provide education to the industrial parties and to the broader community of what constitutes fairness in the workplace.

The government's policy objectives require workplace environments that are open, participative and conducive to learning and parties that are prepared to work in an environment of mutual respect. Changing legislation alone will not achieve this result. Serial changes to legislation and to agencies to reflect the ebb and flow of partisan advantage or political expediency will frustrate capacity and motivation to realise it.

Government can create the environmental factors conducive to this change. The industrial parties and workplace participants need to then take responsibility for making it a reality.

Fair Work Australia won't change workplace culture

The AIER is of the view that this is not a role that Fair Work Australia will easily be able to play. A regulatory and administrative agency such as FWA or the Fair Work Ombudsman will not readily be able to foster the front-end cultural change that is required. The Government needs to look towards organisations such as AIER to assist it to fully achieve its stated policy objectives.

In this discussion paper we sets out in detail why its approach of industrial citizenship should be supported, what changes need to be made as an interim measure and also identifies the role of a new organisation that is vested with the responsibility of assisting the process of changing workplace culture.

2. The AIER approach

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.

It is a framework based on the recognition of the interdependence of the employment relationship and founded in principles of reciprocity and mutuality.

The AIER includes employer and employee interests in our make-up, membership and operation. Our voice is therefore unique within Australia. There is no other space in Australia where employers, unionists, lawyers and academics come together to reach consensus on how our workplaces should be regulated, what cultures and practices should exist within these workplaces and design mechanism to assist in making them a reality.

AIER is 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 at Annexure A

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"*;[2] and

- Rights appropriate to a modern employment relationship that are recognised by the common law.

It is AIER's submission that what is needed is a foundation of principles that is comprehended by all and beyond partisanship. Our systems of employment regulation,

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

and those party to it, have suffered greatly in recent times because there has not been consensus about these founding principles.

This approach of establishing broad principles and values upon which the system of workplace relations in Australia should be founded was emphasised by Professor George Williams, Anthony Mason Professor, Faculty of Law, University of New South Wales in the Report emanating from his Inquiry. The Report from this Inquiry Entitled *Working Together – Inquiry into Options for a New National Industrial Relations System* was released in January 2008.[3]

In developing the principles that he believed should found a new national system Williams refers to three broad sources of rights; those rights embodied in international instruments that Australia has adopted; Australian values which have shaped the foundations and contours of Australian society and underpin our constitutional and institutional history and framework; and rights which reflect the true, current and evolving nature of modern working relationships.[4]

Williams cites a number of Australian and overseas sources used to develop the principles. He gives particular emphasis to the AIER's *Charter of Employment Rights*, the Productivity Commission's *Checklist for assessing regulatory quality* and a report prepared by Professor Harry Arthurs for the Canadian Government entitled *Fairness at Work: Federal Labour Standards for the 21st Century.*[5]

AIER supports the views raised by Professor Williams that a new system should be founded on a set of agreed common principles reached by co-operation and consensus involving the Commonwealth, the States, and key stakeholders agreeing on the foundational elements. It is our view that the Charter of Employment Rights contains those elements.

A detailed description of the Charter and AIER's new initiative the Australian Standard of Employment Rights is contained at Annexure B.

Recommendation 1

AIER therefore calls on the government to adopt via a process of co-operation and consensus involving the Commonwealth, the States, and other key stakeholders

[3] http://www.industrialrelations.nsw.gov.au/action/inquiry.html
[4] The Report opcit p.64
[5] Ibid pp 62-63

the Charter or like set of principles or values as a standard to promote positive work relationships in Australia.

3. A New Approach to regulating work relationships

The AIER welcomes the return to a more balanced approach to industrial relations in the Fair Work Bill. However, the failure to enunciate through the Bill a guiding set of principles and values amounts to a major flaw. The Bill 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 values reflected in the scheme it replaces and in part from approaches associated with an implicit assumption that the rationale for regulating the employment relationship arises from an adversarial character in that relationship extending to most processes that pertain to it. The AIER believes that the Bill's fundamental foundation upon the assumption of adversarial employment relationship causes it to promote a functionalist adherence to legislative standards that reinforces an adversarial approach to the relationship. That orientation of the legislation represents a missed opportunity for Australia.

The AIER believes that the Bill should be based on a foundation of 'workplace citizenship' that would encourage employers, employees and their representatives to interact positively in their capacity as industrial citizens. Such an assumption would enable all parties in the industrial relations system to reject conflict in favour of a new spirit of cooperation.

This section of this submission is structured in three parts. The first section provides a brief background to the theoretical debate over what shape Australia's industrial relations system should take. This leads to a discussion of how a workplace citizenship model works in practice.

The second section provides three critiques of the Bill's reforms, namely the Small Business Fair Dismissal Code, the approach to good faith bargaining and the consultation provisions.

The third and final section provides the AIER's conclusions and recommendations as to how the Bill can be improved.

The AIER contends that Australia needs a fresh approach to industrial relations. The partisanship that has characterised the last decade and before that was an intermittent opportunistic source of industrial and antagonism over many years, should be eschewed. The AIER considers that industrial parties generally would welcome and find considerable

productivity benefits in the reinstatement of a politically stable, widely accepted scheme for governance and guidance of employment relationships.

The AIER's vision for Australia's industrial relations future is one that is underpinned by fairness to all sides, balance and fostering greater respect, harmony and innovation.

Australia's proud history of industrial relations is characterised by a determination to ensure the dignity of all working people, whilst maintaining the success of the economy. This balance was initially achieved through the traditional process of conciliation and arbitration which was rooted in the principle of egalitarianism and provided the balancing of power between employers and employees, legitimised the role of unions and saw dialogue as the way to resolve disputes. Nonetheless, Australia's conciliation and arbitration machinery has largely unravelled as there is increasing emphasis placed on enterprise bargaining and on interactions at the workplace level.

A new model for Australia's industrial relations system needs to be built. The AIER believes that this new model should be based on the principles of workplace citizenship.

A. The Fair Work Bill's residual premise that the employment relationship itself is adversarial should be replaced with a premise of citizenship in the workplace.

Before outlining a citizenship at work model of industrial relations, it is fitting to briefly allude to the broader debates surrounding Australia's industrial relations future. There are three main schools of thought: neoliberals who conceive of a free, unregulated labour market,[6] Third Way adherents who advocate a partnership model between employers and workers through government regulation fostering competitiveness,[7] and those that seek a model of workplace citizenship based upon a government acting to "harness public power to promote the social and economic welfare of the community as a whole".[8] Each of these three theoretical perspectives fiercely contest what shape the industrial relations system should take.

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[6] Hobgin, G. (2006) *"Power in Employment Relationships: is there an imbalance?"* Paper produced by the New Zealand Roundtable, March 2006 at10; Hayek, F.A. (1960) *The Constitution of Liberty* at 268-269; Howard, J (2005) "Workplace Reform: The Next Logical Step", *Address to the Sydney Institute,* Four Seasons Hotel, Sydney, http://www.pm.gov.au/media/Speech/2005/speech1455.cfm. Accessed 13/4/2007.

[7] Collins, H (2000) "Is there a Third Way in Labour Law" in *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities,* Conaghan, J, Fischl R & Klare, K (eds).

[8] Ewing, K D (1998) "Australian and British Labour Law: Differences of Form or Substance" 11 *Australian Journal of Labour Law* 44 at 47.

Neoliberalism, also known as economic rationalism, in its purest form is a perspective which seeks to allow employers and employees to determine the content of their employment contract without interference from external rules. They argue that the labour market – the place where buyers of labour (employers) and sellers of labour (workers) meet – is most efficient when there is no government or other intervention on interactions between the two parties. The Howard Government's Work Choices reforms were arguably aimed to 'deregulate' the labour market by reducing the influence of unions and the AIRC. However, given that these reforms were extremely complex and prescriptive, it is debatable as to the extent to which they actually represent a neoliberal perspective.

In European countries, the 'Third Way' perspective has been influential in the recent reform of industrial relations systems. In particular in Britain, the New Labour Government elected in 1996 has sought to make the labour market more competitive by reducing what they termed as 'over burdensome regulation' and by introducing a partnership model in the workplace. This was aimed to provide a compromise between employers and employees.[9]

A third model is citizenship at work. This approach recognises that there is an inherent power imbalance within the relationship between employers and employees. While he did not use the term 'industrial citizenship' Justice Henry Bourne Higgins who was the second President of the federal labour court from 1907 to 1921 and one of Australia's most respected industrial relations pioneers, recognises this imbalance in his statement that:

> The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to labour. Freedom of contract, under such circumstances, is surely misnamed; it should rather be called despotism in contract and this court is empowered to fix a minimum wage as a check on the despotic power.[10]

Industrial citizenship provides that a harmony between employers and workers is both possible and desirable but requires intervention by the government to ensure that the parties are protected from abuse of power by the other, and in particular to alleviate the poorer bargaining position of workers by guaranteeing fair and reasonable terms of employment.

[9] For a more detailed explanation of recent reform of Britain's labour laws, see Deakin, S & Morris, G (2006) *Labour Law,* 4th edition, Hart Publishing, Oxford, Chapters 1 & 2.
[10] Higgins cited in Chin, D (1997) "Exhuming the Individual Contract: A Case of Labour Law Exceptionalism" 10 *Australian Journal of Labour Law* 257 at 259.

This brief and admittedly rather crude and simplistic tour of the three main schools of thought illustrates the diverse views about what shape Australia's industrial relations laws should take. Consistent with its approach in the development of the Charter, the AIER makes the case for a new model for Australian industrial relations based on the workplace citizenship approach.

Workplace citizenship rejects a minimalist labour law based on providing the basic conditions for the parties to freely contract in the employment relationship. This is because labour is unequivocally *not* a commodity and the neoliberal emphasis on the employment contract fails to recognise this fundamental point.

Whilst employers and workers should interact cooperatively in the workplace, the partnership model is also not considered the ideal because of its failure to genuinely recognise the power imbalance between employers and workers.

In contrast, industrial citizenship conceives of a floor of minimum wages and conditions to protect labour, participatory institutions where worker representation is uncontested and the right to collectively bargain.[11] At its core, this model of citizenship recognises that workplaces do not have to be places of perpetual conflict but provide an opportunity for workers and employers to work together in building innovative, productive and harmonious businesses.

Australian workplaces are crying out for cultural reform based on the implementation of an industrial citizenship approach. Workplace surveys consistently indicate that Australia is lagging behind other countries in its people management. There is also much work to be done in ensuring that discriminatory practices and abuse of migrants, youth, women, older workers and so on no longer occurs. However, it is not just low paid and vulnerable workers that require a citizenship at work model. In 2008 the high profile case of Christina Rich, a senior partner at one of Australia's top four accounting firms, highlighted a worrying lack of quality in one of our major employers. Although ultimately settled after a series of interlocutory losses by PriceWaterhouseCoopers for a figure that was reportedly one of the highest in Australia's history, the prominence of this case raised both public and business

[11] These are a few commonly regarded aspects of an industrial citizenship model. However, for a more detailed discussion see: Ewing, K D (1998) "Australian and British Labour Law: Differences of Form or Substance" 11 *Australian Journal of Labour Law* 44; McCallum, R (1996) "The New Millennium and the Higgins Heritage: Industrial Relations in the 21st Century", 38 *Journal of Industrial Relations* 294; Fudge, J (2005) "After Industrial Citizenship: Market Citizenship or Citizenship at Work?" *Industrial Relations,* 60(4) at 631-653.

understanding of the severity of discriminatory practices and poor dispute resolution processes endemic in many Australian workplaces.

Since the mid-1990s, Australia's most distinguished labour law academic, Ron McCallum, has been advocating that Australia adopts an industrial citizenship model. In writing about the components of such a model in 1997, McCallum foreshadowed many of the rights and responsibilities contained in the Australian Charter of Employment Rights that was developed a decade later. The following extract illustrates the essence of an industrial citizenship approach to industrial relations:

> It is trite to state that workers require fair terms and conditions of employment that give them adequate wages to sustain themselves and their families. However, I wish to focus upon less publicised needs. All employees have the right to be secure in body and mind while at work. Workers require freedom from physical, genetic and mental injuries. This not only includes hazards like chemicals, but sexual and other forms of harassment and bullying that occur in the modern enterprise. Employees also have the right to seek redress against arbitrary power, whether on an individual or a systematic basis. This covers unfair dismissals and demotions, as well as other forms of discrimination and arbitrary conduct.
>
> Women, young persons, Aborigines and persons of non-English-speaking background also require special protection. With regard to women, equity in the workforce is paramount. No labour law system worthy of the name can content itself with giving women merely equal pay for work of equal value. Full pay equity is not just an 'add-on', but also a necessary ingredient of a fair and just nation.
>
> An increasing number of employees do not come within the protective envelope of traditional labour regulation, either because they are independent contractors or because they are not full-time employees. In the past ten years, the number of independent contractor workers has increased, while the growth in the use of casual labour has been overwhelming. At present, one in four workers is a casual worker and most of these are

> women. This growing army of persons is crying out for both recognition and protection.
>
> Lastly, employees wish to be treated as adults at work. At the very least, they have the right to be consulted on the operations of the enterprise. These operations include health and safety, rostering, the introduction of new technology and redundancies. A modern labour law mechanism must facilitate this form of workplace consultation.[12]

McCallum's depiction of what workplace citizenship looks like in practice provides a template for how Australia's industrial relations system could be fundamentally restructured.

The AIER's belief that workplace citizenship is the right trajectory for Australia is also based on the need to provide our citizens with 'decent work'. Whilst having a job is important, it is not enough that this job be achieved at any cost. As a result of globalisation, there is an increasing 'race to the bottom' as countries compete for investment with each other by offering the lowest employment law standards. Some argue that the emergence of low wage economies like India and China means that Australian workers need to accept lower wages so that our industries can compete. However, the AIER rejects this approach. This is because there needs to be a viable safety net and an adherence to a set of principles and values that apply universally. ***There can be no support for a definition of 'fairness' that moves with the economic circumstances of the time or where the factors of 'fairness' are applied only in the good times.***

A developed nation such as Australia needs a strong economy based upon innovation and a productive labour force, not because wages are bargained down to the lowest common denominator. In fact, our very reputation as the 'lucky country' – a label that was partly won because of our history of high minimum wages and industrial fairness – is under threat if we accept the race to the bottom argument.

The right to decent work is an essential part of this model of workplace citizenship. This is not a right to always enjoy one's work or to always be satisfied at work, but it is a right to be treated with respect and dignity, to be given opportunities to grow in skill and experience and to have recognised the importance of work in sustaining one's sense of self. According to the Director-General of the International Labour Organisation, Juan Somavia*, "*The primary goal

[12] McCallum, R (1997) "Crafting a New Collective Labour Law", *Journal of Industrial Relations,* 39(3) at 408-409.

of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity."[13]

Given the increasing momentum of the decent work agenda, the AIER hopes that basing the Australian system on a workplace citizenship model would provide Australian delegates to the World Trade Organisation with tools to argue for decent work on an international scale and as a leverage point in negotiations over Australia's involvement in free trade agreements.

The time has come for Australia to once again be a world leader in the field of industrial relations. If business is the engine room of our economy, the dynamism, skill and energy of our workers is the competitive advantage Australia possesses in our globalised world. We need laws that recognise the dignity of all working people whilst simultaneously achieving a new level of productivity and innovation.

The Fair Work Bill 2008 (Cth) is a step in the right direction in that it eschews the partisanship of the Work Choices reforms, however it is still based on a fundamentally flawed foundation of adversarial workplace relations instead of advocating for genuine cultural reform of Australian workplaces. The Bill retains the common-law concept of the employment relationship as a peg on which the coverage of the proposed system depends. The contemporary legal notion of that relationship has evolved in a manner that reflects both. It's origin in master servant subordinate status (and the laws surrounding it) and the ad- hoc legislative and labour market reforms and expedients grafted on the original concept to adjust to economic and social exigencies.

In Australia, real employment relationships could not always be properly conceived to be adversarial in character. However adoption of the common-law concept of the relationship as a jurisdictional touchstone carries with it legacies from an evolutionary pedigree heavily influenced by experiences of conflict resolution. The Fair Work Bill entrenches these adversarial settings.

Three examples of how the Fair Work Bill eschews a citizenship at work approach, missing the opportunity to achieve lasting cultural reform of Australian workplaces.

[13] http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatisDecentWork/lang--en/index.htm. Accessed 30/12/2008.

The Bill's premise on adversarial workplace relations means that many of its provisions focus on minimising the negative consequences of conflict between employers and employees rather than promoting best practice in Australian businesses. The Bill sets the parameters for adversarial workplace relations but does little to provide for the avoidance of conflict altogether. As a result, there is little incentive for businesses to genuinely foster improved workplaces based on the principle of a 'fair go all round' as the Bill promotes a functionalist adherence to legislative standards.

Three reforms in the Bill, namely the proposed Small Business Fair Dismissal Code, the good faith bargaining requirements, and the inadequate provisions on consultation, exemplify the Bill's premise of adversarial workplace relations and miss the opportunity to promote cultural change.

a. Small Business Fair Dismissal Code

The Fair Dismissal Code is part of the regulations attached to the Bill and not part of the Bill itself. It includes:

> In cases other than serious misconduct, for example, where an employee is under performing, a dismissal is justified if the employer follows the code by giving the employee a warning based on a reason that validly relates to the employee's conduct or capacity to do the job and by providing a reasonable opportunity for the employee to improve his or her performance. Multiple warnings will not be required and it will not be necessary for a warning to be given, although it would be desirable.[14]
>
> The fair dismissal code itself has a checklist attached to it to assist small business, if they wish to use it, in terms of providing that sort of evidentiary material should it be necessary, and the code has been developed in such a way that it is simple, short and concise and therefore very easy for small business to utilise.[15]

[14] Kovacic, J (2008) introducing the Bill at the Senate Standing Committee on Education, Employment and Workplace Relations, Thursday 11 December 2008, Canberra, Hansard at EEWR 4.
[15] Ibid at EEWR 39.

The AIER contends that there are two primary drawbacks to the introduction of a Small Business Fair Dismissal Code. Firstly, formalising the process for dismissal as part of a code effectively limits access to unfair dismissal protection. The introduction of this type of approach in Britain in 2002 was an abject failure that was reversed only four years later by subsequent legislation.

Secondly, the Fair Dismissal Code provides very minimal obligations upon employers and acquiescence to the Code does not guarantee the substantive fairness of an employee's dismissal. These arguments are discussed in turn.

Employer opposition to rising litigation saw the UK's Labour Government introduce a new reform in 2002 that effectively limited access to employment tribunals. The centrepiece of the *Employment Act 2002* was the institution of a statutory grievance procedure that required all employers and employees to follow an internal three step dispute resolution process before bringing an unfair dismissal application. This required that the grievance be stated in a letter and communicated to the other side that a meeting take place between the parties and a reasonable time frame allowed for this to occur. Failure to follow this process would allow the tribunal to impose penalties by reducing awards.[16] Employees who did not utilise the statutory grievance procedures could even be barred from accessing tribunals altogether.[17]

The primary problem with the UK Government's three-step procedure was that it was too prescriptive. There is no one size fits all model for dispute resolution – different businesses require different processes. Furthermore, whilst a documented and accessible workplace policy for dealing with disputes will provide an impetus for workers to resolve conflict, there is a danger in formalising the process too much. As Thomas states:

> The key to controlling the cost associated with workplace conflicts is to address disputes early in their life cycle before they escalate beyond an organisation's ability to effectively intervene.[18]

In order to address disputes early in their cycle, informal options of conflict resolution may be best but the UK Government's institution of a three-step procedure was inherently formal in its approach. Certainly, if informal methods such as talking to the person directly, trying to

[16] *Employment Act 2002* (UK), s 31.
[17] *Employment Act 2002* (UK), s 32.
[18] Thomas, R (2002) *Conflict Management Systems: A Methodology for Addressing the Cost of Conflict in the Workplace,* http://www.mediate.com/articles/thomasR.cfm#, Accessed 30/06/2008.

modify behaviour and discussing the issue informally with a supervisor fail, the business needs to have documented formal avenues for addressing the conflict. However, using formal methods as a starting point for resolving a grievance can often escalate the crisis as parties feel they need to justify their position in the letter and often include unrelated matters that have been building over time. The Gibbon's Review, commissioned by the UK Government, certainly found there to be a problem with formalisation as employers feared that if anything was left informal, they would be open to claims, while employees wanted to ensure that a grievance was registered so that it could be used in a tribunal claim if need be. Gibbons found this red tape and administrative burden to be particular onerous on small businesses with less sophisticated human resource management techniques:

> Small businesses tend to have a more informal culture and the requirement to express problems in writing can act as a trigger for greater conflict.[19]

As a result of his critique of the system introduced under the 2002 Act and its accompanying 2004 Regulations, the Gibbons Review recommended the repeal of three-step statutory grievance procedure and the Employment Act 2008 (UK) achieves this through its reforms.

The UK's failed experiment with codifying fair dismissal processes poses serious questions over the viability of Australia's proposed Small Business Fair Dismissal Code. Whilst the proposed Code is less formal and has fewer requirements, it is likely to put pressure on small business's to adopt the Government's checklist rather than developing an approach that is tailored to the needs of their individual workplace. The Fair Dismissal Code may also create a similar problem to what occurred in the UK, in that employers will warn employees more expansively and indiscriminately in order to have a warning on the record so that a dismissal is permissible down the track. The Code's requirement of a formal warning as a precursor to dismissal certainly encourages such an approach and may lead to increased internal conflict within workplaces that undermines the ongoing employment relationship. From an employee perspective, the Code also effectively limits access to unfair dismissal protection if the employer has followed the Code's requirements even if the substantive merits of the dismissal are contestable.

The emphasis on a procedure in the Fair Dismissal Code evinces a government agenda of trying to get employers to dismiss employees in the *correct procedure, not necessarily having any real regard to fairness*. Such an approach encourages small businesses to adopt

[19] Gibbons, M (2007) *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain,* March 2007 at para 2.11.

risk management processes by mandating strict compliance with the Fair Dismissal Code rather than genuinely fostering cultural change in the way performance management and dismissals are conducted within the workplace. The AIER contends that the checklist approach of the Code and its brevity in only requiring a warning and a reasonable opportunity to improve performance hardly guarantees an employee that their dismissal be fair.

The AIER's recent development of the Australian Standard of Employment Rights reveals how fair dismissal processes need to be far more rigorous than what it is encapsulated in the Fair Dismissal Code. In fact, the Code does small businesses a disservice because it provides the impression that its procedures are all that is necessary to guarantee a fair dismissal, when in actuality its processes are far from the best practice that all small businesses should be striving for. The Australian Standard of Employment Rights provides the following steps as part of a model approach to governing dismissals in the workplace:

- The employer should define conduct and performance expectations clearly at the start of a worker's relationship with the business.

- The employer should ensure that there is consistency and transparency in the ongoing management of a worker's conduct and performance.

- The employer should seek to be honest and transparent in the ongoing management of a worker's performance and conduct.

- The employer's process for managing risk should identify who is responsible for terminating a worker's employment.

- When it becomes apparent that a worker's conduct or performance is below what is required or expected by the employer, the process for reviewing such issues should be fair.

- The employer should provide fair notice or pay in lieu of notice to a terminated worker.

- The employer should exercise the use of probationary or qualifying periods in a responsible manner.

- The employer should have a legitimate reason for termination of employment when that termination relates to the worker's conduct.

In sum, both the brevity of the Fair Dismissal Code and the failed experiment with codification in the UK suggest that the Government should reconsider this reform. Small business should be encouraged to recognise their role as industrial citizens and the state should provide support to foster fair dismissal processes within workplaces instead of a minimalist code that does not guarantee fairness at all.

Recommendation 2

AIER recommends that the Government reconsider the Small Business Fair Dismissal Code as its brevity and prescriptive nature will not necessarily guarantee fair dismissals.

Recommendation 3

AIER recommends that in lieu of the Small Business Fair Dismissal Code government set in place processes that allow for the publication of 'best practice' approaches in the area of termination of employment more generally not limited to small business.

Recommendation 4

AIER recommends that any standards or descriptions for fair dismissal incorporate the elements contained in the Australian Standard of Employment Rights including:

> ***The employer should define conduct and performance expectations clearly at the start of a worker's relationship with the business.***
>
> ***The employer should ensure that there is consistency and transparency in the ongoing management of a worker's conduct and performance.***
>
> ***The employer should seek to be honest and transparent in the ongoing management of a worker's performance and conduct.***
>
> ***The employer's process for managing risk should identify who is responsible for terminating a worker's employment.***

When it becomes apparent that a worker's conduct or performance is below what is required or expected by the employer, the process for reviewing such issues should be fair.

The employer should provide fair notice or pay in lieu of notice to a terminated worker.

The employer should exercise the use of probationary or qualifying periods in a responsible manner.

The employer should have a legitimate reason for termination of employment when that termination relates to the worker's conduct.

b. Good faith bargaining

The Bill provides, within Division 8 – FWA's general role in facilitating bargaining, arequirement that bargaining representatives must meet the good faith bargaining requirements as set out.

AIER submits that there are a number of drawbacks to this approach. Firstly this approach fails to make good faith an object of the Act.

A good faith approach implies a commitment to honesty, fair dealing and cooperation in all aspects of the employment relationship – from bargaining, to performance and termination. Such an approach requires parties to adopt a less adversarial approach, recognising and taking into account the interests of the other party.

Riley defines good faith in practice as "an obligation to cooperate to achieve the mutually agreed objects of the relationship [and an agreement] not to act in a manner calculated to destroy the mutual trust and confidence of parties to the relationship."[20]

In essence, good faith requires that employers and workers keep open channels of communication and to respect each other's entitlement to benefit from the employment relationship. In this sense, good faith bargaining has the potential to operate as a bulwark against the notion of industrial "dictatorship".[21]

[20] Riley, J (2007) *Australian Charter of Employment Rights,* Bromberg M & Irving M (eds), Hardie Grant Books at 13.
[21] See Laski in McCallum, Ron, 2005, 'Industrial Citizenship', in Joe Isaac and Russell Lansbury (Eds), *Labour Market Deregulation: Rewriting the Rules*, Federation Press, Sydney at 20.

There has been increasing discussion of the concepts of 'good faith' and 'mutual trust and confidence' in judicial decision in Australia and the United Kingdom. Whilst the duty of good faith has been recognised by English courts, there have been few cases in Australia where the point has been directly raised and decided. In *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*[22] Rothman J held that duties of mutual trust and confidence and good faith are implied into the employment contract. On appeal, the New South Wales Court of Appeal was prepared to assume the existence of a duty not to destroy mutual trust and confidence for the purposes of argument, but because they found that there was no breach of such an obligation in this case, they did not need to categorically confirm its existence in Australian law. So we are still waiting for a definitive clarification of this issue by an appellate court.[23] However it is certainly the case that the Court of Appeal did not rule out the duty, and in fact referred with approval to a number of authorities that assume its existence.

Justice Rothman in *Russell* referred to the statement in *Heptonstall v Gaskin*[24] that it would be casting "too long a bow to suggest the implication of good faith is recognised as being part of the law of Australia".[25] However, his view was that employment contracts ought to be treated like commercial contracts and should have implied into them a duty to act in good faith. Good faith requires "prudence, caution and diligence" to "avoid or minimise adverse consequences that might flow to the other party because of their actions".[26]

Similarly, in terms of mutual trust and confidence, Justice Rothman held that the employment contract could only work if there is such a duty, referring to *Concut v Worrell* where each member of the High Court, other than Justice McHugh, acknowledged that the employment relationship contains an implied duty of mutual trust.[27] Justice Rothman was also strongly influenced by the fact that the implied duty of mutual trust and confidence is settled law in England[28] and referred to the acceptance of mutual trust and confidence in *Burazin,*[29] although this acceptance did not form not part of the decision's ratio.

[22] [2007] NSWSC 104 ('*Russell'*).
[23] *Russell* at 134.
[24] [2005] NSWSC 30 at 23.
[25] *Russell* at 99.
[26] *Russell* at 117.
[27] *Concut v Worrell* (2000) 75 ALR 312, *Russell* at 131.
[28] *Russell* at 133 & 122; *Malik & Mahmud v BCCI* (1998) AC 21 *(Malik)*, *Eastwood v Magnox* [2004] UKHL 35 *(Eastwood).*
[29] *Burazin v Blacktown City Guardian* (1996) 142 ALR 144, 151 *('Burazin').*

The concept of good faith has also been explored in the realm of general contract law, not just in the area of employment contract law. According to Peden, recent judicial decisions reveal an increasing trend for courts to recognise and uphold express and implied obligations of good faith.[30] Consequently, there has been much discussion of what is the contractual meaning of good faith. There is no agreed definition but there are many suggested definitions in the mix. Some attempt to define good faith by referring to 'bad faith' – that is, conduct that is undesirable and not allowed in the performance of a contract.[31] A more positive enunciation of the right is provided by former High Court judge Sir Anthony Mason who suggests that good faith embodies three key concepts:

- An obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself);
- Compliance with honest standards of conduct; and
- Compliance with standards of conduct which are reasonable having regard to the interests of the parties.[32]

In referring to the different schools of thought in defining good faith, Peden concludes that the most appropriate meaning is a requirement *that parties are required to regard the other party's interests.*[33] It seems paradoxical that the necessity for good faith is seen by Courts to be integral to commercial contracts but there is judicial resistance to recognizing a similar requirement as integral to a contract of employment.

The right to good faith performance is emerging as one of the key innovations of recent developments in labour law. Despite the different definitions proposed, there does seem to be a general consensus that good faith is a helpful concept because it requires the parties to keep to their contractual bargain in the fairest possible manner.

Looking at good faith with this broader lens would again assist to move away from notions of the employment relationship as adversarial. Layering good faith requirements throughout the Act and making one of the objects of the Act the achievement of work relationship based on good faith and mutual trust and confidence would provide substantive levers beyond bargaining to encourage cultural change.

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[30] For an overview see Peden, E (2001) "Incorporating Terms of Good Faith in Contract Law in Australia", 23 *Sydney Law Review* 22.
[31] Summers R S (1968) "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code", 54 *Virginia Law Review* 195.
[32] Mason, A (2000) "Contract, Good Faith and Equitable Standards in Fair Dealing", 116 *Law Quarterly Review* 66.
[33] Peden, E (2002) "The meaning of contractual 'good faith'", 22 *Australian Bar Review* 235.

In its Australian Standard of Employment Rights AIER has articulated the elements of this broader view of good faith:

> Employers and workers do not seek to mislead, deceive or trick each other but always seek to act in an honest and trustworthy manner.
>
> Employers and workers do not abuse any powers or discretions granted to them in the employment contract.
>
> No person in or associated with the workplace is subjected to harassment or humiliation so as to cause psychological harm or distress.
>
> 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.
>
> Employers and workers do not maliciously damage the reputation of the other.
>
> Employers do not seek to place an illegitimate restriction on the freedom of workers to pursue their careers once their employment relationship is over.

Using this broader vision of good faith as the starting point allows us to consider a number of areas through the Bill that provisions associated with good faith could be included.

> **Recommendation 5**
>
> ***AIER recommends that good faith requirements need to be layered throughout the Act (and in particular in the Objects) in order to promote the cultural change that is needed to rebuild trust and confidence in the employment relationship.***

AIER wonders how employers and employees and their representatives are meant to truly achieve meaningful outcomes if they have bad faith relationships one day and then, simply because they walk into the bargaining room, they are required to exhibit good faith relationships the next

As a result of this it is clear that the Act requires only a functional commitment to good faith behaviours and only when bargaining. This does not provide support for broader cultural change. In fact it will encourage a checklist, risk management approach to bargaining without parties examining or altering their behaviour at all.

The list of good faith bargaining requirements itemised at clause 228 of the Bill sets out an array of attitudinal or behavioural criteria that may assist in the promotion of cultural change but the list could be substantially improved upon to achieve that objective.

Recommendation 6

AIER recommends that any definition of good faith within the Act be extended to include the requirements to:

Act honestly and openly, which includes refraining from capriciously adding or withdrawing items for bargaining and not doing anything that does, or is likely to, mislead or deceive the other party

Bargain genuinely and dedicate sufficient resources to ensue that this occurs

Adhere to agreed outcomes and commitments made by the parties

Respect confidences and information or proposals provided on a without prejudice basis

Bargain directly with the representatives of the other party or parties and not undermine, or do anything likely to undermine, the bargaining or the authority of the representatives conducting the bargaining

In addition the employer should:

Provide reasonable opportunities for the worker's representatives to meet and confer with employees and their delegates about the bargaining

Provide for the release of delegates/representatives to participate in bargaining

Provide reasonable facilities and resources for delegates/representatives to carry out their role in bargaining, including the opportunity to consult and to communicate with workers.

The placement of the good faith bargaining requirements within Chapter 2 part 2-4 Division 8 is another example of how the Bill promotes a functionalist adherence to legislative standards and reinforces an adversarial approach to the relationship. Rather than focussing

Paul Munro
Comment: I prefer this formulation of the way in which the bill May be characterised as having an adversarial character.

on mechanisms to assist parties to build a good faith relationship and avoid conflict the provisions only really come into play if the conflict has arisen and a party is seeking orders against another. A more appropriate provision would be to provide FWA with a general power to assist parties to achieve a relationship that promotes understanding of the other party's interests and *requires them to regard the other party's interests.*[34]

Recommendation 7

AIER recommends that FWA be given a general power to assist parties to achieve a relationship that promotes understanding of the other party's interests and require them to regard the other party's interests.

c. Consultation provisions

Essential to workplace citizenship is meaningful and regular dialogue between employers and employees. The legislative framework needs to set the parameters for such dialogue and encourage its existence. Without external prompting, not all businesses will be sites of genuine cooperation and consultation and the Government has a role in recognising the inherent power imbalance in the employment relationship by mandating that employers do not merely pay lip-service to the notion of consultation but recognise the need for it as part of the employer's role as an industrial citizen.

The AIER welcomes the consultation provisions in the Fair Work Bill but recommends that these be strengthened in order to increase their impact upon workplaces. Currently in the Bill, employees must be consulted about major workplace changes. Such consultation is required to include employees' representatives and agreements which do not have a consultation clause are required to adopt the model consultation term in the Bill's Regulations.[35] In terms of redundancy, the consultation requirements have been described as follows:

> There are in chapter 3, part 3.6 some provisions about consulting with registered employee associations in circumstances where 15 or more employees are being made redundant. That requires just a notification of the number of employees and when it is likely to

[34] Peden, E (2002) "The meaning of contractual 'good faith'", 22 *Australian Bar Review* 235.
[35] Fair Work Bill 2008 (Cth), Explanatory Memorandum, Clause 205.

> occur; it does not actually impose any requirements to provide a business plan.[36]

These provisions need to be strengthened in order to encourage cultural reform within businesses to ensure genuine consultation and cooperation. The requirement of notification of the number of redundancies and a timeline for when this is to take place is a step in the right direction but does not sufficiently guarantee workplace democracy. The Charter of Employment Rights enshrines the right to workplace democracy. It stipulates that the employer's right to responsibly manage their business be counterbalanced by the right of workers to participate in the making of decisions that have implications for themselves or their workplace.

This right to participation goes beyond mere consultation or notification of change. It requires workplaces to adopt mechanisms that foster ongoing communication about workplace changes that provides information to workers but also provides opportunity for their feedback and ideas on how the change could be better implemented.

The Australian Standard of Employment Rights provides a stronger guarantee of consultation than what is currently included in the Fair Work Bill. It states that 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 and be provided with information and meaningful consultation. Managing change within businesses is a sensitive matter as it affects the lives of those working for the business. The basic substantive requirement is that the change must be capable of being justified and workers should be consulted as early on in the process as possible. The following steps are important:

- The intention to implement change should be flagged through the mechanism(s) for consultation within the business.
- Workers should be provided with adequate notice of proposed changes and be given all relevant information in relation to proposed changes, and importantly, the likely impact of these changes on them.
- Workers should then be invited to express their views in relation to proposed changes and due consideration should be given to those views.

[36] Cully, P (2008) introducing the Bill at the Senate Standing Committee on Education, Employment and Workplace Relations, Thursday 11 December 2008, Canberra, Hansard at EEWR 35.

This will enable workers to be involved in the decision-making process and is likely to foster more harmonious workplace relations once a decision has been made. Research shows that the participation of workers in decision-making is a critical method for achieving acceptance and effectiveness of planned change.[37] This is because if workers are involved in the change process they are more likely to implement the decision than if they were not involved at all.[38]

As recognised by the Bill, redundancies are a particularly serious situation where consultation is a must. Workers and their representatives should be provided with information and meaningful consultation at early planning stages. Fairness also requires that a redundancy be genuine in the sense that the employer must no longer require the 'redundant' position to be performed by anyone.[39]

Other countries provide useful guidance on how the state can encourage businesses to adopt meaningful and regular consultation in the employment relationship. Under Germany's labour laws, the principle of an employer's right to manage is subject to the rights of workers to participate (to varying degrees) in many aspects of business decision-making through employee-elected works councils. Under the *Works Constitute Act 1972* German works councils have rights to be involved in the broader operation and strategic direction of the business. They are also able to work cooperatively with management in jointly determining workplace rules, working hours, employee performance monitoring and personnel planning. Other European countries are also increasing their legislative requirements for workplace consultation as a result of the European Union's Information and Consultation Directive 2002. It requires that employees be provided with information and consultation rights regarding the recent and probably direction of the business, especially any developments that may threaten employment and consultation about any decisions likely to lead to major changes in work organisation or contractual relations. Finally, in New Zealand, the overarching duty of 'good faith' imposes fairly comprehensive obligations about information and consultation with regards to business restructuring and providing genuine opportunities for employees to comment on proposals such as contracting out, business sales or transfer and redundancies.

Paul Munro
Comment: Is this the correct citation?

[37] Sagie, A et al. (1990) "Effect of Participation in Strategic and Tactical Decisions on Acceptance of Planned Change," *Journal of Social Psychology,* vol.130(4).
[38] Gollan, P et al. (2002) *Work Councils in Australia: Futures, Prospects and Possibilities,* The Federation Press, Leichhardt, NSW at 24-36.
[39] Stewart, D & Furlan (2004) "Managing Workplace Change" in *Human Resources Magazine,* http://www.humanresourcesmagazine.com.au/articles/51/0c025151.asp. Accessed 15/6/2008.

Clearly then, there are many international precedents as to how Australia can improve its requirement that the employment relationship be genuinely consultative. Certainly, the international trend is to expand such requirements and place obligations upon the parties to this end. The Fair Work Bill 2008 presents a unique opportunity for Australia to encourage workplace reform by requiring businesses to be sites of meaningful dialogue between employers and employees, and for the right to workplace democracy to be accorded to all. The AIER believes that strengthening the consultation provisions in the Bill will assist in the move away from adversarial workplace relations.

Recommendation 8

AIER recommends that the Government strengthen the consultation provisions in the Bill in order to guarantee the right to workplace democracy for employers and employees and to promote a culture of responsible management.

4. A Mechanism to foster and support cultural change – the creation of a Centre for Workplace Citizenship

This proposal is intended to scope the establishment of a national resource to promote fair work practices in Australia.

By resource we mean an organisation/Centre dedicated to:

Improving the quality of working lives of individual Australians

Creating conditions for business success

Enhancing social cohesion via the promotion of respectful workplaces and the understanding of workplace citizenship

Educating the Australian public about fair work practices and workplace citizenship.

It is proposed that this organisation be independent and ultimately self-sustaining. The resource should be composed of representatives of employers and employees and those who broadly have an interest in the establishment of fair work practices and workplace citizenship.

Whilst the ultimate aim is for the organisation to be self sustaining (founded in the recognition that fair work practices and respectful relationships are directly beneficial to the parties in the labour market), initial seed funding from government is required in order to promote the immediate success of the organisation, public recognition for its purposes and its ability to ensure that its efforts are not narrowly confined.

The present aggressive, adversarial workplace culture publicly promoted via recent past public policy requires an injection of resources to overcome learned behaviour promoted by the previous federal government– the perpetuation of a cost based competitive strategy by business and an entrenched industrial relations culture. There is therefore a substantial public benefit warranting the expenditure of public funds in the manner outlined in this proposal.

Context

> "*We confront the challenge of keeping our nation competitive in the global economy and ensuring fairness at work for all Australians.*
>
> *Our opponents believe we must choose between economic prosperity and fairness.*
>
> *Our opponents have chosen to throw fairness out the back door for Australian working families.*
>
> *Labor believes we can have both economic prosperity and fairness.*
>
> *We believe our economy can go forward, but with fairness."* [40]

The emphasis of the Rudd Government is on fairness and economic prosperity. For Australia to achieve this, a change is not only required in the machinery that governs the employment relationship but in the culture of workplaces themselves. The legacy of WorkChoices has left a tough environment for fostering trust and respectful relationships within workplaces and between the parties to the labour exchange.

For the government to achieve its stated policy objectives there is a need to rebuild an environment of mutual trust and confidence in workplaces and between the industrial parties. There is also a need to provide education to the industrial parties and to the broader community of what constitutes fairness in the workplace.

The government's policy objectives require workplace environments that are open, participative and conducive to learning and parties that are prepared to work in an environment of mutual respect. Changing legislation alone will not achieve this result.

Government can create the environmental factors conducive to this change. The industrial parties and workplace participants need to then take responsibility for making it a reality. The creation of this national resource will be an important step to that end.

Co-operative approaches to stakeholder engagement are being adopted in broader social and economic contexts both within Australia and internationally.

There is also a growing trend internationally for this co-operative approach to promoting innovation and productivity in the workplace.[41] For example:

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[40] (ALP Policy Document *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, April 2007)

New Zealand - Partnership Resource Centre, Equal Employment Opportunity Trust

United Kingdom -Advisory Conciliation and Arbitration Services (Acas)

Republic of Ireland- National Centre for Partnership Performance

Canada- Federal Mediation and Conciliation Service – Preventative Mediation Program

Different models apply – independent not for profit entities that receive government funds (NZ EEOT), distinct operating units within government bureaucracy (NZ Partnership Centre), independent statutory authorities (Ireland's National Centre for Partnership Performance).

In Australia the Victorian and Queensland Government have sponsored programs designed to showcase the partnerships approach through initiatives such as the Partners at Work Grants (Vic) and Better Work and Family Balance Grants Program (Vic) and the Smart Workplaces Projects (Qld).[42]

The Australian Institute of Employment Rights (AIER) has occupied a unique space being the only independent body in Australia with employer and employee/union representation in its composition and with the stated aims of promoting the recognition and implementation of the rights of employees and employers in a cooperative industrial relations framework. The AIER has adopted the principles of the ILO and its commitment to tripartite processes.

With limited resources, and in a difficult political environment, the AIER has been able to produce valuable resources such as its Charter of Employment Rights (and accompanying book) and its soon to be release Australian Standard of Employment Rights, participate in and facilitate forums for public debate and input into public inquiries. It has received numerous requests to provide more information and to assist organisations wishing to improve workplace culture.

The above summary on international and Australian initiatives demonstrates there is an appetite for the initiative contained in this proposal.

The benefits of establishing this resource

Initiatives of this kind benefit employers, employees and unions. It is logical therefore that employers and the trade union movement will invest in an initiative of this type. There is also

[41] Forsyth A and Howe J (2008) *Current Initiatives to Encourage Fair and Cooperative Workplace Practices: An International Survey: Report for the Victorian Office of the Workplace Rights Advocate*, Monash University Workplace & Corporate Law Research Group and Melbourne University Centre for Employment & Labour Relations Law.
[42] Ibid

substantial public (or third party) benefits associated with the initiative that warrant the injection of public funds.[43]

Without initiatives designed to drive fairness and an understanding of workplace citizenship organisations will continue with their current cost competitive approach and the adversarial industrial relations culture will permeate.

For as long as global competitiveness relies increasingly on flexibility and innovation (rather than price) and the service related industries heavily reliant on the quality of human capital continue to grow in Australia, there is a need to move beyond short term, and adversarial workplace relationships.

New workplace relationships can be fostered that:

- help to re-orient firms towards developments which improve quality, innovation and responsiveness to emerging market opportunities
- shift the industrial relations climate to one of engagement around issues of mutual interest
- ensure, via involvement and respect that maximum value of employees is reached
- provide a positive role for trade unions to play in the workplace.

The public benefits associated with this proposal are:

- Reduced transactional costs in forming and maintaining workplace relationships
- Reduced level of industrial disruption and loss of productivity via hidden dissatisfaction and low morale
- More adaptive production base
- Accelerated pace of organisational and cultural change
- Improved social cohesion resulting form greater satisfaction with work and improved productivity and economic sustainability.

[43] For a comprehensive analysis of the cost –benefits of fair and cooperative employment practices see Gahan et al (2008) *The Impact of Fair and Co-operative Employment Practices on Business Performance – A review of the International Evidence* Work and Employment Rights Research Centre, Monash University

In addition the public benefit should also be measured in terms of the costs of not supporting such an initiative. These costs are largely associated with the lag or delay in achieving cultural change towards fairness where parties are sceptical or find it difficult to move away from past practice or where the improvements with these changes are incremental and difficult to measure. In this environment and without the support of additional resources the positive more long-term initiatives may be crowded out by immediate short-term agendas.

There is also the potential that without a resource that provides a catalyst for positive change the experience of this change will be narrow. For example solely amongst large organisations with the internal human resources capabilities to manage it themselves.

The role and function of the resource

There is a very clear need for this new resource:

- Arising from the adversarial/divisive environment created by the WorkChoices legislation
- To ensure that fairness moves beyond the machinery of government and to facilitate the development of on the ground of cultural change
- Changes to the nature of the labour market and in particular Australia's skills shortage require innovative responses
- Promoting respecting and trustful environments within workplaces will allow innovation and productivity to flourish
- Industrial parties need support and education to move forward particularly given the recent past.

This resource should be guided by the following objectives:

- Improving the quality of working lives of individual Australians
- Creating conditions for business success
- Enhancing social cohesion via the promotion of respectful workplaces and workplace partnerships
- Educating the Australian public about fair work practices.

It will achieve these objectives through facilitating improvements in workplace and industry relationships, promoting fair work practices and educating the community. It should carry out the following functions:

Fostering front-end cultural change

Promoting models of fair work practices

Educating workplaces, industrial parties and the broader community

Collecting and analysing data regarding practices within workplaces.

Fostering front-end cultural change

The resource will act as a catalyst for cultural change providing on the ground assistance to organisations wanting to take up this challenge. It will assist organisations to build the internal capacity to make themselves fair both in terms of the process of change itself and the implementation of fair practices. The emphasis will be on building the capacity of the organisations themselves to implement effective strategies. To this end the resource will:

Provide information, resources and examples of fair work practices and processes

Train internal fair work facilitators from amongst the staff and management of organisations

Be available to provide advice to organisations and act as a resource and train and accredit others to also provide this resource

Establish a network of organisations that apply fair work practices that can help and support each other.

Promotion/demonstration of models of fair work practices

What is fair? Practices that emerged under WorkChoices provided Australia with many examples of what unfair practices might look like. Whilst we have an idea or general feel for what the difference is between fair and unfair practices, Australian workplaces will need some clear standards as a guide or rule of thumb of what fairness means in practice.

Jurisdictions such as the UK have done this by legislative initiative and providing codes of conduct on a variety of matters. The AIER has attempted to capture the minimum provisions that should exist in any workplace via its Charter of Employment Rights and the Australian Standard of Employment Rights. To some extent the federal government has provided a broad guide of the fairness parameters in the Fair Work Bill.

This national resource will help organisations to interpret and apply the legislation in practice. To this end it will:

Create a model standard or set of benchmarks for fairness which are consistent with, and help organisations to meet, the requirements of new legislation

Publish and promote this standard/benchmark

Publish and promote case studies of organisations achieving or striving to achieve this standard/benchmark

Establish a system of voluntary accreditation against the benchmark or standard

Publish voluntary codes of conduct

Educating workplaces, industrial parties and the broader community

The politicisation of workplace relations has done little to enhance genuine understanding of fairness at work. The dominance of unitarist theory in the training of human resource practitioners that has emerged in Australia since the 1980s has also undermined the partnership approach to workplace participation. It has always been difficult to educate first time entrants to the labour market about the rights and obligations in the workplace and what is fair and reasonable treatment. To this end the national resource should:

engage in initiatives designed to promote an understanding in the Australian community about what is fairness at work

engage with academia and those involved in the training of HR/IR practitioners about a values based approach to their teaching/learning and

assist in the production of resources targeting new entrants to the labour market.

It should also hold a biennial conference (the first in 2010) designed to

Showcase examples of fair work in practice

Provide a venue for the presentation of research and academic discussion about trends

Engage and educate practitioners in the achievement of fair work standards.

Collecting and analysing data regarding practices within workplaces

The collection and analysis of what's happening inside workplaces over the next decade will be a crucial tool to assess the depth of cultural change that legislative and policy change has brought about. This new national resource will be well placed to examine qualitatively the level of progress towards fairness within workplaces. To this end the national resource will

> Survey biennially organisations about what is happening to implement fairness in the workplace. This survey will be linked to the fairness standards and accreditation system the organisation has established.
>
> The surveying process will be established in conjunction with a recognised tertiary institution that has expressed an interest in oversight the survey process. This will ensure the rigour of the process and that the results of the survey will be able to be used to enhance academic endeavours.
>
> Survey results will be made available publicly for the purposes of promoting fair work practices, enhancing academic endeavour, facilitating public discourse and informing public policy.
>
> Survey results will be explored at the biennial conference of the resource.

Relationship to Fair Work Australia & the Fair Work Ombudsman

This resource could be on the ground promoting cultural change and fair work practices as early as mid to late 2009.

There is a significant benefit to government in having this resource working on the ground prior to the substantive parts of the Fair Work Bill and FWA becoming operational as it will be promoting the cultural change that the legislation will also be geared to achieving. In this sense it will help to set the scene for the new legislation and FWA.

The work of this new resource and FWA will be complimentary but not overlap. For example this resource will not be involved in dispute resolution. Its emphasis will be on assisting the process of cultural change, promoting fair work practices and education about these practices and their benefits. It is likely that the new resource will be able to gain the confidence of employers and employees in ways that FWA or the FWO will not be able to be because it will have no enforcement or compliance powers or role and will be able to take a problem solving approach to assisting the parties.[44]

[44] see Forsyth & Howe op cit p 51

Recommendation 9

AIER recommends that federal government support the establishment of a Centre for Workplace Partnerships. The Centre's role will be:

- ***Fostering front-end cultural change***
- ***Promoting models of fair work practices***
- ***Educating workplaces, industrial parties and the broader community***
- ***Collecting and analysing data regarding practices within workplaces.***

Annexure A

Executive Members

AIER President

Mordy Bromerg SC – Victorian Bar

Vice Presidents

Employer – Fiona Hardie – Hardie Grant Publishing

Employee – Cath Bowtell – ACTU

Independent - Hon. Paul Munro

Treasurer – Bev Myers – TCFUA

Members

Michael Harmer – Harmers Workplace Lawyers

Sean Reidy – Carne Reidy Herd Lawyers

Professor Joellen Riley – University of Sydney

Gary Rothville – Rothville and Associates

Mark Irving – Victorian Bar

Tim Kennedy – National Union of Workers

Lisa Heap – AIER Executive Director

Charter - Panel of Experts

Professor Joellen Riley, University of Sydney

Professor Greg Bamber, Department of Industrial Relations, Griffith University

Carol Andrades, Consultant, Ryan Carlisle Thomas

Dr Anthony Forsyth, Senior Lecturer in Law at Monash University

Associate Professor Colin Fenwick, Director, Centre for Employment and Labour Relations Law

Professor Marilyn Pittard, Monash University

Professor David Peetz, Head of the IR Department at Griffith University

Professor Barbara Pocock, Director, Centre of Work and Life at the University of Adelaide

Justice Paul Munro, former Presidential Member of the AIRC

Mordy Bromberg SC, Victorian Bar

Professor Ron McCallum, Dean of the University of Sydney Law School

David Chin, NSW Bar

Anne Gooley, Partner, Maurice Blackburn Cashman

Professor Russel Lansbury, Professor of Work and Organisational Studies at the University of Sydney (liaison)

Emeritus Professor John Neville, School of Economics, UNSW

Associate Professor Peter Kriesler, School of Economics, UNSW

Michael Harmer, Chairman and Senior Team Leader, Harmers Workplace Lawyers, Sydney

Mark Irving, Victorian Bar

Peter Rozen, Victorian Bar

Julia Watson, Melbourne University

Annexure B

Charter of Employment Rights

1. In 2007 AIER published the Australian Charter of Employment Rights.

2. 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.

3. 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.

4. 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.

5. An online survey was developed in order to receive feedback on its content.

6. Public forums were held in Sydney and Melbourne.

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

8. Formal consultations regarding the content of the Charter were held with representatives of every major Australian political party and with the current Federal Workplace Relations Minister prior to her taking up this role.

9. 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.

10. In response to requests from organisations for assistance to implement the Charter as a standard in the workplace the AIER has developed a tool called the

Australian Standard of Employment Rights. The primary job of the Standard is to translate the ideals and values embodied in the ten Charter rights and show how a workplace would achieve this in practice. The Standard consists of a handful of key components which are essential across workplaces regardless of their size, industry and background. Businesses are free to apply these components to the specific circumstances of their workplace and indeed the AIER's objective is that businesses realise there is no one formula or prescription of how to achieve workplace fairness but that the best businesses are those that build upon the principles inherent in the Standard in a dynamic, unique and innovative manner.

11. The Australian Standard of Employment Rights forms part of the AIER's accreditation program to be launched in June 2009.

Annexure C

RECOMMENDATIONS

Recommendation 1

AIER therefore calls on the government to adopt via a process of co-operation and consensus involving the Commonwealth, the States, and other key stakeholders the Charter or like set of principles or values as a standard to promote positive work relationships in Australia.

Recommendation 2

AIER recommends that the Government reconsider the Small Business Fair Dismissal Code as its brevity and prescriptive nature will not necessarily guarantee fair dismissals.

Recommendation 3

AIER recommends that in lieu of the Small Business Fair Dismissal Code government set in place processes that allow for the publication of 'best practice' approaches in the area of termination of employment more generally not limited to small business.

Recommendation 4

AIER recommends that any standards or descriptions for fair dismissal incorporate the elements contained in the Australian Standard of Employment Rights including:

> ***The employer should define conduct and performance expectations clearly at the start of a worker's relationship with the business.***
>
> ***The employer should ensure that there is consistency and transparency in the ongoing management of a worker's conduct and performance.***
>
> ***The employer should seek to be honest and transparent in the ongoing management of a worker's performance and conduct.***
>
> ***The employer's process for managing risk should identify who is responsible for terminating a worker's employment.***

When it becomes apparent that a worker's conduct or performance is below what is required or expected by the employer, the process for reviewing such issues should be fair.

The employer should provide fair notice or pay in lieu of notice to a terminated worker.

The employer should exercise the use of probationary or qualifying periods in a responsible manner.

The employer should have a legitimate reason for termination of employment when that termination relates to the worker's conduct.

Recommendation 5

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

Recommendation 6

AIER recommends that any definition of good faith within the Act be extended to include the requirements to:

Act honestly and openly, which includes refraining from capriciously adding or withdrawing items for bargaining and not doing anything that does, or is likely to, mislead or deceive the other party.

Bargain genuinely and dedicate sufficient resources to ensue that this occurs.

Adhere to agreed outcomes and commitments made by the parties.

Respect confidences and information or proposals provided on a without prejudice basis.

Bargain directly with the representatives of the other party or parties and not undermine, or do anything likely to undermine, the bargaining or the authority of the representatives conducting the bargaining.

In addition the employer should:

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

Recommendation 7

AIER recommends that FWA be given a general power to assist parties to achieve a relationship that promotes understanding of the other party's interests and require them to regard the other party's interests.

Recommendation 8

AIER recommends that the Government strengthen the consultation provisions in the Bill in order to guarantee the right to workplace democracy for employers and employees and to promote a culture of responsible management.

Recommendation 9

AIER recommends that federal government support the establishment of a Centre for Workplace Partnerships. The Centre's role will be:

> ***Fostering front-end cultural change.***
>
> ***Promoting models of fair work practices.***
>
> ***Educating workplaces, industrial parties and the broader community.***
>
> ***Collecting and analysing data regarding practices within workplaces.***