Australian Institute of Employment Rights

Paper Rights:
The role for voluntary compacts on labour rights

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Using the Charter of Employment Rights: Will it work? How will it work? A Union Perspective.

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The Charter of Employment Rights developed by the Australian Institute of Employment Rights (AIER) is an Australian contribution to a seemingly ever-expanding number of corporate, national and international voluntary codes concerning labour rights.

The purpose of this paper is: to overview the international situation; to examine how the Charter might be used be practically employers operating in Australia; and to briefly consider the likely utility of the Charter from an employee and trade union perspective.

WHY RIGHTS ARE IMPORTANT.

> *"If low-wage workers do not always behave in an economically rational way, that is, as free agents within a capitalist democracy, it is because they dwell in a place that is neither free nor in any way democratic. … [L]arge numbers of citizens spend half their waking hours in what amounts, in plain terms, to a dictatorship.*" Barbara Ehrenreich, *Nickel & Dimed*[1]
>
> "*We run an absolute dictatorship and that's what's going to drive this transformation and deliver results… If you can't get the people to go there and you try once and you try twice… then you just shoot 'em and get them out of the way...*" Telstra Ltd. COO[2]

There is more than a little irony in the fact that citizens *as employees* are sometimes willing to tolerate treatment from corporations that they would never accept *as consumers*: the customer may be the new king, but the employee often lives in "*the upstairs downstairs world of old Europe*."[3]

An effective antidote to dictatorship, in employment as in civil society, is respect for rights. This explains why the concept of *rights in employment* has such intuitive appeal. The reciprocal character of the wages / work bargain (recognised in Article 1 of the Charter) and its importance in the lives of individuals, supports a *social compact* style approach to the employment sphere: *workplace "justice as fairness"*.[4]

The continuing development of a variety of national and international employment rights codes (the basic principles therein being broadly similar regardless of the source) underlines the importance and the validity of a project like the Charter. With the Australian domestic debate on industrial relations increasingly mired in arcane legal technicality, it is both refreshing and rewarding to refect on, and seek agreement about, fundamental values.

CODES, COMPACTS & CHARTERS.

There is now what one recent author calls a "*scrum of standards*" linking the behaviour of business to social concerns like labour rights, and against which corporations can be assessed and certified.[5] The basic sources of standards are:

- International soft law initiatives (from the UN and agencies like the ILO and OECD);
- Corporate policies relating to Corporate Social Responsibility (CSR) and/or to meet Socially Responsible Investing (SRI) guidelines;
- Sector or industry codes (like the Equator Principles[6] for project finance or Social Accountability International[7] for retail supply chains); and
- Agreements with domestic or international trade union bodies.

All these sources establish labour rights principles and obligations, usually with overlapping and cross-referenced content. This reveals the extent to which there is broad consensus on what a citizens basic workplace rights should be: freedom of association; collective bargaining; dignity, safety and security at work; freedom from forced labour; fair minimum standards; and protection from arbitrary dismissal. These rights (essentially ILO Core Labour Standards[8]) are also reflected in the AIER Charter. One example can broadly illustrate these developments.

Example: The UN Global Compact.

> *"A universal consensus now exists that all countries, regardless of level of economic development, cultural values, or ratifications of the relevant ILO Conventions, have an obligation to respect, promote, and realize these fundamental principles and rights"*[9]

The UN Global compact emerged from discussions between the UN and major corporations at the Davos World Economic Forum in January 1999. Its consists of ten principles, pulled together from UN conventions, which are designed to reflect a basic set of standards for corporate behaviour in a "*sustainable and inclusive global economy*". As well as human rights, environmental and anti-corruption requirements, the Global Compact contains four labour principles: supporting freedom of association and collective bargaining; anti discrimination and forced or child labour. By early 2006, some 2300 corporations had voluntarily signed up to the Code of Conduct.[10] While I have not been able to find firm statistics on overall Australian participation, around a quarter of the member corporations of the Business Council of Australia are signatories (either directly or via a parent company).

It is necessary to record the substantial criticism, particularly from NGO's, of the Global Compact and other voluntary arrangements. The most valid criticisms are: the inclusion of known violators of human rights norms as signatories; the lack of enforcement or even reporting measures; and the difficulty of converting aspirational or "*compromised*" commitments into enforceable standards of behaviour.[11] Others see these same features as advantages:[12] for the world peak employer body the essential features of CSR obligations, including on labour rights, are "*voluntariness, diversity and flexibility*."[13] A wondrous thing it is that can be *universal* and *voluntary* and *fundamental* and *flexible* all at the same time.

The case(s) for rights.

I would have liked to have been able report the existence of an incontrovertible economic case for adopting a rights model. Alas, this is an area where there is plenty of contradictory

literature to suit existing prejudices. Those who see unions as market distorting rent-seekers and SRI as a fuzzy New-Age breach of fiduciary duties are well served. Those convinced of the productivity, growth and societal benefits of good corporate citizenship also have plenty to choose from. Nevertheless, it is possible to say that there is a substantial, but not uncontested, body of evidence that respect for basic workplace rights has a net positive effect on both the corporation and the society in which it operates.[14]

What is beyond doubt is that more and more investor money is seeking a social responsible home. Pension and superannuation funds are increasingly applying screens to investment decisions or engaging in some form of shareholder activism or community investing.[15] A growing number of sustainability indices such as the *FTSE4Good* include labour standards, again usually the ILO Core Labour Standards, as part of their inclusion criteria.[16] Large cap stocks in particular are very likely to be included in SRI indices.[17] In Australia, the volume of managed funds subject to a formal SRI overlay doubled in the two years to June 2006.[18]

I remain cynical about the more hyperbolic responses to this trend, including that corporations now operate in a global "*civil economy*" that has many of the characteristics of civil society.[19] It is clear that globally, a mix of ethical, legal, public relations and strategic considerations are pushing corporations to set guidelines for corporate behaviour, and that such guidelines almost always have a labour rights component.[20] Whether this extends to "*an emerging global consensus on basic standards of corporate behaviour*"[21] or merely a general view that it's better not to get caught being irresponsible might be an open question.

So what does this add up too in practice? If you work for a publicly listed company a variety of people, internally and externally, are already running various rules over your policy and performance. If you work for a multi-national you almost certainly already have ethical, if not legal obligations, to ensure compliance with basic standards. For any Australian employer it means that making an independent voluntary commitment to the set of well established basic workplace rights is the international norm and ought be entirely uncontroversial: in the jargon *du jour* it's "best practice".

THE NUW EXPERIENCE.

The NUW experience of using voluntary labour rights agreements at an enterprise level is overwhelmingly positive. As part of our response to the decision of the High Court in *Electrolux* and later to WorkChoices, the NUW has sought to reach agreement with employers on a basic memorandum of employment and union rights. The memorandums deal

not just with the fundamental matters like a commitment to collective bargaining and freedom of association, but also more prosaic matters necessary to give effect to those rights: things like delegate rights, mass meetings and right of entry. Nationwide, the union has finalised some hundreds of these agreements, with employers ranging from MNEs to family businesses.

In adopting this approach, the NUW has been less concerned about niceties of enforceability than with securing an ethical commitment. The level of resistance to this approach from employers has been generally low, certainly much lower than the public debate on WorkChoices suggests it should be. Moreover, our experience is that parties take voluntary commitments seriously and intend to honour them: absent a factor like ownership change I am aware of only one employer that has resiled from these commitments. Sadly, some major employer organisations are now recommending to all members, in all circumstances, that they reject such any such approach.

Through our international affiliation with the International Union of Foodworkers (IUF) the NUW has been involved in various global labour rights agreements with MNEs. Unfortunately, the implementation of many of these agreements on the ground has been patchy. One successful example is the IUF Agreement with the dairy food giant Fonterra, which commits the company to collective bargaining, labour rights and consultation throughout its international operations.[22] This agreement has been a useful in creating and sustaining good labour relations and positive relationships between unions and management across the Asia-pacific. In particular, unions in developing countries have used the agreement to ensure workers understood they were free to organise.

COLLECTIVE RIGHTS VITAL.

In line with all the significant international instruments, the Charter puts collective bargaining and trade union rights at the centre of any meaningful conception of workplace rights. Collective representation is the key to allowing workers to participate, without fear, in internal mechanisms. Without collective representation, participation in these mechanisms can be a dangerous game for employees.[23] Corporate codes can only be properly acquire legitimacy by having a genuine democratic component.[24] There is good anecdotal evidence about the use charters, codes and values (including consultative and team mechanisms) to enforce conformity, or as instruments of coercion, manipulation and punishment.[25] I would argue that it is actually more demeaning to be called "Associate" if you are still treated like a disposable factor of production.

SOME NOTES OF CAUTION.

> *"Principle 3 Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining."*
>
> UN Global Compact. (Various AMMA members signatory).
>
> *"Mr Knott said [mining] companies opposed collective bargaining and awards…* [and]*…did not want a return to ritual negotiations potentially involving unions every three years."*
>
> Steve Knott, CEO, AMMA[26]

First, abstract commitments must be given practical effect. The ILO Workers' Group has said that some CSR policies on labour rights are actually adopted "*for the express purpose of avoiding the collective bargaining exercise and full recognition of fundamental principles and rights at work*."[27] Corporations cannot say one thing to shareholders and the public, argue a different thing to Governments via an industry association and ignore the lot when it comes to actually dealing with employees. Mere sophistry and blatant hypocrisy are both dangerous.

Second, it's easy to observe "rights" in some contexts: even Wal-Mart, famous for fighting unionisation, has found unions it likes in China. [28] Commitments must not be jettisoned as soon as they are inconvenient, and rights must be observed even when it would be more expedient or profitable to ignore them: again in China, we have MNEs actively campaigning against basic labour standards they are committed to in the developed world.[29] What you do when you can "get away with it" reveals much about your real values.

Third, it is necessary that these rights are not some disembodied set of ideas but an actual break on capricious or opportunistic behaviour. Rights must migrate beyond the Annual Report, or the confines of the Public Affairs Department and inform and guide actual decisions. This must applies equally to small and essentially private decisions like terminations as well as large and scrutinised ones like re-structuring. Speaking to the IUF Global Congress, the CEO of Danone indicated that despite corporate commitments, his company had a major problem with site managers who simply didn't want to work with unions.[30]

Finally, the impact of voluntary codes should not be over-stated: studies suggest that they successfully target blatant exploitation (for example child labour) but are less successful in areas where some measure of subjectivity is possible (for example good faith bargaining).[31] Even the practical utility of the UN standards is limited: the ACTU President was recently painted as a sort of industrial Benedict Arnold for her audacity in raising the obvious incompatibility of WorkChoices with some ILO standards.[32]

CONCLUSION.

Importantly, national governments cannot be let off the hook. Many of the problems that voluntary arrangements are designed to address are caused by the failures of national governments to legislate consistent with fundamental standards and / or to adequately enforce their own legislation even where it does exists.[33] Basic principles are not an alternative to proper state regulation: they are the foundation on which a balanced system of labour laws should be built.

It is contrary to the national interest for Australia's labour law to be subject to continual and sometimes tectonic shifts. It is unsustainable for unions and business to simply pull the political debate as hard as possible in opposite directions. You will never make industrial law apolitical, but we can hope that the Charter of Employment Rights will be part of a genuine tripartite process that builds a national consensus on fundamental rights at work.

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NOTES

[1] Ehrenreich B, *Nickel & Dimed: Undercover in Low-Wage USA* (London: Granta 2002) Page 210.
[2] "Telstra worker 'succumbs to pressure'" *The Australian* 18 June 2007.
[3] Robin C, *Fear: The History of a Political Idea* (New York: OUP 2004).
[4] Rawls J, *A Theory of Justice* (Oxford: OUP 1990).
[5] Davis S et. al. *The New Capitalists: How Citizen Investors are Reshaping the Corporate Agenda* (Boston, Harvard Business School Press 2006) Page 162-163.
[6] www.equator-principles.com
[7] www.si-intl.org
[8] *ILO (1998) Tripartite Declaration on Fundamental Principles and Rights at Work* which is effectively a summary of the eight most important ILO conventions. See www.ilo.org
[9] See www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/labourStandards.html
[10] Davis. *The New Capitalists* Page 162-163.
[11] See for example: *Global Compact with Corporations: "Civil Society" Responds*, NGO Panel on Corporate Accountability at www.globalpolicy.org and criticisms by Human Rights First, Amnesty and Oxfam, www.humanrightsfirst.org/workers_rights/issues/gc
[12] Kirton J & Trebilock M (eds) *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (UK: Ashgate 2004) Introduction Page 5-6.
[13] International Organisation of Employers, *Corporate Social Responsibility: An IOE Approach* (March 2003) at www.ioe-emp.org.
[14] See Hirsch BT, *What Do Unions Do for Economic Performance?*, Institute for the Study of Labor IZA, (Bonn, 2003) and Bates M et al, *Creating Workplace Environments that Reflect Human Rights*, Cultural Diversity Institute, University of Calgary, (2000).
[15] Even in 2003 11% of funds under management in the US had at least some SRI overlay – See Nolan J, *Corporate Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure*, [2007] UNSWLRS 15Note 8.
[16] Companies must meet the standards on Freedom of Association and Collective Bargaining to be included in the FTSE4Good Index. (see www.ftse.com/Indices/FTSE4Good_Index_Series). US sustainability indices seem to have weaker labour rights commitments that European equivalents.
[17] For example 72% of the component equities in the DJ EURO STOXX 50 (Europe's largest corporations) are also included in at least two SRI indices. See Ivanaj S et al Assessing the sustainable development commitment of European MNEs, see Ivanaj S et al *Assessing the sustainable development commitment of European MNEs,* Georgia Tech Working Paper 015-07/08, (October 2006), Page 14 (www.ciber.gatech.edu).
[18] Ethical Investment Association *Sustainable Responsible Investment in Australia 2006* Page 12-13 see www.eia.org.au
[19] Davis S et. al. *The New Capitalists* Page 17.
[20] See Nolan J, *Corporate Accountability*.
[21] Paine L et.al, *Up to Code: Does Your Company's Conduct Meet World-Class Standards?* Harvard Business Review, 83(12) (December 2005) page 122.
[22] Copy available at www.iufdocuments.org
[23] Freeman R & Medoff J *What Do Unions Do*, (New York: Basic Books 1984)
[24] Scherer A et al, *Global Rules and Private Actors - Towards a New Role of the Transnational Corporation in Global Governance,* Business Ethics Quarterly, (16) (2006), p. 505-532.
[25] See for example Grenier G, *Inhuman Relations: Quality Circles & Anti-Unionism in American Industry* (Philadelphia: Temple UP 1988) Page 74 and Sennett R, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism*, (New York: Norton 1999) Page 99.
[26] "Mining chiefs put Rudd on notice" *The Australian* (14 May 2007).
[27] "Business with a Conscience: Why Best Practice is Good Practice", *World of Work: the Magazine of the ILO* (No. 57) (September 2006) Page 17.
[28] "Wal-Mart Loves Unions (In China)", *The Washington Post*, (1 December 2004) & "Unions Triumphant at Wal-Mart in China", *The International Herald Tribune*, (12 October 2006).
[29] *China Drafts Law to Empower Unions and End Labor Abuse*, New York Times, 13 October 2006.
[30] Frank Riboud, Danone CEO, see www.iuf.org/25thcongress/2007/03/global_companies_global_unions.html
[31] For example see *The Ethical Trade Initiative Code of Labour Practice: Do Workers Really Benefit*? (2006) at www.eti.org.uk
[32] "ACTU's Burrow 'smears' Australia's reputation" *The Australian* (5 June 2007)
[33] Kuruvilla S et al., *International Labor Standards, Soft Regulation, and National Government Roles*, ILR Collection Articles, Cornell University, (2006)