Australian Institute of Employment Rights

The Debate: Regulating Work Relationships in Australia

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Contents

welcome

Over the next few months the federal Government 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. It needs to be a fairness based on good faith relationships and the desire to create dignity at work..

Our society has been shaped by iconic Australian employment rights, such as the right to a living wage, the eight-hour day and the industrial principal of a "fair go". Over the past few years many of these rights have been eroded. 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. It is an approach that was resoundingly rejected by the Australian population at the last federal election.

The federal Government's *Forward with Fairness* policy goes some way towards the creation of fairness but the Australian Institute of Employment Rights (AIER) believes there is still some way to go.

The AIER is an organisation independent of government or any particular interest group. Our membership and governance structures include representation from employers, employees, academics and lawyers who have an interest in promoting positive work relationships.

Last year, recognising that improved workplace relations require a collaborative culture, the AIER created the Australian Charter of Employment Rights, as a 'back to basics' attempt to define the rights of employers and workers (see page v).

This magazine seeks to continue the debate on what constitutes a fair workplace, now, and into the future. We also hope that this publication will act as a guide to those in parliament who have the responsibility to enact fair workplace laws.

Lisa Heap, executive director AIER

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Charter Next Steps: the Accreditation System

With legislation changing towards more cooperative employment practices, employers are seeking tools that will help them align their practice with the new system's standards. Lisa Heap reports

The Australian Charter of Employment Rights has set a new standard for fair employment practices within Australia. Already it has been used as a reference point for reviewing Australia's systems of employment regulation and now it will form the basis of a challenging accreditation system.

The AIER has received numerous enquiries from employers interested in using the charter as a standard within their organisations.

Governments are also interested in exploring how the charter can be used as a tool to advise procurement practices.

The charter will now be developed to include a system of accreditation that employers and workers can voluntarily engage with.

Working once again with our panel of experts, our first task was to take the 10 rights and obligations identified in the charter and develop measurable standards for each. This is an exciting task when you consider this includes establishing mechanisms to measure values and attitudes such as good faith and dignity at work.

Our accreditation system will:

- be accessible to a vast array of employers. The costs and complexity of the system will not preclude small organisations – or those with limited HR expertise – from engaging with it
- encourage involvement from employers and workers, and their representatives in the assessment process
- ensure the results will be (whilst confidential in terms of individual organisations) available for the purpose of academic research and public policy development.

Particular attention has been paid to the architecture of the system to ensure that it can be tailored to the needs of individual organisations.

Our measure of accreditation is based on the principle of 'reasonable progress to reasonable proximity'. This principle allows for differences in organisation size, background and history. Compliance with the charter standard will be measured on a relative basis.

The zone of "reasonable proximity" may vary according to the size of the business. For example, a well-resourced business with a dedicated human resources team will be required to be closer in proximity to the aspirations of the charter than a business with no human resources personnel or experience.

This principle recognises that the charter standard is aspirational and no business will ever be able to achieve it fully at all times. Thus, if the standard represents the "perfect workplace" – businesses will be measured according to their progress and proximity towards this goal, in light of their starting point and the size, history and background of their business.

The accreditation system includes resources for participating organisations and individuals to assist in improving the standards within their organisations. The first step is a self-evaluation process, assisted by our evaluation kit, through which organisations can assess how close they are to the charter standard.

The system will be trialled in the last quarter of 2008 and early 2009 with the aim that it will be operational during 2009. We have a list of organisations and individuals who have expressed an interest to be involved in the trial and are happy to receive enquiries from other interested parties.

The AIER would like to thank those who have contributed to the development of the accreditation system:
Queensland Department of Industrial Relations, Western Australian Department of Consumer and Employment Protection, ACTU, Harmers Workplace Lawyers and our two project officers, Joanna Mascarenhas and Sam Caddy.

And, of course our panel of experts.

For more details or to be part of the trial contact Lisa Heap on 03 9647 9102 / 0418996354, lisaheap@bigpond.net.au

LISA HEAP

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Forward with Fairness: Filling in the Gaps

Several areas of the Rudd Government's *Forward with Fairness* policy need fleshing out, writes Professor Ron McCallum. His suggestions concern the proposed collective bargaining regime, the unfair dismissal laws, and the new agency Fair Work Australia

The coming into force, on 28 March 2008, of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) marked the first step in the Australian Parliament's dismantling of the WorkChoices laws. The Act ended the making of further individual workplace agreements (AWAs), and a "no disadvantage test" was once again inserted into the legislation to protect employees governed by collective agreements. This transitional statute also commenced the process of Award modernisation, which is now being carried out by the Australian Industrial Relations Commission. On 11 June 2008, the much broader statutory safety net of terms and conditions of employment, known as the National Employment Standards, was unveiled in a comprehensive document.

All of these initiatives are both welcome and long awaited, but the test of the new Rudd Government will be its substantive workplace relations legislation, which is to be presented to the federal parliament later this year. If all goes to plan, the substantive legislation will be fully operational on 1 January 2010.

The *Forward with Fairness* policy documents released by the ALP in 2007 when it was in opposition – in April (policy document) and August (policy implementation plan) – were more or less policy documents. They are sufficiently detailed to outline the *Forward with Fairness* policy, but they lack the specificity to acquaint readers with the necessary nuts and bolts of Labor's workplace relations laws.

IN SUMMARY

- Strong remedies are needed to penalise failure to bargain in good faith.
- The scope of collective bargaining agreements is best left to the employing enterprise, its employees and any recognised trade union.
- Don't wait until 2010 to reform the unfair dismissal laws.
- Retain the Australian Industrial Relations Commission, and don't make changes to the Chapter III courts in the field of industrial relations.

Collective Bargaining

The centrepiece of the Rudd Government's post-WorkChoices laws will be the collective bargaining regime, however much of the current landscape will remain unchanged because there will still be union and non-union bargaining that will be confined largely to single enterprises. The WorkChoices laws prohibiting all strikes, other than protected industrial action, will remain in force, and pattern bargaining will continue to be illegal.

The big change will be that, for the first time under federal labour law, employees will be able to require their employer to collectively bargain either with their representative trade union or directly with the workforce. Under the Howard laws, employers could not be compelled, as a matter of law, to engage in collective bargaining with their employees either with or without a trade union. In other words, the legal levers of choice were in the hands of the employers, who could refuse to engage in collective bargaining without penalty.

How will the employees of an employing enterprise be able to make it known to the employer that they wish a trade union to bargain on their behalf? It does appear that the Government will borrow from the labour laws of the United Kingdom's Blair government relating to trade union recognition that were enacted into law in 1999. In England, a trade union can seek voluntary recognition by the relevant employer and can take its case to an agency known as the Central Arbitration Service. If discussions do not resolve the matter, the agency may order the

> "The test of the new Rudd Government will be its substantive workplace relations legislation"

employer to recognise the trade union for the purposes of collective bargaining in the following circumstances: first, where the trade union is able to demonstrate that a majority of the employees are members, or second, where a majority of the employees vote in favour of recognition, provided that at least 40 per cent of the employees participate in the ballot.

The two matters on which comment will be made are bargaining in good faith and the scope of collective bargaining.

Good Faith Bargaining

Of course, the Rudd labour laws will oblige employers to bargain in good faith with recognised trade unions, however, as the United States experience shows, without a meaningful remedy it is virtually impossible to ensure that good faith bargaining occurs. Under US law, while employers ultimately may be required to pay damages for bad faith bargaining, the law will not step in to ensure that the transgressing employer and its employees will be governed by a collective agreement. In Canada, on the other hand, remedies for a failure to bargain in good faith are stronger, and a collective agreement may be arbitrated to resolve an impasse.

In my view, the Rudd Government should borrow from the labour laws of Western Australia, which enable that state's Industrial Relations Commission to make arbitrated enterprise orders of terms and conditions of employment to resolve bargaining impasses. In WA, these orders, which are confined to single employing enterprises, have been sparingly made and have proven to be effective. Without a meaningful remedy, in my judgement any legal exhortations to bargain in good faith will amount to little more than hot air.

The Scope of Bargaining

Under the WorkChoices laws, collective bargaining was largely confined to wages, hours, rostering and leave because many significant matters were prohibited content. Under the Workplace Relations Regulations 2006 (Cth), employees, trade unions and employers were prohibited on pain of large fines, from including in their agreements significant matters including the use of independent contractors, the replacing of employees by labour hire workers and the participation of trade unions in dispute resolution mechanisms. It has always been possible, that is from the day it was sworn into office, for the Rudd Government to repeal or amend this portion of the Workplace Relations Regulations. It can do so with a stroke of the pen, but so far it has not. Since 1 July 2008, the Senate appears to be more favourably disposed to the Government, and accordingly it is suggested that thought be given to amending these regulations.

The *Forward with Fairness* documents appear not to envisage any limits on the scope of bargaining. However, I have no doubt that business will wish the Government to continue to preclude employees and their trade unions from bargaining about the use of contractors and labour hire workers. Business will argue that unilateral managerial control over where and when contractors or labour hire workers are to be utilised is necessary to ensure the competitiveness of enterprises. In my view, if collective bargaining is to be meaningful, employees who may lose employment through the use of contractors, labour hire workers or technological change should be enabled to bargain about these issues with their employers. Leaving aside bargaining fees, which the Rudd Government will continue to prohibit, the scope of collective bargaining agreements is best left to the employing enterprise, its employees and any recognised trade unions.

> **"The most disappointing portions of the *Forward with Fairness* documents concern the unfair dismissal laws"**

Unfair Dismissals

In my opinion, the most disappointing portions of the *Forward with Fairness* documents concern the unfair dismissal laws. It will be recalled that under the WorkChoices laws, which are still in place, employees are denied remedies for unfair dismissal, unless their employer employs more than 100 employees. Even where this hurdle is overcome, employers may terminate employees for "genuine operational reasons". This phrase is so broadly defined that with a small amount of legal advice, it is possible to clothe most terminations in the trappings of operational reasons and thus to preclude dismissed employees from obtaining redress.

The *Forward with Fairness* documents propose that employees who have been employed for at least six months and whose employers employ 15 or more workers may seek a remedy for unfair dismissal. Where an employer employs less than 15 employees, the employees will have to have been employed for one year before an unfair termination remedy will be granted to them. It is also envisaged that a fair dismissal code will be developed with employer and employee input. So far, this is wholesome. However, what disappoints me are the procedures to be adopted, together with the probability that nothing of significance may change until 2010.

The Procedures

Under the *Forward with Fairness* documents, where an employee is dismissed, she or he will usually only have seven days to seek redress. In the 1980s, Victorian law gave terminated employees only four business days to bring claims, and from my observations, this proved to be far too little time for workers, especially unskilled and semi-skilled employees, to obtain advice and assessment of their circumstances. A week is on par with four business days, so unless Fair Work Australia is given the power to extend this time limit, many workers will lose their rights to seek redress.

Where an application is made by a dismissed employee, officials of Fair Work Australia will hold a short conference where it will be determined (presumably conclusively determined) whether or not a dismissal was unfair. It appears that lawyers will be excluded and that

cross-examination will not be allowed. No government would handle disputes between taxpayers and the Australian Taxation Office in this manner, so why treat employees in this fashion? By all means have conciliation conferences where most matters will be settled, but at the very least room should be left to enable employers and employees to appeal to a higher body where legal representation and cross-examination are permitted.

Reform the Law Now

From my reading of the *Forward with Fairness* documents, the new unfair dismissal laws that are proposed are so tied up with Fair Work Australia and its conferencing procedures that I fear there will be no changes made to the Howard unfair dismissal laws until Fair Work Australia becomes operational. This will not occur until January 2010. If I am correct, and the current unfair dismissal laws remain in place until then, they will have operated longer under the Rudd Government than they did under the Howard Government. At the very least, the "genuine operational reasons" limitation should be promptly repealed, and all employees whose employers employ at least 15 employees should be entitled to seek redress where they have been unfairly terminated.

Fair Work Australia

As I read the *Forward with Fairness* policy documents, a new super-agency is to be created to deal with virtually all aspects of federal labour law. It will take over all of the functions now bestowed upon the Australian Industrial Relations Commission, and it will undertake the inspectoral advice and enforcement duties that are currently performed by the Workplace Authority and the Workplace Ombudsman. It will have a separate judicial division that is likely to be a new industrial court.

I question the desirability of abolishing the Australian Industrial Relations Commission, which, together with its predecessor bodies, has aided in the settlement of industrial disputes and ensured decent living standards for workers for more than a century. No evidence has been presented, of which I am aware, as to why this agency should not continue to operate in the Labor's new post-WorkChoices world. Why dismantle this accepted element of Australian society when its independence and long-standing experience give it the capacity to resolve both individual and collective disputes?

> **"The establishment of Fair Work Australia is so novel an approach that it is likely to be the subject of a constitutional challenge"**

Similarly, I question the need to establish a new industrial court that would presumably hear matters that currently come before either the Federal Magistrates Court or the Federal Court of Australia. In my view, both of these courts have operated in a fair and impartial manner.

I fear that the establishment of Fair Work Australia is so novel an approach that it is likely to be the subject of a constitutional challenge. This type of litigation is undesirable at this time when a more balanced set of labour laws is being bedded down in the community.

Labour relations, more than most areas of law, depend upon broad community acceptance for the effectiveness and legitimacy of its institutions. In other words, to operate appropriately, labour tribunals and courts need to have the confidence of employees and employers, and of trade unions and employer associations. This confidence flows from tribunals' and courts' independence, impartiality and their track record of fair dealing. The dangers inherent in a body like Fair Work Australia is that its integration of all of these functions into a single agency lessens, I suggest, its actual (and of more importance) perceived capacity to act with independence and in an arm's-length manner. For all of these reasons, I urge the Rudd Government to retain the Australian Industrial Relations Commission and to make no changes to the Chapter III courts in the field of labour relations. ■

PROFESSOR RON McCALLUM AO

teaches labour law and litigation at undergraduate and postgraduate levels in the Faculty of Law at the University of Sydney. He was the foundation Blake Dawson Waldron Professor in Industrial Law in the Faculty of Law at the University of Sydney, the first, full professorship in industrial law at any Australian university.

The Freedom to Agree

Mark Irving explains why employers, workers and their unions should be left to determine the content of their agreement pertaining" criteria

Unions, employees and employers have in recent years been entering into deeds to circumvent the restrictions on prohibited content

IN SUMMARY

Bargaining must extend to the content of that bargaining and should not be restricted to "matters pertaining" to the employment relationship.

The right to bargain collectively is one of the rights recognised by various foundational ILO conventions and the Declaration of the Fundamental Principles and Rights at Work. The ILO recognises that the right to bargain collectively includes the right to decide about the subject matter of the bargaining.

For many years Australia's principal industrial laws limited the proper matters for collective agreements and awards by requiring these to be about "matters pertaining" to the employment relationship. In addition to this limitation, WorkChoices imposed further restrictions by making it unlawful to agree on a range of prohibited matters, or even to seek to agree about them. These prohibited matters ranged from agreements to improve the job security of employees, workplace meetings and bargaining fees. The list of prohibited matters should be abolished and there should not be a reversion to the "matters pertaining" criteria.

There are seven reasons to support this proposition.

First, as noted above, this is the position under ILO conventions that binds Australia and is consistent with the Charter of Employment Rights.

Second, the parties are in the best position to determine what is important to them and, where they can, reach agreement about it. Similar restrictions do not apply to parties in a non-industrial context. The same freedom to agree should be afforded to parties in employment. As Professor Ron McCallum has previously observed: "American employers would rightfully regard a list of prohibited bargaining matters specified by Congress as a gross interference upon their liberty to contract with trade unions."

Third, the Government should not restrict the liberty of the parties to agree on any matters they consider fit, providing the agreement does not result in the avoidance of other laws designed to protect employees, such as laws establishing minimum working conditions, anti-discrimination laws and occupational health and safety laws. For some employees, an agreement by the employer to pay school fees, union fees or mortgage payments directly will be important. For others it will not. The free market will sort out the good ideas from the bad, the workable agreements from the impractical and the benefs from the burdens. But it should be for the parties to decide whether such an agreement should be reached and not for the Government to limit the options and prohibit experimentation.

> "The ILO recognises that the right to bargain collectively includes the right to decide about the subject matter of the bargaining"

Fourth, the history of government regulation in this field illustrates the short sightedness of limiting the freedom to agree. Issues that are now commonplace in agreements were once considered impermissible. Unions, employees and employers now regularly commit to continuous improvement of methods of production and consult about steps to retain clients and gain new business. These matters were once considered the exclusive domain of an employer as they were within the prerogative of management. But times change. Industrial laws should not be drafted to prevent the parties agreeing to change with the times. There should be scope to expand the field of possible agreement between the parties to more fully embrace notions such as those reflected in the workplace democracy principle of the Charter of Employment Rights. By imposing limits to reflect current thinking about the proper bases for agreement, the Government runs the risk of retarding the future evolution of employment relations in ways that are currently unforeseen.

Fifth, the "matters pertaining" criteria arose from limits (or perceived limits) of the federal Government's power over industrial relations. Using the corporations' and other powers (and not the conciliation and arbitration power) the federal Government may now permit the making of agreements and awards that are not limited to matters pertaining to the employment relationship. The moribund "matters pertaining" test, based on a

discarded constitutional head of power, should not be revived in a new legislative environment.

Sixth, the "matters pertaining" test creates unsupportable distinctions. For example:

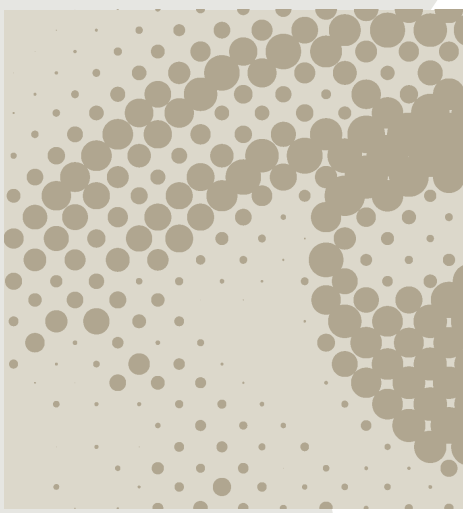
- A payment to an injured employee is a "matter pertaining", but a payment to the widow of a deceased employee is not.
- A payment of superannuation is a "matter pertaining", but the payment of a pension is not.
- Giving preference to unionists is a "matter pertaining", but giving absolute preference to unionists is not.
- Requiring the employer to pay wages direct to a bank is a "matter pertaining", but requiring them to pay some of the wages to a bank, some to a credit card company and some to a union is not.

> **"During collective bargaining there are often concurrent negotiations about the content of the collective agreement and the content of the deed"**

- Requiring the employer to retrospectively increase wages by $2,000 is a "matter pertaining", but requiring them to pay a disputed wages claim of $2,000 is not.

Seventh, unions, employees and employers have in recent years been entering into deeds to circumvent the restrictions on prohibited content. During collective bargaining there are often concurrent negotiations about the content of the collective agreement and the content of the deed. An industrial relations system is flawed when it creates such contrivances. The reversion to the "matters pertaining" test would result in the same contrivances.

The Rudd Government has stated that, under Labor's new industrial relations system, there will be freedom to bargain collectively without excessive government rules and regulations. This freedom must extend to the content of bargaining. ■



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For the past 15 years he has been the Victorian editor of the *Australian Labour Law Reporter*.

The case for an umpire

If the United States is considering new legislation that would introduce compulsory arbitration for some interests disputes, why is Australia considering abandoning its industrial umpire? asks Joellen Riley

As Australians with a keen appreciation of best practices in sporting competitions, we have always understood the benefit of an umpire, someone independent and unbiased, who blows the whistle when play gets rough, settles arguments and sets the game in motion again on a fairer footing. In this respect, industrial disputation is not unlike sport. The traditional Australian system of conciliation and arbitration of industrial disputes recognised the benefit of recourse to arbitration by an independent umpire when the parties themselves could not settle disputes. And so we have developed, at state and federal level, expert industrial relations commissions, to assist in the prevention and settlement of industrial disputes.

In more recent decades, however, as we have moved towards an enterprise bargaining model of industrial relations similar to the United States system, the role of the umpire has been pared back. Disputes are now seen to be of two kinds: "interests" disputes, about the terms and conditions under negotiation; and "rights"disputes, about the interpretation and application of existing entitlements. The new thinking is that there is no role for an umpire in an interests dispute. The ideology of complete "freedom of contract" means that if the parties themselves cannot come to an agreement about the terms that will govern their relationship, then there will be no deal. So under the WorkChoices laws introduced by the Howard government, the Australian Industrial Relations Commission had no power to arbitrate an interests dispute, even if the parties themselves conferred that power on the commission: see *Workplace Relations Act 1996* (Cth) s 706(4)(b) and (5). The only way the commission could stop and settle a highly destructive strike or lockout would be if it exercised its powers under s 430 to terminate a bargaining period and made a limited "workplace determination" under s 504.

Unfortunately, this approach led to long-running disputes, such as the Boeing dispute. Without the certainty that an umpire may ultimately step in to impose reasonable terms on parties, disputes are able to fester unproductively for a very long time. As we now look towards the rebuilding of a national industrial relations system under the *Forward with Fairness* banner, we need to revisit the role of the umpire in industrial disputes.

IN SUMMARY

Australian employers and unions have chosen to appoint the commission as a 'private arbitrator' of disputes arising under collective workplace agreements. This indicates a general acceptance of the value of engaging an independent umpire.

Even in the United States (from which we have borrowed much of our new enterprise bargaining model) labour market regulators are considering new legislation that would introduce compulsory arbitration for some interests disputes. A bill for a proposed Employee Free Choice Act, which is currently before the United States Congress, would provide that if a union and an employer seeking to reach their first registered enterprise agreement had not been successful after 90 days of bargaining, either party could refer the matter to the Federal Mediation and Conciliation Service (FMCS), first for mediation. If mediation failed to establish an agreement within 30 days, the FMCS could arbitrate the matter. So essentially, the parties would have a total of 120 days to come to an agreement, after which an agreement would be imposed upon them.

The bill has not been passed by Congress yet, however it does indicate that even in United States, where the ideology of freedom of contract is particularly strong, pragmatic legislators recognise that there are times when the public interest is best served by enforcing an industrial peace. After all, it is not only the parties to the particular contract who are affected by long-running strikes and lockouts. Other businesses, and consequently their customers and employees, often suffer as well.

If the United States is planning to newly introduce compulsory mediation and arbitration for some kinds of disputes, it would be wise for us in Australia to reconsider its abandonment. After all, we have an industrial history and culture here which understands the value of conciliation and arbitration. The fact that many Australian employers and unions have chosen to appoint the commission as a 'private arbitrator' of disputes arising under collective workplace agreements indicates a general acceptance of the value of engaging an independent umpire and submitting to their rulings so as to be able to get on with the game. According to the commission's 2006-2007 annual report, it has increased its private arbitration caseload by 70 per cent over the five years to June 2007. (Prior to the WorkChoices laws, these private arbitrations were possible under s 170LW, and many agreements containing these dispute resolution clauses have been preserved for a time under the WorkChoices transitional provisions.) The commission conducted 1142 cases of this kind in the 2006-2007 year. If so many Australian enterprises have been content to adopt this practice, why not normalise it through legislation?

Reintroduction of access to compulsory conciliation and arbitration of interests' disputes would not necessarily see a huge rise in the workload of the commission – or Fair Work Australia. There is nothing quite like the threat of a third party ruling in the background to galvanise disputing parties into coming to their own terms voluntarily. A right of access to compulsory arbitration – as a final resort – would by no means destroy an enterprise bargaining based industrial relations system. It would simply add more certainty and orderliness to that most important game of industrial relations. ■

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A compelling argument for

There is a clear legal rationale for returning the unfair dismissal laws to the bulk of Australian workers, writes Marilyn Pittard

The changes to unfair dismissal laws, introduced by WorkChoices, have meant that most businesses are free to dismiss employees fairly or unfairly and in the knowledge that these employees cannot access any remedy for unfair dismissal protection under the *Workplace Relations Act 1996 (Cth).* Only employees of 'larger' businesses currently enjoy unfair dismissal protection, which is defined by the number of employees engaged by an employer. Whilst there are some exceptions, for example, in the area of ensuring that dismissals are not of a discriminatory nature, or due to such reasons as employees filing complaints against employers, the statement that there is a lack of unfair dismissal protection for most employees for most dismissals remains true in Australia today.

Forward to Fairness is committed to removing the medium-to-small business exemption from the unfair dismissal laws and to returning statutory unfair dismissal protection to employees (which has existed federally from 1993). There is a change, however, from previous legislation – there is to be an exception made for genuinely small businesses. This revitalisation of unfair dismissal laws is essential to balance various competing rights and interests. On the one hand, there are employee rights to be treated fairly, in both the process applied to them when they face losing their jobs, and in the justification for dismissal (appropriate reasons for termination of employment). On the other hand, there are the rights of small business employers to feel free to engage employees and to operate in an environment in which they are not unduly burdened by legal regulation, given their business size and economic capacity. There are also policy considerations that small business employers should not be discouraged from taking on staff by unfair dismissal laws.

IN SUMMARY

- Most employees are not protected against most unfair dismissals.
- ILO standards compel a return to fair dismissal in Australia.
- Employers already have a range of contractual and flexible employment arrangements that ensure they are not locked into ongoing employment relationships with employees.

Individual perspective

Examining individual rights – the rights of people to be treated with dignity and to be treated fairly – compels the adoption of fair dismissal laws. This means that an employer should not capriciously terminate employment without a justifiable reason. An employer should not, for example, dismiss an employee to replace that employee with a favoured one, say, a relative of the manager. Society endeavours to ensure that people are adequately housed, clothed and educated

> **"To not have these unfair dismissal rights and standards, regrettably gives to those employers … a licence to fire at will"**

Intricately woven into Labor's policy to restore unfair dismissal protection is the value that there should be a right to fair dismissal for employees, unless there are good and sound reasons for excluding that right (as in the case of small business).

This raises the question: why there should the right to fair dismissal protection be conferred on most employees and remedies provided for breach of these provisions?

This question goes to the heart of unfair dismissal protection and the rationale for legislative intervention to correct the current position. Various reasons can be put forward to justify the right to fair termination of employment. These reasons can be broadly divided into the following perspectives: individual, community and social, and global.

and that certain rights are preserved, such as the rights to free speech and to vote freely in elections. Similarly, basic standards in employment should today be preserved and interfered with only after due inquiry and justification.

Rights to individual freedom are tightly guarded and people incarcerated only through the due process of law, similarly, rights to not be deprived of one's livelihood should be safeguarded and not taken away without fair process and reason.

This does not mean that employees have entrenched rights to work or that there is a job for life. Whilst today we might be conditioned to accept more temporary forms of employment, such as short-term contracts or casual employment, there is no reason to deny fair dismissal when an ongoing employment relationship is

fair dismissal

to be ended. To leave the employer with the absolute right to decide when that relationship is ended and how, really argues that we should have "employment at will", that is, employment continuing at the will of the employer.

There is a range of contractual and flexible employment arrangements available to an employer to ensure that the business is not locked into on-going employment relationships with employees. These include short-term contracts, either for a specified period of time or for a particular project, and casual employment, not to mention "on call" or seasonal arrangements, or even engaging the worker as an independent contractor. There is no need to then convert permanent employment to de facto "at will" employment through the device of having no unfair dismissal protection for employees. Employers are well able to organise themselves strategically to engage employees on particular contractual arrangements to facilitate not being locked in to ongoing employment. If they have chosen to have more permanent employment arrangements, employers should undo these only for cause and not randomly or arbitrarily, that is – not unfairly.

Community and social perspective

Once employees are employed, they have income, community involvement, social interaction and perhaps standing and status in the community. They may also have dependants. At stake, then, is not just their economic and social well-being but also that of others. The price of preserving that economic and social well-being – in terms of fair dismissal – is small.

Safeguarding employees from unfair dismissal protects families and dependants. Whilst I have earlier acknowledged that an employee does not have a right to a job, developed countries recognise that there should be some job security for employees. Employees are not commodities to be dispensed with on command or demand. Nearly a quarter of a century ago, the, then Australian Conciliation and Arbitration Commission in the test case brought by the ACTU, "Termination Change and Redundancy case" (1984), supported the insertion in awards of clauses protecting employees from "harsh, unjust or unreasonable" dismissal. This became a standard that was adopted in all federal awards. WorkChoices' elimination of fair dismissal turned the clock back more than 25 years. Other rights, such as rights to convert casual employment to permanent employment, and the right to return to work after a period of maternity leave, indicate that today we acknowledge a certain level of job security.

The WorkChoices Act eliminated unfair dismissal rights and remedies for the vast majority of Australian employees. It created a two-tiered system divided between those who were entitled to fair dismissal (employees working for large employers with 101 or more staff) and those who were not entitled to fair dismissal (employees of small and medium businesses). This division, arbitrarily created by the selection of the crude, 101-employee limit, was a means that did not take account of actual business size, for example, turnover. Thus society cohesion also supports unfair dismissal protection.

Moreover, other rights may effectively become unenforceable if a workforce is fearful (because they might lose their jobs) of bringing them to the employer's attention. This may include voicing concerns about underpayments of entitlements, health and safety issues, and workplace treatment or harassment.

> **"WorkChoices' elimination of fair dismissal turned the clock back more than 25 years"**

Global perspective

A compelling argument for fair dismissal rests on Australia's commitment to international labour standards in the ILO convention and recommendation on termination of employment. Enshrined in these ILO agreements, the standards demand fair dismissal procedures and reasons for employees' dismissal. Whilst exceptions are permitted, taking the heart out of the dismissal protection (via WorkChoices) is at odds with a declared commitment to those ILO labour standards. Keeping to the spirit, and to the letter, of ILO standards compels a return to fair dismissal in Australia.

Employer perspective: is it adequately acknowledged?

I have put forward the argument for not entrenching the current, two-tiered approach to job security and fair dismissal – that some employees have job security and fair dismissal, but most do not. But what of the cry of many employers that (due to statutory unfair dismissal laws) they are saddled with unsatisfactory employees and cannot be rid of them? The answer lies in recruitment and employment practices. Employers need to ensure that they have hired the right employee and that there is ongoing direction, training and management of the workforce. These recruitment and management practices, in any event, are demanded today of modern business and human resources departments.

> **“Employers need to ensure that they have hired the right employee and that there is ongoing direction, training and management of the workforce”**

The law, however, also provides the employer with many choices. They can choose to place the employee on probation and not confirm the contract until the employee proves to be satisfactory. The employer has a wide range of measures and targets available by which they can measure employee performance objectively. Further, as previously mentioned, the employer can engage the employee on a short-term contract.

The employer also retains the right to dismiss an employee without notice for good cause – for example, for substantiated misconduct of a serious nature, such as stealing from the employer. It is true that, sometimes, fair process may involve the employer in proving that the employee has committed an act of misconduct. However, that price is small for the maintenance of individual, community and global standards. To not have these unfair dismissal rights and standards, regrettably gives to those employers – who would otherwise be able to follow fair process with no difficulty – a licence to fire at will, and unfairly. The proposed small business exception accommodates any difficulty a smaller employer might encounter with the regulation of fair dismissal. They are not bound to follow fair process.

Conclusion

This article puts forward policy and legal rationales for returning to fair dismissal laws for the bulk of Australian employees. Developed nations should lead the way on adhering to ILO standards for termination of employment. Today, these are neither radical nor unattainable. With education and community and government support, the transition back to fair dismissal for those implementing them at employer level should not be onerous and will safeguard the individual, community, social and global perspectives discussed. ■

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"Operational reasons" means no worker's job is safe

It's not only employees in small businesses who suffer from a lack of unfair dismissal rights, says Anne Gooley

IN SUMMARY

- Making a claim for a redundancy for "operational reasons" does not give employees a chance to double dip their unfair dismissal claims.
- The previous provisions relating to operational requirements should be immediately restored.

While a great deal of media attention has been given to the removal of unfair dismissal rights for employees who work for a company with fewer than 100 employees, less attention has been given to the removal of unfair dismissal rights for all employees who are terminated for operational reasons or reasons that include an operational reason.

The Workplace Relations Amendments (Work Choices) Act 2005 provided that an employee could not bring a claim that their termination was harsh, unjust or unreasonable if the employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons. Employees could still bring a claim for unlawful termination if one of the reasons for the termination was for a reason set out in s 659(2).

Operational reasons are reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, and service or business.

If, in response to an employee's claim that the termination of their employment was harsh, unjust or unreasonable, the employer claims that they had an operational reason for the termination of the employment, or the Australian Industrial Relations Commission forms the view that there was an operational reason for the termination of the employment, then the commission must deal with this as a preliminary matter. It cannot consider, at the same time, whether the termination of employment is harsh, unjust or unreasonable. As a result, an employee, who is successful in establishing that there was no operational reason, is faced with the additional cost of running the unfair dismissal claim on its merits. Even if the employee establishes that there was another reason for the termination of the employment, if the employer establishes

> "… this claim that employees could double dip was a myth"

that operational reasons was one of the reasons for the termination of the employment that is sufficient to defeat the employee's claim.

In the second reading speech the Minister for Workplace Relations explained that the purpose of new provision was as follows:

"In addition, no claims can be brought where the employment has been terminated because the employer genuinely no longer requires the job to be done."

Under the predecessor legislation, the commission, in determining whether a termination was harsh, unjust or unreasonable, had to have regard to whether there was a valid reason for the termination related to "the operational requirements of the employer's undertaking, establishment or service".

As such, the commission was able to consider whether, in a particular redundancy case, the selection of a particular employee or employees was fair, or whether there were alternative arrangements other than termination that were available to the employer.

This was to end with the WorkChoices legislation. The, then prime minister John Howard, said that the provision was to stop employees "double dipping" i.e., getting paid redundancy and then being entitled to a remedy for unfair dismissal.

However, this claim that employees could double dip was a myth. The commission, when awarding compensation to employees who had been dismissed in redundancy situations, always had regard to the amount received by the employees as redundancy payments.

For example, in *Alkemade and Ors v Serco* [Print R0909] 4, employees of Serco were made redundant. They were paid redundancy based on their length of service with Serco, which had taken over the business of the Gas and Fuel Corporation. Blue-collar workers who transferred from the Gas and Fuel Corporation, and were made

redundant at the same time, were offered redundancy based on their service with the Gas and Fuel Corporation, as well as Serco. The applicants who were white-collar workers received payments based only on their years of service with Serco. The commission held that this differential treatment did not afford the employees a fair go all round and ordered compensation. In doing so, however, the commission had regard to the amount already paid.

What the new law was really aimed at was preventing the commission from determining, in a redundancy situation, whether the procedures adopted by the employer were fair. This is why the case relied upon by the then prime minister is so instructive.

In parliament, and in the media, John Howard cited the Blair Athol workers as an example that could not be dealt with by the commission under the new laws. In *Smith and Ors v Pacific Coal Pty Ltd* [PR902379] Commissioner Hodder reviewed the termination of 16 employees who had worked at the Blair Athol mine. Here, employees selected for redundancy had been blacklisted by their employer. The commission found that the existence of the blacklist tainted the redundancy selection process so as to make their selection for redundancy unfair and ordered that the employees be reinstated. While the primary judgement was upheld on appeal, the Full Bench of the commission [PR925566] determined that reinstatement was not an appropriate remedy. When assessing the compensation payable to the employees the Full Bench took account of what they had already paid and held that no compensation was payable.

"Could the provision be used if there was no redundancy? The answer to that question is a resounding 'yes'"

This case exposed an employer's discriminatory selection process. Under the WorkChoices legislation, such cases could not be run in the commission and, in a redundancy situation, it doesn't matter how tainted the selection process is, or if there were alternative positions the employee can fill, once the operational reason is established, that is the end of the matter.

After some early decisions, which found that the commission could determine if the termination of the employee's employment was a logical response to the operational requirements, it was thought that the change would not be a significant one.

However, in the first Full Bench appeal in such a matter the breadth of the changes was highlighted. Consider this case: Mr Carter worked for Village Roadshow for 20 years. He was employed as a cinema manager at the Doncaster cinema complex. Due to site renovation the cinema was shut, but Mr Carter was the only employee who was made redundant. He had offered to take his six months' accrued long service leave to see if an alternative position could be found for him. In the first instance the commission dismissed Village's contention that Mr Carter had been terminated for operational reasons. The commission held that Village's failure to consider alternative positions, or Mr Carter's offer to take long service leave to see if a position came up, made the termination unfair. The Full Bench rejected this approach and held that once it was established that there was an operational reason for the termination, it was not relevant that the employer did not take any steps to avoid the termination. See *Village Roadshow v Carter* [2007] AIRCFB 35.

It might be said that Carter was precisely the type of case that the legislation was aimed at stopping. The cinema was being demolished, and thus Mr Carter's position was redundant. You might say there's nothing wrong in preventing the commission from reviewing that decision.

The next major case, however, showed the real sting in the provision.

Priceline terminated Andrew Cruickshank in November 2006. Priceline had suffered a significant financial loss and made a number of employees redundant, including Mr Cruickshank, who subsequently discovered that his position had been advertised at a lower rate of pay. At first instance Commissioner Eames held that Priceline had a genuine operational reason for terminating Mr Cruickshank's employment. That decision was appealed and the decision of Commissioner Eames was overturned because the commissioner failed to give adequate reasons for his decision. On rehearing before Commissioner Lewin, evidence was led that clearly established that Priceline had decided to retain Mr Cruickshank's position, but at a lower rate of pay. Commissioner Lewin held that operational reasons included circumstances where an employer terminated an employee so as to reduce costs by replacing existing employees with others to be paid less, in order to reduce losses or increase profits See *Cruickshank v Priceline* [2007] AIRC 1005].

The prime minister said at the time : "Operational reasons are not and should not be seen as code for saying 'I will get rid of X because I am paying him $100,000 a year so I can employ Y at $80,000 a year'. There has to be a bona fide operational reason and that of course has always been the law."

Despite this the commission held that Mr Cruickshank's employment was terminated for operational reasons and was lawful.

Could the provision be used if there was no redundancy? The answer to that question is a resounding "yes".

Consider another case: Mr Wilson had been on light duties from 1996 until he was terminated in 2006. Mr Wilson had been employed in the cutting room, then the box store, and prior to his termination he had been working in the office computerising records. Mr Wilson could not return to his original position. ADI contended that the office position, and the position in the box store were no longer available or required and that the only positions it had available were in the cutting room. As Mr Wilson was not medically fit to do that job there was no position in the organisation for him. Commissioner Roberts held that the decision to terminate was structural in nature and therefore dismissed Mr Wilson's claim *Wilson v ADI Ltd* [2007] AIRC 598. Mr Wilson had not been made redundant and was not paid a redundancy payment. He was clearly not double dipping, yet his termination for operational reasons was lawful.

What should be done?

In every case it is not argued that an employee's claim has been defeated (because the employer argued that they had operational reasons for the termination) that they would have been able to establish that the termination was harsh, unjust or unreasonable. The problem is that the commission never gets to ask the question.

The previous provisions relating to operational requirements should be immediately restored. The commission should be able to ensure that if an employer has an operational reason for reducing or restructuring its workforce that the selection of a particular employee is not harsh, unjust or unreasonable. ■

> **"He was clearly not double dipping, yet his termination for operational reasons was lawful"**

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Super cop has no place in industrial relations

Mordy Bromberg asks why the building industry needs a commission with ASIO-like powers to watch over it

IN SUMMARY

- The Australian Building and Construction Commission, with its holster full of offensive weapons aimed at the civil liberties of ordinary workers, should be abolished. The Workplace Ombudsman is capable of providing protection against industrial unlawfulness without resort to inappropriate powers and with the confidence of both unions and employers.

The Building Industry Royal Commission was established to investigate conduct in the building industry, including allegations of rampant and systemic criminal activity. Arising from the recommendations of that commission *the Building and Construction Industry Improvement Act 2005* was enacted and the Australian Building and Construction Commission was established. Whilst the commission did not discover systemic criminal activity in the building industry, it nevertheless provided impetus and the political justification for the Australian Building and Construction Commission being given widespread coercive powers. These are powers that ordinary police do not have, and are usually reserved for investigative bodies such as ASIO or the Australian Crime Commission charged with dealing with terrorism or the most serious kinds of organised criminality.

The Australian Building and Construction Commission can require a person to attend a closed-door hearing and be subjected to a secret interrogation, the facts of which may not be disclosed. Non-cooperation is punishable by imprisonment for up to six months. There are no excuses for not cooperating. There is no right to silence and questions must be answered even if the answers may tend to incriminate the person and result in exposure to penalty or other liability.

These are extreme powers and may be exercised against anyone in the building industry whether under suspicion or not. Ordinary police have no such powers. In 1998 the New South Wales Law Reform Commission examined whether the right to silence when questioned by police should be retained. That commission concluded that the right to silence was a necessary protection, the modification of which would undermine fundamental principles. Examination of empirical data did not support the argument that the right to silence was widely exploited or the argument that it impeded the prosecution or conviction of offenders. The Victorian Parliament's Scrutiny of Acts and Regulations Committee came to similar conclusions in its 1999 examination of the issue.

> **"There is no justification for a super cop in the building industry with a holster full of offensive weapons aimed at the civil liberties of ordinary workers"**

It might then be sensibly asked why is it that the Australian Building and Construction Commission needs powers which we deny to the police? How much criminality has the commission exposed in the three years in which it has operated with coercive powers of this kind? If the removal of civil liberties may be justified by the size of the criminal catch – how many fish has the Australian Building Construction Commission caught?

It seems that no criminal has yet been hauled in, but there is good reason why this commission has little to show for its extraordinary investigative armoury. Despite the political justification for its establishment, this commission has no charter to fight crime. Its main function is to monitor and promote compliance with the Workplace Relations Act and prosecute contraventions.

That there should be compliance with industrial laws in the building industry is obviously desirable. That is desirable too in the retail industry, in the clothing and textile industry and wherever work is performed. Just as employers in the building industry may be exposed to conduct proscribed by the Workplace Relations Act, so too are millions of workers in a range of industries in every corner of the economy.

For all industries other than the building industry, the Workplace Ombudsman exercises the function of assisting both employers and employees and protecting them against industrial unlawfulness.

The Workplace Ombudsman is given powers of inspection, powers to institute

“if a cop on the beat of industrial relations is necessary, the Workplace Ombudsman is there”

court proceedings and other like powers, which are ordinarily provided to a public investigative body charged with addressing civil contraventions of the law. Unlike the powers and functions provided to the Australian Building and Construction Commission, the Workplace Ombudsman’s powers and functions do not infringe basic civil liberties, such as the right to silence, and do not breach international labour laws.

Unlike the Workplace Ombudsman, which has the confidence and acceptance of industrial participants, the union movement reviles the Australian Building and Construction Commission. It is viewed as a politicised body that has abused its inappropriate powers. Whatever the reality, that perception is an important impediment to the usefulness of the commission

Now that AWAs are off the agenda, the Australian Building and Construction Commission serves as the loudest reminder of the fractious and hostile WorkChoices regime. Labor’s pre-election commitment to keep the Australian Building and Construction Commission, at least until 2010, was ill advised and should be reversed. If a cop on the industrial relations beat is necessary, the Workplace Ombudsman is there to provide balanced policing for the whole of the economy. There is no justification for a super cop in the building industry with a holster full of offensive weapons aimed at the civil liberties of ordinary workers. ■

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Australian Institute of Employment Rights

Industrial Fairness

– the essentials

Now is the time to lay the platform for fairness in Australian workplaces

The Australian Institute of Employment Rights (AIER) welcomes the advances in employment rights embodied in the Government's *Forward with Fairness* policy and implementation plan.

During 2007 AIER defined the essential elements of fairness at work. We consulted extensively with the public as part of this process.

The Australian Charter of Employment Rights is the result of this work (see page v).

We are concerned that aspects of *Forward with Fairness* do not meet Australia's obligations under international law, or the standard of AIER's Charter of Employment Rights. We also believe that this gap may widen following lobbying from interest groups.

AIER hopes its Charter will inform and inspire Labor's new legislation and provide a framework for the new regulatory system. The following represents the key issues that need to be addressed by new legislation.

We ask the federal Government to take steps to ensure that the problems we have identified are addressed in the manner we propose. >>

Security of Employment Now

THE ISSUES

ILO conventions demand that every Australian worker is protected against unfair, capricious or arbitrary dismissal without valid reason. A person's right to be treated with dignity provides one basis for protection against unjust dismissal.

Job security should not be altered or interfered with in the absence of a valid reason and a fair and due process.

A job generates not only income and livelihood, but also social contact and networks and perceptions of feeling of worth and contribution to society. This should not be able to be removed unilaterally without just cause, as it is likely to have wide-ranging effects not only for the individual worker but also for family and dependants.

Workers and employers owe each other a reciprocal duty of good faith. An employee is required to produce "a fair day's work for a fair day's pay" and the employer should reciprocate by acting fairly.

THE PROBLEMS

The current unfair dismissal laws are manifestly unjust. The Government should not wait until 2010 to redress this injustice. If it does so, it may correctly be charged with promoting unjust practices in relation to dismissal for longer than the Howard government did.

Job security protections are not aligned with binding ILO obligations and developed world practice if termination of employment on grounds of redundancy is completely exempted from protection, as sought by some industry groups.

Existing protections against unlawful termination of employment for prohibited reasons, including discrimination related to gender or pregnancy, have been fatally frustrated by judicial interpretations. That frustration has not yet been addressed in the proposed scheme.

THE SOLUTIONS

Bring forward to 1 January 2009 the unfair termination of employment element of the legislative package.

There should be no exemption to the long-established fairness principles that require that selection of individual workers for redundancy be made by reference to declared criteria applied objectively through independent assessment.

Amend relevant provisions relating to termination of employment and discriminatory conduct for prohibited reasons in order to overcome judicial confusion and ensure that the intent of the Workplace Relations Act (the Act) is not frustrated and ensure Australia's international obligations are met.

Freedom of Association

THE ISSUES

The freedom of association – the right of a worker to join with other workers and freely associate in a union – is recognised as a fundamental human right, deeply rooted in international and Australian law. It is a right that is recognised in almost every Charter of Human Rights, including the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the US Constitution and the Canadian Charter of Rights and Freedoms. It is also a fundamental principle in various ILO conventions ratified by Australia.

The ILO's Freedom of Association Committee has stated that: "The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade union represents."

THE PROBLEMS

A need to design institutional arrangements, which takes account of the reduced commitment of workers to join trade unions, does not justify maintaining measures and pressures against collective representation, such as complex right-of-entry provisions.

Unions should be given access to potential and current members so they can understand these workers' aspirations and grievances. Unnecessary restrictions in this area represent a practical repudiation of freedom of association.

THE SOLUTIONS

Right of entry and associated provisions should be linked to the right of workers to be effectively represented.

Under the Act unions should be given reasonable access to the workplace without the need for technical administrative procedures. Facilities should be made available to enable unions to promptly and effectively carry out their responsibilities. Access should include the ability to post and distribute union notices.

Workers' representatives should be given prompt access to representatives of the employer, who have the capacity to resolve disputes, so that they can properly carry out their functions.

Agreement Making and Bargaining

THE ISSUES

Genuine bargaining requires both sides to have equivalent bargaining power and capacity. The right to bargain collectively and the right to take industrial action are enshrined as part of the pantheon of fundamental and universal human rights.

THE PROBLEMS

There is confusion regarding the distinction between the right to bargain collectively and the notion that bargaining should be voluntary. The right to bargain collectively would be contradicted if bargaining is to be voluntary for any party.

Rather than facilitating a free bargaining regime, an emphasis is being put on the need to prescribe, in technical terms, a variety of matters that constrain the bargaining process. These include unnecessary prescriptions around:

- The bargaining entity (enterprise or multiple employers)
- The scope and content of bargainable matters
- The process for registering agreements

The right to bargaining collectively is contradicted by surrounding the process with controversy.

Technical requirements can be used as a loose end and exploited to frustrate or avoid the bargaining process.

THE SOLUTIONS

The right of workers to collectively bargain needs to be matched by a duty on employers to bargain in good faith.

Disagreements over exercise of the right to bargain collectively (whether about bargaining unit, the use of unions or elected spokespersons, or authority to bargain) should be reserved for the industrial tribunal to sort out without detailed legislative prescription.

Bargaining arrangements need to provide for multi-employer bargaining in circumstances where there is a genuine and obvious need, e.g. in relation to atypical employment, fragmented or consolidated industries, where employment conditions within an industry are set across the industry by government funding.

Where there is no prospect of an agreement being reached (including because of a failure to bargain in good faith) and an agreement is appropriate in the public interest, conciliation services should be provided by a tribunal that is also empowered to arbitrate an agreement as a last resort.

The legislation should ensure that subject to the requirement to bargain in good faith, workers have the right to take industrial action and employers have the right to respond, without complex and inflexible procedural prerequisites.

Good Faith Relationships

THE ISSUES

Even the conservative common law has evolved to formulate the implicit expectation of co-operation in employment contracts as a duty not to destroy mutual trust and confidence in the relationship. This duty is now understood to be shared by both the employer and employee.

Efforts are being made to replace references to good faith with the much narrower phrase "genuinely try to reach agreement".

THE PROBLEMS

Discussion around good faith has been limited to bargaining.

In terms of bargaining, the ILO consistently emphasises the importance of bargaining in good faith and the need for employers and workers to make every effort to reach agreement. There is a danger that new legislative provisions will focus on minimal formal obligations that preclude enforcement of prescribed steps and measures directed to securing agreement.

Efforts are being made to remove reference to good faith in bargaining (and elsewhere) with the much narrower, currently used phrase "genuinely try to reach agreement". This does not pick up the breadth of behaviours and attitudes captured by the term good faith and does not place an emphasis on acting in accordance with the principles of promoting trust and confidence in the employment relationship.

THE SOLUTIONS

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.

The policy commitment to provide good faith bargaining should be retained.

Steps and requirements concerned with the bargaining process (not the outcome) should be linked with the obligation to bargain in good faith.

A comprehensive list of such requirements should be tied in with a power of the tribunal to order specific steps to be taken.

The list of requirements should include an obligation on the parties to:

- **meet at reasonable times and places for the purpose of conducting face-to-face bargaining**
- **state their position on matters at issue and explain that position**
- **disclose in a timely way relevant and necessary information for bargaining, including information that is reasonably necessary to support or substantiate claims or responses to claims during bargaining**
- **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**
- **give thorough and reasonable consideration to the other's proposals, and respond to those proposals**
- **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 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**
- **for the release of delegates to participate in bargaining**
- **reasonable facilities and resources for delegates to carry out their role in bargaining, including the opportunity to consult and to communicate with workers.**

Fair Minimum Standards

THE ISSUE

Australia needs a set of fair minimum standards that meets the needs of modern workers and modern workplaces while taking account of both international standards and the rich traditions of Australia. This requires a minimum standards regime:

- that includes enforceable entitlements and obligations
- where the standards can be maintained, updated and supplemented over time
- that ensures that there is a mechanism for resolving disputes over the application of the entitlements that is speedy, not costly or time consuming and readily accessible.

THE PROBLEMS

The proposed national employment standards scheme (NES) falls short of our definition of the fair and minimum standards and machinery essential to ensure fairness across the labour market.

Not every worker will have entitlements under the NES, because "employees" covered will not include workers engaged under disguised employment arrangements; parts of the NES standards do not create enforceable entitlements; and some employment will not be caught within the federal system.

Minimum standards will not be maintained by an impartial tribunal independent of government. This means there is no independent mechanism that updates and reviews the standards in light of movements in community standards, or in order to encourage good practice and fair behaviour. The role of minimum standards is particularly significant for women. The pattern of minimum standards needs to keep pace with gender composition and care responsibilities of the evolving workforce. Such standards cannot be frozen in time but must lead and respond to change.

A regime of minimum standards that, at its heart, is based on a government decree means that NES will be subject to the fluctuations of the political cycle. This is disruptive for both employers and employees. Parliament's role in the minimum standards regime should not be allowed to undermine or constrain the standards established through independent tribunals.

The capacity of a party to enforce the mandated entitlements is unclear and at best obscure.

The creation of two streams (the NES and modern awards), one under the auspices of government and one under Fair Work Australia, that regulate minimum entitlements and obligations has the potential to create confusion and unnecessary complexities.

THE SOLUTIONS

Empower a minimum standards division of Fair Work Australia to maintain, adjust and review the NES and modern awards.

Provide for dispute resolution procedures that, as a last resort, can determine rights applicable to work subject to NES and modern awards. A precedent might be found in New Zealand's comprehensive reciprocal obligation of good faith. It provides protection that may be utilised at both a collective and individual level.

Stipulate that entitlement in the NES to a process about flexible working arrangements extends to access to an independent dispute resolution process (DRP).

Stipulate that upon an employee commencing employment, they are entitled to a fair work information statement that includes details of the basic terms of engagement, the actual or default scheme of minimum standards to apply to the work including the DRP process, and information about where to access details.

Commit to a review of the NES within the first 18 months of operation to assess whether the exclusion of workers in disguised employment arrangements promotes the use of such arrangements and causes the effective absence of protective standards for the workers affected.

The Australian Institute of Employment Rights aims to promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework.

Our governance structures and membership include representatives of unions,employers, academics, lawyers and the general public.

Our tripartite framework, employers, employees and the public interest, based on that of the International Labour Organisation, ensures that our work has broad community support.

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Recognising that:

improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers

and drawing upon:

Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

1 Good Faith Performance

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith. They have an obligation to co-operate with each other and ensure a "fair go all round".

2 Work with Dignity

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:

- treated with respect
- recognised and valued for the work, managerial or business functions they perform
- provided with opportunities for skill enhancement and career progression
- protected from bullying, harassment and unwarranted surveillance.

3 Freedom From Discrimination and Harassment

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- race, colour, descent, national, social or ethnic origin
- sex, gender identity or sexual orientation
- age, physical or mental disability
- marital status
- family or carer responsibilities
- pregnancy, potential pregnancy or breastfeeding
- religion or religious belief
- political opinion irrelevant
- criminal record
- union membership or participation in union activities or other collective industrial activity
- membership of an employer organisation or participation in the activities of such a body
- personal association with someone possessing one or more of these attributes.

4 A Safe and Healthy Workplace

Every worker has the right to a safe and healthy working environment. Every employer has the right to expect that workers will co-operate with, and assist, their employer to provide a safe working environment.

5 Workplace Democracy

Employers have the right to responsibly manage their business.

Workers have the right to express their views to their employer and have those views duly considered in good faith. Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace.

6 Union Membership and Representation

Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.

Workers have the right to require their union to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference.

Every worker has the right to be represented by their union in the workplace.

7 Protection from Unfair Dismissal

Every worker has the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker. This right is subject to exceptions consistent with International Labour Organisation standards.

8 Fair Minimum Standards

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

9 Fairness and Balance in Industrial Bargaining

Workers have the right to bargain collectively through the representative of their choosing.

Workers, workers' representatives and employers have the obligation to conduct any such bargaining in good faith.

Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.

Conciliation services are provided where necessary and access to arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires.

Employers and workers may make individual agreements that do not reduce minimum standards and that do not undermine either the capacity of workers and employers to bargain collectively or the collective agreements made by them.

10 Effective Dispute Resolution

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy.

The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.

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