Australian Institute of Employment Rights

JUSTICE at WORK
Have we achieved it?
Can the system deliver it?

The Inaugural Ron McCallum Debate: Background Briefing Note

Theme: Justice at Work – Have we achieved it? Can the system deliver it?

Prepared by the Australian Institute of Employment Rights*

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For The Inaugural Ron McCallum Debate

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Australian Institute of Employment Rights Inc.
PO Box 237, Seddon West, Victoria, 3011 Tel: +613 9647 9102 Fax: +613 9647 9199 Email: admin@aierights.com.au www.aierights.com.au

Overview

This briefing note was prepared to inform the discussion at the Australian Institute of Employment Right's (AIER) Inaugural Ron McCallum Debate 22 June 2011. It represents a summary of the internal discussions held within AIER regarding the theme*Justice at Work*and the various sub-themes that were identified as falling under that heading. Post the debate this briefing note has been publicly released because it is relevant to a continuing dialogue about what justice at work looks like and what steps need to be taken in order to realise the goal of building just workplaces. AIER will continue to support this dialogue over coming months.

The Australian Institute of Employment Rights

The Australian Institute of Employment Rights ('AIER') is an independent, not-for-profit organisation that works in the public interest to promote the recognition and implementation of the rights of employers and workers in a cooperative industrial relations framework.AIER works in a variety of ways.

A respected **think tank**, it is a leader in the development of informed, contemporary and balanced ideas in the area of workplace rights.

It is place of **research**, working with a team of leading academics, legal experts and industrial relations practitioners to undertake substantial research and analysis that aims to offer new ideas and models for decent and efficient workplaces.

AIER is an influential and sensible voice in the area of workplace **legislation**, contributing significantly to the development and improvement of Australian policy and towards legislative reform.

As a **trainer, educator** and **moderator**, AIER works on-the-ground with organisations, workers and their representatives to create more positive and efficient workplace models and environments. AIER collaborates with like-minded organisations to develop and implement programs that educate and empower. It is also a resource for community organisations, educational institutions, the media and the general public.

AIER is an **advocate** and agitator, championing the fundamental rights of employers, workers and the public interest, and arguing for the importance of **cultural change** in workplaces to ensure decent and fair conditions for all.

The Australian Charter of Employment Rights

The Australian Charter of Employment Rights ('the Charter') lies at the heart of AIER's work and philosophy. The Charter defines and articulates the pre-eminent rights of employers and workers by identifying the universally accepted fundamental principles on which any legislative system of industrial relations should be based. It has become a blueprint for assessing government policy, for legislative reform, for company practice and for education about workplace rights.

The Charter is based upon three sources of rights: rights enshrined in international instruments that Australia is a party to; egalitarian values embedded in Australia's constitutional and institutional history of industrial/employment law and practice; and common law rights appropriate to a modern employment relationship.

The Australian Standard of Employment Rights

An explanation of how the Charter applies in practice can be found in the Australian Standard of Employment Rights *('*the Standard'*)*. It provides a tool for Australian businesses to assess their compliance with the Charter.

The Inaugural Ron McCallum Debate

Along with Bob Hawke, Ron McCallum is a Patron of AIER. It was fitting that in the year that Ron McCallum was named Senior Australian of the Year, and in order to recognise his election to the Chair of the Monitoring Committee for the United Nations Convention on the Rights of Persons with Disabilities, AIER celebrated his work.

Given the event is in honour and recognition of Ron McCallum and his work, the theme Justice at Work became an obvious choice. In preparation for this event the AIER subcommittee, charged with the responsibility of organising the event, explored the sub-themes that fall from the topic *Justice at Work* and developed the following questions to inform the debate discussion:

1. Does the federal system promote access to justice for employers and workers pursuing their workplace rights? Did the system ever promote justice? What does justice look like? Where is the balance between the economic interests of employers and the rights of workers and their representatives?

2. What has been the impact of the loss of the system of compulsory conciliation and arbitration and the reliance on corporations power?

3. Does it (the legislative system) comply with international labour law and human rights standards? If not how should it be changed? How are we achieving the ILO's agenda of Decent Work within Australia? How are employers responding to the growing international 'moral' pressure to become good corporate citizens in relation to labour rights as human rights? Are Australian employers feeling this pressure?

4. What is the system doing to promote a cultural shift towards cooperation, partnership and good faith relationships? Is there anything more that can be done to the system that would assist here?

5. Does the system provide enough opportunity for the economically and socially disadvantaged? Is there an adequate safety net for the low paid (are the minimum standards adequate)? Will minimum standards be maintained over time?

6. Does it (the system) provide enough protection for the insecure and impermanent workforce?

7. Does it (the system) provide equal opportunity for women?

8. Does it (the system) provide an adequate balance between the legitimate rights of employers to control their workplaces and the privacy rights of individual workers? What suggested changes could be made?

The following material represents a summary of the matters that AIER explored when designing the content of the event and to assist those who would be involved in guiding the discussion at the event.

SUB-THEMES FOR EXPLORATION

Sub-theme 1: The System and Justice

1.1 What does justice look like?

The Australian Charter of Employment Rights: The Charter has been built upon the guarantee of industrial fairness and reasonableness, an egalitarian principle that former High Court Judge Michael Kirby and AIER regard as having profoundly influenced the nature and aspirations of Australian society.

The concept of 'industrial citizenship': Ron McCallum has examined the writings on industrial citizenship to determine the appropriate rights and obligations that labour law should bestow on Australian citizens at work - ie Australia's 'industrial citizens'. He argues that labour law changes which do not meet the standards of justice and fairness will be found wanting by Australian industrial citizens and their families.

McCallum notes:

> "… all writers on industrial citizenship argue that workers should receive fair wages and reasonable terms and conditions of employment, including protective legislation in the areas of unfair termination, privacy and occupational health and safety. Another recurring theme is the notion that industrial citizens should be given an input in to the processes of employer decision-making.
>
> It is also obvious that a re-working of industrial citizenship is essential to take account of the needs and aspirations of immigrant workers, of part-time and casual employees, of home workers, of labour hire employees, and of those workers who are receiving remuneration as independent contractors and consultants."[1]

1.2 Does the federal system promote access to justice for employers and workers pursuing their workplace rights?

The *Fair Work Act 2009* (Cth) ('FW Act') did not revert to the past constitutional guarantees of fairness (under the constitutional conciliation and arbitration power) and it relies on the corporations power to an even greater extent than WorkChoices.

AIER believed at the time that the Fair Work Bill was passed, the government did not take up the opportunity presented to it to found a new system based on a new cooperative model:

[1] McCallum R (2010), 'Citizenship at Work: An Australian Perspective.' (Sydney Law School Research Paper No. 11/17) Available at SSRN: http://ssrn.com/abstract=1769271

> "The Fair Work Bill contains provisions which are an improvement on the current legislation however; the government has not taken the opportunity to found the system on a positively cooperative model such as that of 'workplace citizenship', avoiding the policy and procedural hangovers from the essentially adversarial model it replaces.
>
> Beyond the triggers and signals provided for in legislation the government needs to introduce significant initiatives to support workers and employers to make the shift to a new culture.
>
> The government's policy objectives require workplace environments that are open, participative and conducive to learning and parties that are prepared to work in an environment of mutual respect. Changing legislation alone will not achieve this result. A regulatory and administrative agency such as FWA or the Fair Work Ombudsman will not readily be able to foster the front-end cultural change that is required. The government needs to look towards organisations such as AIER to assist it to fully achieve its stated policy objectives."[2]

Ged Kearney, President of the Australian Council of Trade Unions ('ACTU') welcomed the FW Act "as a great step forward for fairness and balance in the workplaces of this country", but stated that there are several aspects that warrant further consideration. Chief among the amendments sought by the trade union movement is change to the collective bargaining regime to allow for bargaining beyond the enterprise, particularly in situations where some third party controls the wages and working arrangements at the enterprise. Kearney also calls for restrictions on the content of enterprise agreements to be removed and for Fair Work Australia to be given the authority to settle disputes by making binding orders where an employer applies the agreement in an unfair manner.

This approach is in contrast with that of employer advocates like the Australian Mines and Metals Association ('AMMA'), the Australian Chamber of Commerce and Industry ('ACCI'), as well as the Opposition spokesperson for Industrial Relations. They are calling for amendments to the FW Act that would revive some of the key features of WorkChoices. In particular, they advocate the removal of unfair dismissal rights for employees of small business, the re-introduction of individual agreements (rather than collective agreements) and for further constraints on the industrial tribunal Fair Work Australia in terms of the functions it may exercise.[3]The AMMA denounced the federal industrial relations regime as "aiming to resuscitate an ailing union movement" rather than improving business conditions and job prospects for ordinary Australians.[4]

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[2] Mascarenhas J, Munro P and Heap L (2010), 'The Fair Work Bill and Beyond' (Discussion Paper), Australian Institute of Employment Rights, 2010 at <*www.aierights.com.au*>

[3]Stevens, M (2011), 'Fair Work Decision Opens Door to Industrial Chaos*', The Australian*, June 3 2011 <http://www.amma.org.au/home/home/media_publications/2011/030611_MediaClips_FWARuling.pdf>; Australian Mines and Metals Association, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Fair Work Bill 2008,* 12 January 2009, <http://www.amma.org.au/home/publications/AMMASubmission_FairWorkBill_12January09_FINAL.pdf

[4] Australian Mines and Metals Association,
'Resources Sector Calls on Government to Take off Its Blinkers and Remove Union Agenda from New IR System' (Media Release)
<http://www.amma.org.au/home/home/media_publications/MR_10Dec08_ResourcesSectorAppalledByGovernment%27sIRLaws.pdf>

Rather than seeing the FW Act as representing the interests of one party over another, McCallum has suggested that it ought to be viewed as an "armistice" and that it is time for both sides now to respect the settlement and learn to work within the framework provided by the FW Act.

In a show of bipartisanship, the AMMA has joined the ACTU in criticising the resolution initiated by the Opposition and passed by the Senate requiring FWA President Justice Geoffrey Giudice to appear for questioning during Estimates hearings.[5]This resolution has been denounced by AIER as an attack on the independence of the tribunal.[6]The IR Society of Australia said that:

> "…it puts Fair Work Australia in an invidious position to have its President required to attend and be questioned by senators in relation to particular criticisms they may have; or about particular cases. There are appropriate appeal mechanisms under the *Fair Work Act*, and ultimately under the *Constitution*, that may be followed if any party believes that Fair Work Australia makes a decision that goes beyond its jurisdiction, or makes an error of law...
>
> Should senators have questions about administrative matters involving Fair Work Australia, consistent with the practice for the High Court and the Federal Court, evidence about such matters has traditionally been provided by senior public servants from within the bureaucracy of Fair Work Australia or its predecessors."[7]

Liberal Senator Mary Fischer defended the resolution saying that Estimates was the "proper place" for scrutiny of the person occupying the office of the President of Fair Work Australia.[8]

1.3 Did the system ever promote justice?

McCallum argues that our labour relations regimes have always focussed upon justice and fairness at work:

> "The precepts of fairness and justice sprang from the conciliation and arbitration origins of our mechanisms. Yet, despite the labour law deregulation of the last decade and a half and the move away from the conciliation and arbitration power, the collectivist aspects of our system still adhere to this fairness and justice precept…
>
> It is essential to appreciate three aspects of the operation of this fairness and justice precept in our labour laws. The conciliation and arbitration systems did for the first half of

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[5] *Workplace Express*, 'Liberals Brush off AMMA Criticism of Giudice's Senate Questioning', 11 February 2011 < http://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=2&selkey=44742&hlc=2&hlw=Liberals+brush+off+AMMA+criticism+of+Giudice%27s+Senate+questioning&s_keyword=Liberals+brush+off+AMMA+criticism+of+Giudice%27s+Senate+questioning&s_searchfrom_date=631112400&s_searchto_date=1308294390&s_pagesize=10&s_word_match=2&s_articles=2&stream=2>

[6] Australian Institute of Employment Rights (2011), 'Independence of Workplace Tribunal Under Attack' (Media Release, March 7 2011) <http://www.aierights.com.au/2011/03/independence-of-workplace-tribunal-under-attack/>

[7] Workplace Express, 'IR Society calls on Senate to Back Down on Requiring Giudice to Appear', 10 June 2010<http://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=2&selkey=42866>

[8] *Workplace Express*, 'Coalition Keeps Giudice Issue Alive with Tabling of Clerk's Advice', 2 June 2010 < http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=42737>

the 20th century, pay far less attention to the plight of women and native Australians than was warranted even in accordance with the standards of those times. Second, and of no less importance, there was always a healthy tension between doing fairness to employees and employers on the one hand, with on the other hand, the recognition that favourable employee outcomes had to be tempered by the economic capacity of the nation to absorb them. These tensions between economic capacity and fairness and justice can be seen clearly in the famous 1907 Harvester decision of Justice Higgins. In specifying a minimum wage for a worker to support his dependants, Higgins was mindful of the economic consequences of his decision. In fact, a central element of wage fixation in Australia has been this tension between the capacity of the economy and the fairness and justice precept…

Finally, the precept of fairness and justice became so ingrained in the Australian community that when conciliation and arbitration was jettisoned in favour of collective bargaining, the industrial relations tribunals were given powers of certification of collective agreements as a means of maintaining worker confidence in this new collectivist mechanism of union and non-union bargaining at the level of the undertaking."[9]

Sub-theme 2*:* The impact of the loss of the system of compulsory conciliation and arbitration

Australia's proud history of industrial relations is characterised by a determination to ensure the dignity of all working people, whilst maintaining the success of the economy.

This balance was initially achieved through the traditional process of conciliation and arbitration; a unique system that shunned strikes and lockouts in favour of state intervention and compulsory binding arbitration when workers and employers could not reach agreement. Harvey says that this approach was a response to the great disputes of the 1890s in the pastoral and maritime industries:

> "While the state had a significant role to play, the legislation also encouraged the formation of representative bodies of employers and employees who became the driving forces of industrial relations."[10]

The conciliation and arbitration system was rooted in the principle of egalitarianism. It provided the balancing of power between employers and employees, legitimised the role of unions and saw dialogue as the way to resolve disputes. However, Australia's conciliation and arbitration machinery has largely unravelled in recent times, and the industrial relations system has seen an increased emphasis on enterprise bargaining and interactions at the workplace level. There is concern that this post-WorkChoices shift from an

[9] McCallum R (2005), 'Justice at Work: Industrial Citizenship and the Corporatisation of Australian Labour Law' (Speech delivered at the Kingsley Laffer Memorial Lecture, Monday 11 April 2005) <http://worksite.econ.usyd.edu.au/McCallum_laffer.pdf>

[10] Harvey K (2011), 'So Much for Compulsory Arbitration', *New Matilda*, 25 May 2011, <http://newmatilda.com/2011/03/25/so-much-compulsory-arbitration>

industrial relations system based on the constitutional conciliation and arbitration power to a system based on the corporations power will threaten key IR values.

Professor McCallum is apprehensive that:

> "laws based upon the corporations power [alone] will be centred around corporations to the detriment of flesh and blood persons who interact with corporation."

Heobserves:

> "… labour laws of broad application… enacted in reliance upon the corporations power could not for long maintain [the] balance between employers and employees. In the fullness of time… labour laws will become little more than a sub-set of corporations law because inevitably they will fasten upon the economic needs of corporations and their employees will be viewed as but one aspect of the productive process in our globalized economy."[11]

His Honour former Justice Paul Munro, a presidential member of the AIRC, and member of the AIER Executive reflected on the egalitarian principles underpinning the system of conciliation and arbitration prior to WorkChoices:

> "The provision in the Constitution for the prevention and settlement of industrial disputes by conciliation and arbitration proceeds upon an egalitarian value and principle. Literally and by necessary implication, s 51(xxxv) of the Constitution connotes the existence and recognition of participants in disputes, including employers, employees and their respective organisations within industries. By stipulating conciliation and arbitration, the Constitution ordained a relatively well-understood process and associated principles for dealing with the conflicting interests at stake. From that stipulation 'an industrial process that is uniquely Australian' has evolved."[12]

Following WorkChoices and the FW Act's reliance on the corporations power, the unique Australian vision of access to conciliation and binding arbitration as the bedrock of a fair and equitable industrial relations system was laid to rest on 26 March 2011.

[11] McCallum R (2005), ' The Australian Constitution and the Shaping of our Federal and State Labour Laws' (Paper presented at the Industrial Relations Society of New South Wales 46th Annual Convention, 13 May 2005).

[12] Munro P (2006), 'Changes to the Australian Industrial Relations System: Reforms of Shattered Icons? An Insider's Assessment of the Probable Impact of Employers, Employees and Unions' (2006) 29, *University of New South Wales Law Journal* 1, p. 128.

Sub-theme 3:International law and human rights

3.1Does the current system comply with international labour law and human rights standards? If not, how should it be changed?

The FW Act could breach International Labour Organization ('ILO') Conventions, specifically provisions regarding freedom of association for workers to join trade unions, the right to engage in collective bargaining and also through the Australian Building and Construction Commission which has coercive powers.

McCallum believes that opposite views on the role of trade unions contribute to potential breaches by Australian law of ILO Conventions:

> "… the ILO regards trade unions as joint regulators of the workforce with employers…Australia, on the other hand, simply regards trade unions as no more than agents for their members…in many ways - it is quite a different philosophy."[13]

Collective bargaining and freedom of association: The ILO has indicated that the right to engage in collective bargaining by trade unions is a broad right. A trade union should be free to choose the level at which it bargains, ie. the trade union could bargain collectively with a single enterprise, or it could bargain with a group of employers on a regional basis or on an industry basis.

The FW Act only permits broad based collective bargaining at the enterprise level. While it does allow for multi-employer agreements, it does not permit trade unions to take industrial action to further their demands. This limits the options of trade unions.

Australia is the only country in the world to outlaw pattern bargaining - where a trade union seeks the same wages and working conditions from a group of individual employers. Under the FW Act, protected industrial action cannot be taken in pursuit of pattern bargaining.

The Australian Building and Construction Commission: The ILO has consistently found that the powers and actions of the Australian Building and Construction Commission are contrary to the 'Freedom of Association and Protection of the Right to Organise Convention, 1948', the 'Right to Organise and Collective Bargaining Convention, 1949' and the 'Labour Inspection Convention, 1947'.

In its most recent report, the ILO said:

> "The Committee considers that the prosecution of workers does not constitute part of the primary duties of inspectors and may not only seriously interfere with the effective discharge of their primary duties – which should be centred on the protection of workers under Article 3 of the Convention – but also prejudice the authority and impartiality necessary in the relations between inspectors and employers and workers."[14]

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[13] Sharples S (2009), 'Fair Work Act Could Breach International Law', *Lawyers Weekly* (8 September 2009) < http://www.lawyersweekly.com.au/blogs/top_stories/archive/2009/09/08/fair-work-act-could-breach-international-law.aspx >

[14] International Labour Office, (2010) *Report of the Committee of Experts on the Application of Conventions and Reccomendations*.

3.2 How are we achieving the ILO's agenda of 'Decent Work' within Australia?

In June 1999, the ILO set itself the goal of "promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity".[15]In a relatively short time this concept has forged an international consensus among governments, employers, workers and civil society that productive employment and Decent Work are key elements to achieving a fair globalisation, reducing poverty and achieving equitable, inclusive, and sustainable development.The Decent Work Agenda can be summarised as comprising of four objectives with gender equality as a cross-cutting objective:

1. creating jobs
2. guaranteeing fundamental principles and rights at work
3. extending social protection and social security
4. promoting social dialogue

According to the ILO, decent work involves:[16]

- employment in conditions of freedom, equity, security and human dignity
- opportunities for work that is productive and that delivers a fair income
- security in the workplace
- social protection for families
- better prospects for personal development and social integration
- freedom for people to express their concerns
- opportunitiesfor people toorganise and participate in the decisions that affect their lives
- equality of opportunity and treatment for all women and men

By implementing forward-thinking economic and industrial policies, negative aspects of globalisation can be combated by national governments combining their political will to advance a common agenda, increasing employment prospects and preventing a downward spiral in labour conditions. If labour standards are lowered in an effort to remain competitive in a global economy, then in fact the opposite will occur as efficiency and standards fall.

Organisations calling for greater de-regulation of the Australian labour market may be acting in self interest and promoting insular policies that fail to recognise the true impact of globalisation, the importance of productive and rewarding work within the Australian community and the responsibility of all parties to seek to achieve this. Economic and labour market policies that rest on the 'trickle down' effect to distribute the benefits of wealth are outmoded.

In the Australian context, the ACTU and its affiliates have committed to pursuing and promoting the decent work agenda over coming years through:

- enterprise bargaining and agreements between employers and employees and their unions aiming to adopt the principles of decent work with clauses in agreements that support decent work

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[15] International Labor Organisation, 'Constitution of the International Labor Organisation', <http://www.ilo.org/ilolex/english/constq.html>

[16] International Labor Organisation, 'Decent Work Agenda', <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

- lobbying governments to legislate for elements of the decent work agenda that are not already enshrined in law
- conducting and sponsoring research on decent work policies and their role in improving job satisfaction and business productivity
- renewed efforts to eliminate discrimination in the workplace

3.3 Are Australian employers feeling the growing international pressure to become good corporate citizens and recogniselabour rights as human rights? How are they responding to this pressure?

Following the rise in the power of the transnational corporations there has been greater emphasis on the need for enterprises to behave as good corporate citizens. For multinational companies, brand image and reputation play a significant role in improving competitive advantage. Concerns regarding the ethical practices of these companies now make corporate social responsibility a bottom line business issue.

The International LabourOrganisation (ILO) defines corporate social responsibility ('CSR') as:

> "a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law".[17]

The elements that characterise CSR are:

- its voluntary nature – enterprises voluntarily adopt socially responsible conduct by going beyond their legal obligations
- it is an integral part of company management
- CSR actions are systematic not occasional
- close links with the concept of sustainable development

In general, CSR activities have been posited to include[18]:

- incorporating a social awareness and similar characteristics or features into company policy
- adopting progressive human resource management practices
- adopting environmentally friendly technology
- advancing community concerns

CSR is now being researched and applied as part of the overall strategic practice of organisations. One author has applied classical economic theory to CSR, concluding that companies involved in repeated transactions

[17] International Labour Organisation, 'Resource Guide on Corporate Social Responsibility (CSR') <http://www.ilo.org/public/english/support/lib/resource/subject/csr.htm>

[18] McWilliams A, Siegal D and Wright P (2006), 'Social Responsibility: Strategic Implications' 43(1) *Journal of Management Studies*, pp. 1-18.

with stakeholders premised upon good faith, trust and mutual cooperation may gain a significant competitive advantage because the returns on such ethical dealingsare high.[19]

UN initiatives such as the Global Compact and the recently developed Protect Respect Remedy Framework place a human rights framework around CSR initiatives. The ILO's MNE Declaration is also being used as a tool to ensure that enterprises are meeting the labour dimension of CSR. International audit standards, such as ISO 26000 are being developed in order to measure enterprises compliance with CSR objectives.

Sub-theme 4: Cooperation, partnership and good faith relations

4.1What is the system doing to promote a cultural shift towards cooperation, partnership and good faith relationships?

Beyond the triggers and signals provided for in legislation, the government needs to introduce significant initiatives to support workers and employers to make the shift to a new workplace culture incorporating the approach of industrial citizenship. A regulatory and administrative agency such as FWA or the Fair Work Ombudsman will not readily be able to foster the front-end cultural change that is required. The government needs to look towards organisations such as AIER who work collaboratively (and in our case from a framework of tripartism)to assist it to effect substantive change.

For the government to achieve its stated policy objectives there is a need to rebuild an environment of trust and partnership in workplaces and between the industrial parties. There is also a need to provide education to the industrial parties and to the broader community of what constitutes fairness in the workplace. The government's policy objectives require workplace environments that are open, participative and conducive to learning as well as willingness from parties to work in an environment of mutual respect. Changing legislation alone will not achieve this result.

Serial changes to legislation and to agencies reflecting the ebb and flow of partisan advantage or political expediency will frustrate capacity and motivation to create lasting cultural change. The partisanship characterising at least the last decade was an intermittent source of industrial antagonism and should be eschewed. AIER considers that industrial parties generally would welcome and find considerable productivity benefits in the re-instatement of a politically stable, widely accepted scheme for governance and guidance of employment relationships.Government can help to create the environmental factors conducive to this change but the industrial parties and workplace participants need to then take responsibility for making it a reality.

AIER's vision for Australia's industrial relations future is one that is underpinned by fairness to all sides, balance and fostering greater respect, harmony and innovation. A fresh approach to industrial relationsshould be based on the principles of workplace or industrial citizenship, as advocated by Ron McCallum.

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

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[19] Jones T (1995), 'Instrumental Stakeholder Theory: a Synthesis of Ethics and Economics', 20 *Academy of Management Review,* pp. 404–37.

Industrial citizenship conceives of a floor of minimum wages and conditions to protect labour, participatory institutions where worker representation is uncontested and the right to collectively bargain respected.[20]At its core, this model of citizenship recognises that workplaces do not have to be places of perpetual conflict but can provide an opportunity for workers and employers to work together in building innovative, productive and harmonious businesses.

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

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

The right to decent work is an essential part of workplace citizenship. This is not a right to always enjoy one's work or to always be satisfied at work. It is a right to be treated with respect and dignity, to be given opportunities to grow in skill and experience and to have recognisedthe importance of work in sustaining one's sense of self.

The Fair Work Act is a step in the right direction in that it eschews the partisanship of the WorkChoices reforms, however it is still based on a fundamentally flawed foundation of adversarial workplace relations instead of advocating for genuine cultural reform of Australian workplaces.

To achieve this reform, AIER has called for the establishment of a national organisation to promote fair work practices in Australia - the Australian Centre for Workplace Citizenship. This organisation would be dedicated to:

- improving the quality of working lives of individual Australians
- creating conditions for business success
- enhancing social cohesion via the promotion of respectful workplaces and the understanding of workplace citizenship

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

- educating the Australian public about fair work practices and workplace citizenship

4.2The Business Case for Cultural Change

Investing in workplace culture improves the success of business, and in turn, the overall success of the Australian economy. Whilst traditionally labelled the 'lucky country' after 1901– an epithet earned partly because of Australia's history of relatively high minimum wages and industrial fairness - this new century offers an opportunity for Australia to earn a new reputation as an 'international employer of choice'. It can take advantage of this opportunity by investing in workplace culture and developing a comprehensive strategy for recognising the dignity and worthof its working people.

The ability of Australian businesses to manage their workplaces in a fair and reasonable manner will improve the health of employees and the profitability of the business.Research shows that there is a clear link between workplace culture, the mental and physical well-being of employees and business performance.[21] It has been demonstrated that when a business invests in workplace culture, the benefits are substantial. There are numerous incentives for businesses to invest in workplace culture.

The first incentive for investment in workplace culture is 'responsibility', in a manner analogous to corporate social responsibility. The second incentive is the 'cost of inactivity', for a failure to invest in workplace culture will lead to greater costs associated with absenteeism, 'presenteeism' and recruitment and training of new staff. The third incentive to improve workplace culture is the return on investment for improving the quality of work organisation, including corporate brand reputation and product innovation.

Absenteeism and presenteeism: Poor workplace culture adversely impacts an employee's commitment to thebusiness and is usually associated with higher degrees of absenteeism andwhat is known as 'presenteeism'. In contrast to absenteeism, presenteeism encompasses the problems faced when employees come towork but are not productively functioning, for example when they are ill. Presenteeism, like absenteeism can have negative repercussions onbusiness performance.Research conducted by Econtech in 2008 found that stress-related presenteeism and absenteeism are directly costing employers $10.11 billion a year.[22]

Productivity and efficiency: Poor workplace culture has been found to have a detrimental impact upon the productivity and efficiency of employees. Psychosocial stressors surrounding work and the workplace, if allowed to fester, can have unwelcome consequences for the ability of employees to perform at their optimum. These consequences may include compensation claims for conditions like post-traumatic stressdisorder, stress adjustment disorder, clinical depression and anxiety. However, the results of an Australian programme of early diagnosis and intervention for employees with depressive symptoms indicate annual financial benefits in terms of higher productivity, which are nearly five times the annual costs of the programme.[23]

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[21] AIER 2009 Preventative Health and Workplace Culture http://www.aierights.com.au/2009/08/aier-presents-its-preventative-health-and-workplace-culture-submission/#more-308

[22] Medibank Private, 'The Cost of Workplace Stress in Australia' < http://www.medibank.com.au/Client/Documents/Pdfs/The-Cost-of-Workplace-Stress.pdf>

[23] Hilton M (2005), 'Assessing the Financial Return on Investment and Good Management Strategies and the WORC Project', WORC Project paper, <http://www.qcmhr.uq.edu.au/worc/Documents/Hilton_Paper(2005).pdf>

Another overriding reason for businesses to invest in workplace culture is that the quality of workplace relationships has been found to be the single most important driver of excellence in Australian workplaces. A comprehensive 2003 study of Australian workplaces found that while other factors such as 'workplace leadership', 'clear values', 'being safe', 'pay and conditions', 'getting feedback' and the like were important, no factor was as important as 'quality working relationships' in driving business excellence.[24]

Corporate brand and reputation: Workplace culture influences external perceptions of the corporate brand by customers and prospective business partners. Employees are pivotal in enacting the attributes of a corporate brand and their actions ultimately foster customer experience – whether good or bad.Staff actions either re-inforce or undermine the promises a brand makes to its consumers. Favourable employee treatment ensures that employees working internally within the business are in sync with the external message and brand of the business. As Harris states,"Employees have the formidable task of demonstrating the brand by the actions they take. The adage actions speak louder than words is a truth that holds firm in the process of building successful brands."[25]Evidence shows that strong brands develop through consistent and positive consumer experience over time. Therefore there is a clear business case for investing in workplace culture in order to strengthen the corporate brand and reputation of the business.

A 2008 study by CeridwynKing and Debra Grace looked at the factors employees consider to be necessary for them to successfully deliver their organisation's corporate brand promise. It was found that the 'human factor' iscrucial. Although training, internal marketing and the provision of information to employees about the corporate brand are undoubtedly useful, it is only through the appropriate treatment of employees by the organisation that the corporate brand is likely to be supported and successfully promoted by employees. King and Grace conclude,"Simply giving employees information is insufficient to attract, retain and motivate employees to be brand champions. Rather the development of long-term, mutually beneficial relationships between an employer and employee is advocated."[26]

Staff attraction and retention: Whilst it is well recognised that businesses that invest in workplace culture are likely to improve staff attraction and retention, what is less acknowledged is the need for Australia to invest in workplace culture across the economy so as to become an 'international employer of choice'.Australian businesses frequently look overseas for senior executives and other employees. But the combination of geographic isolation, onerous taxation structures and the dislocation of moving families extensive distances to Australia militate against the success of Australianbusinesses in attracting executives. This challenge could belessened if potential recruits, are aware of Australia's reputation as an international employer of choice with a consistently positive workplace culture.

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[24] Hull D & Read V (2003), *Simply the Best: Workplaces in Australia.* (Working paper no.88), ACIRRT, Sydney, Australia, University of Sydney.

[25] Harris P (2007), 'We the people: The importance of employees in the process of building customer experience', *Brand Management,* 15(2) at p. 102.

[26] King C & Grace D (2008), 'Internal Branding: Exploring the employee's perspective', *Journal of Brand Management*, vol.15(5), pp. 358-372.

4.3A National Accreditation System

The federal government should commit to establishing a National Accreditation System as a method of instigating widespread cultural change in the workplace.Such a system should be underpinned by the Australian Charter of Employment Rights and the Australian Standard of Employment Rights.

To administer the National Accreditation System, the federal government should:

- use the existing statutory bodies of Fair Work Australia and/or the FairWork Ombudsman to promote education, awareness and best practice inworkplace culture
- provide seed funding for the establishment of a National Centre forWorkplace Citizenship that would work in conjunction with the existingstatutory bodies to administer the accreditation system and promote education, awareness and best practice in workplace culture.

Examples that support adopting this approach include the British Government's establishment of the 'Investors in People' standard through a tripartite forum.

The federal government should seek accreditation as an employer and implement the Australian Charter of Employment Rights and the Australian Standard of Employment Rights as part of its employment and procurement policy, and encourage state, territory and local governments to do the same.AIER also proposes that the Australian Standard of Employment Rights be used to tangibly measure compliance with the Fair Work Principles.

The Australian Charter of Employment Rights and the Australian Standard of Employment Rights should be used by the federal government to promote education of workplace rights and responsibilities in Australian schools. The WorkRight initiative developed in Victoria is an example of this. Developed by AIER in conjunction with the Teacher Learning Network, this curriculum resource engages year 9 and 10 students in understanding their workplace rights and responsibilities. [27]

The federal government should also make addressing Australia's endemically unhealthy workplace culture a key priority area under its preventative health budget, and the National Preventative Health Taskforceshould be charged with assessing and promoting recommendations and mechanisms for improved health and culture in Australian workplaces, including via the National Accreditation System.[28]

In the likely event that reform of Australian workplaces leads to improvement in workplace culture and a corresponding unburdening of the health system, the federal government should consider setting up favourable tax structures to encourage business engagement with, and participation in, the National Accreditation System. By establishing tax incentives for businesses to achieve accreditation, the federal government will be ensuring that improving workplace culture is built into the lifeblood and objective of all businesses in Australia. Australia, as a whole, will greatly benefit from such an investment in preventative health and workplace culture.

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[27] To review WorkRight go to www.teachworkright.com or the AIER website www.aierights.com.au

[28] See AIER's detailed submission on this matter at http://www.aierights.com.au/2009/08/aier-presents-its-preventative-health-and-workplace-culture-submission/#more-308

Sub-theme 5: Dealing with disadvantage

5.1Does the current federal system provide enough opportunity for the economically and socially disadvantaged?

Federal institutional arrangements for the determination of employment terms and conditions are now dominated by enterprise bargaining. The question is, does enterprise bargaining achieve justice?

A generation of academic research has established that collective bargaining is an ineffective method of delivering equity in wages, and terms and conditions. Decentralised and lower level bargaining arrangements produce greater wage dispersion and less equal outcomes. The current system based upon enterprise bargaining provides little avenues for wage decisions that effect whole classes of workers, occupations or industries. The opportunity for a wage increase granted to one group of workers to flow on to other workers doing the same work in a perhaps less organised or more vulnerable workforce is circumvented.

The concept of bargaining itself is based upon power relations. Industrial power is not held by the most vulnerable members of society and therefore such a system cannot deliver industrial justice or fair outcomes to the most disadvantaged in our society. The current federal system does however provides mechanisms including the 'low paid bargaining stream' to ameliorate the lack of bargaining power for those that cannot access enterprise bargaining.

Low paid bargaining stream: Through this stream a bargaining representative or an organisation of employees who have historically been unable to bargain with individual employers may apply to Fair Work Australia for entry into the low-paid stream to bargain with a specified list of employers. Fair Work Australia will then consider a range of factors to determine if the proposed multi-employer bargaining is in the public interest. These factors will include the questions of whether it would assist low paid employees and the history of bargaining in the industry in which the employees work. Fair Work Australia will also be required to consider the extent to which the applicant is prepared to respond to the needs of individual employers.[29]

The first decision under the low paid bargaining stream[30] was in respect to workers in the aged care industry. Fair Work Australia stated that the low paid bargaining provisions are not a means of lifting people from low pay but are a mechanism to facilitate those not participating in bargaining. Following this logic the Tribunal found that even though some of the workers in question were low paid, the fact that they had (at one time) had access to bargaining, prevented them from an entitlement to bargain under the low paid bargaining regime. It appears then that this institutional framework offers little in the way of bridging the gap for industrial justice for all.

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[29] Australian Government, 'Assisting low paid employees and those without access to collective bargaining'. < http://www.rcsa.asn.au/uploads/news/Factsheet%207%20-%20Assisting%20those%20without%20access%20to%20collective%20bargaining.pdf>

[30] [2011] FWAFB 2633 PR508904

5.2Is there an adequate safety net in the current federal system?

Minimum wages: It is estimated that 1.5 million workers are reliant upon the federal minimum wage. Over the last decade there has been a decline in the minimum wage as measured against average weekly earning. The gender wage gap has also widened.

The objects of the Fair Work Act are to maintain a minimum in consideration of the relative living standards of the low paid and which promotes social inclusion, but it would appear that the bargaining system has produced outcomes that do not align with these objects.

Under the FW Act, the Minimum Wage Panel of Fair Work Australia must conduct an annual wage review in each financial year. In each annual review, Fair Work Australia:

- must review modern award minimum wages and the national minimum wage order
- must make the national minimum wage order
- may make one or more determinations varying modern awards to setting, varying or revoking modern award minimum wages

In the Annual Wage Review 2010-11, Fair Work Australia reiterated that:

> "As part of the minimum wages objective, Fair Work Australia must establish and maintain a safety net of fair minimum wages, taking into account promoting social inclusion through increased workforce participation. In addition, as part of the modern awards objective, Fair Work Australia must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the need to promote social inclusion through increased workforce participation."[31]

The minimum wage objective is set out in s284 of the *Fair work Act (2009)*, and is extracted below:

> What is the minimum wages objective?
>
> (1) FWA must establish and maintain a safety net of fair minimum wages, taking into account:
>
> (a) the performance and competitiveness of the national economy,
>
> including productivity, business competitiveness and viability, inflation and employment growth; and
>
> (b) promoting social inclusion through increased workforce participation; and
>
> (c) relative living standards and the needs of the low paid; and
>
> (d) the principle of equalremuneration for work of equal or comparable value; and
>
> (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

[31] [229].

Fair Work Australia released its 2011 Annual Wage Review decision on 3 June 2011. The decision increased modern award minimum wages by 3.4% making the new national minimum wage $589.30 per week or $15.51 per hour. It will take effect from the first pay period commencing on or after 1 July 2011. Despite criticisms from groups like the Chamber of Commerce and Industry who have said it will force employers to reduce weekly hours and cut jobs,[32] the Australian Government made the following submissions to the Annual Wage Review:

> "In the Australian context, in the years preceding the recent economic downturn, moderate increases in minimum wages were accompanied by strong employment growth. This suggests that in periods of strength the demand for labour is such that any impact of minimum wage increases on employment levels is tempered, if not, in fact, neutralised."[33]

Modern awards: The objectives for modern awards are set out in s134 and are extracted below:

> What is the modern awards objective?
>
> (1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (e) the principle of equal remunerationfor work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[32] ABC News, *Wage Rise Criticised*, < http://www.abc.net.au/news/stories/2011/06/04/3235540.htm>

[33] At [247]

There are some, albeit limited, opportunities for pressuring Fair Work Australia for a review of minimum rates established in modern awards outside of the Annual Wage Review. One area is in relation to claims under the equal remuneration provisions of the act. In 2010 community sector workers lodged an equal remuneration case. The interim decision from this case has found that work in this industry has been undervalued and that a contribution to this undervaluation has been gender - via the predominance of women working in the industry and also the historical construct of care work as "women's work":[34]

> "The Full Bench found 'there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with workers in state and local government employment. We consider gender has been important in creating the gap between pay in the SACS industry and pay in comparable state and local government employment."

Significantly, FWA ruled that the unions did not need to prove discrimination in order to demonstrate the validity of the claim and that they did not need to compare social and community service workers with male workers.

The bench said the next step involved identifying "the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses the situation". It has called for more submissions to demonstrate what proportion of the pay gap is a result of gender and what the pay increase should be.

FWA's ruling is an important gain in the fight for gender pay equity; recognising the undervaluation of workers in these highly feminised industries. Unfortunately however the federal tribunal has rejected the approach of both New South Wales and Queensland tribunals with respect to how to address and remedy the historical undervaluation of work based on gender. In this most recent case the Full Bench is requiring the applicants to demonstrate almost in a scientific manner the amount of undervaluation that can be attributed to gender inequality. If this highly technical approach is to continue it is unlikely that the Fair Work Act will be a practical vehicle for achieving gender pay equity.

The systems ability to deliver on the requirement to set a safety net of fair minimum wages will come under scrutiny when the process of reviewing modern awards commences by virtue of the operation s156 of the Act. The system allows for this review but predominantly requires changes to the award to be justified using work value principles alone. If the Full Bench of the tribunal is to take a narrow or technical approach to these matters, such as in the equal remuneration case, this may limit the ability of the system to provide protections for low paid workers who are reliant on the award stream and who may not be able to secure improvements in these awards over time.

[34] 2011] FWAFB 2700

Sub-theme 6: The insecure and impermanent workforce

6.1 Is there enough protection for these workers?

The Australian Council of Trade Unions (ACTU) identifies the following workforce statistics:

- About 2.1 million Australian workers are without paid leave entitlements
- More than 1 million workers have been casually employed in their current job for more than a year
- More than 325,000 have been employed casually in their current job for more than five years
- Over 330,000 Australians work on a fixed term contract
- There are more than 1 million independent contractors, of which 43% have no authority over their work
- Almost 600,000 people found work through labour hire companies in 2008[35]

The Work Place Research Centre at Sydney University[36] identified a massive growth in non-standard forms of employment over the past two decades. It is estimated that 30% of the workforce are in these forms of employment. Some of these workers who are more specialised can do well from these arrangements, but most are at the lower end of the labour market the low paid, women and migrant workers. Many of these workers are in more vulnerable arrangements, non-unionised and reliant upon minimum wages and employment rights. Many are not in a position to enforce what little entitlements that they do have.

For some people, the flexibility of casual employment suits their circumstances. But for many more, insecure work is a scourge of the modern workplace. The rise in precarious forms of employment is part of a shifting of costs from business to workers so they can drive down costs and increase profits, and is exposing working families to greater financial risk. In the workplace, it reduces employee's ability to stand up for their rights, and denies them a proper career path. Outside of work, it causes unnecessary financial hardship and affects the ability of working people to plan their lives properly, including purchasing a home.

Findings in 'Shifting Risk – Work and Working Life in Australia':

- People are now required to absorb more and more financial, social and economic risks, therefore experiencing much more financial and social stress
- Increase in the inequalities of pay and conditions between workers
- Despite the enormous growth in the wealth being produced by labour, organisedlabour's capacity to claim a share of that wealth has been made more difficult by the more restrictive regulatory environment in which unions operate
- As fixed costs of living rise, the household is now more sensitive to any shocks on either the cost or income side
- There has been a large transfer of risk from the employer to the worker
- Labour is becoming increasingly flexible
- Earlier forms of security have been and are gradually but systematically being individualised and financialised, which has led to the individualisation of the (risk managed) experience
- The contemporary challenge is to recognise the process of risk shift as a new frontier of individualism and press the point that is has to be resisted collectively

[35] www.actu.org.au

[36] Rafferty M, Yu S (2010), 'Shifting Risk – Work and Working Life in Australia', A Report for the Australian Council of Trade Unions, Workplace Research Centre, Sydney University

The system, structured around a view that the predominant relationship is one of employer and employee (and largely favouring a full-time bread winner concept) is failing those workers who fall outside this definition. A shift to describing the relationship as between a business and those who carry out work, therefore removing the consternation about the definition of employee and removing the temptation for business to create relationships based on artificial constructs in order to avoid obligations, would assist here.

Sub-theme 7: Equal opportunities for women

Although women's participation in the workforce has increased substantially in recent times, women continue to fare less well than men on a number of key measures of equality in employment.[37] In particular, the gender wage gap has largely stagnated for the past 25 years. On average, women working full-time earn 17.2% less than male full time workers and female graduates earn $2,000 less p/a than male graduates.[38]Women have $3 to the $10 men have in their superannuation accounts and are almost twice as likely to be under-employed than men.[39] Occupational segregation sees women dominate the lower paid occupations of clerical, sales and community and personal service.

In 2008, the Australian Council of Trade Unions issued a report titled 'Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting equality.' Its submissions identified the following shortfalls in the current anti-discrimination regime:

- the focus of the Sex Discrimination Act on individual complaints does not effectively address systemic discrimination
- there is inadequate advocacy and support for complainants
- regulatory agencies that deal with equal opportunity for women and the elimination of discrimination have limited rights to initiate investigations
- there are insufficient regulatory tools to encourage and assist organisations to prevent discrimination
- the complaints process is very time consuming, legalistic and costly
- enforcement provisions in the Act are insufficient both in terms of regulation and the level of punitive damages available, particularly when compared to similar jurisdictions such as occupational health and safety and consumer protection legislation

AIER argues that the complaint handling process needs to be more efficient and cost effective to give women a greater opportunity to seek redress for discrimination. Under the current regime, there is little effective remedy for workers who demonstrate that they have been subject to unlawful discrimination in the workplace. Access to adequate remedies requires applicants to take on costly litigation before the Federal Court or Federal Magistrates Court but the costs, time delays and stress associated with this process are overwhelming.

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[37] Review of the Equal Opportunity for Women in the Workplace Act 1999 < http://www.fahcsia.gov.au/sa/women/pubs/general/equal_opp_review/Pages/p2.aspx>

[38] ABS, Cat. 6302.0, Average Weekly Earnings – Trend, February 2011 (released 19.05.11) http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6302.0Feb%202011?OpenDocument ; Graduate Careers Australia, Gradstats 2010, 2010.

[39] Australian Council of Trade Unions 'Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting equality' 2008.

Sub-theme 8: Privacy and Work

Does the current federal regime provide an adequate balance between the rights of employers to control their workplaces and the privacy rights of individual workers?

Surveillance:*The Workplace Surveillance Act 2005* (NSW) requires employers to inform employees of the surveillance to which they are subject. It covers camera surveillance, computer surveillance and tracking surveillance. Additional requirements for computer surveillance are given in s12. Defences may be made out under s22.

Employees are meant to be protected from unwarranted surveillance in and outside the workplace. Surveillance in the workplace should only occur with the consent of workers and when used for a legitimate purpose. It is important that the business balances the worker's right to privacy with the employer's right to responsibly manage the business. This NSW standard does not apply nationally.

As per *Australian Standard of Employment Rights:*[40]

> "Workers do have the right to withhold their consent where a legitimate purpose for surveillance does not exist, or where the least invasive measures necessary to achieve a legitimate purpose are not being utilised. Dignity at work requires that workers are not subjected to unwarranted and unnecessary surveillance that has an improper or even indiscernible purpose."

The National Privacy Principles include aspects that assist in maintaining employee privacy, however these principles are not well understood in the workplace and are generally observed in the breach.

There are also a number of emerging privacy issues for which the law does not provide an adequate remedy including:

Private email accounts
Commentary regarding monitoring of employee email from the *Sydney Morning Herald* reported on 26 June 2001 that one undecided issue is employees' private use of email and the rights of employers to monitor that use.

The Federal Privacy Commissioner, Mr Malcolm Crompton, recently acknowledged that the new law for workplace privacy required interpretation and "could be difficult to work out". While employee records are one of the main exemptions from the Act, Mr Crompton said this only applied to "records that were part of the employer relationship". Outside that 'relationship' employers would have to comply with the Act. "You have to tell staff what you're doing and get their permission," he said.

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[40] Howe J and Riley J (2009,*) The Australian Standard of Employment Rights: A How to Guide for the Workplace*, Hardie Grant Books, Melbourne, pp. 30 -31.

Whether employees' private use of email is covered or exempt is open to interpretation, however. "You could probably make a case that how much they use it and where they go is part of the employer relationship... but it would be harder to argue that the content of email is part of the employee record."[41]

Using work computers at home

A Federal Court decision upheld the right of employer to terminate an employee who had used a work computer at home outside of working hours to view what the employer believed was inappropriate material.[42]The judge said that, while the sacking might be harsh, it was reasonable as the public servant had dissembled when asked about his internet usage, which led to an "adverse" view about his integrity.

Social networking

There are increasing reports of disciplinary action being taken by employers against employees for remarks posted on an employee's Facebook and other social networking sites. People who are sacked over social network comments could have grounds to file an unfair dismissal claim, as employment contracts rarely cover staff use of social networking sites.

The system does not yet provide clear parameters to assist employers and workers to understand the intersection between privacy and employment/industrial relations law. There is a need to review the law in this area.

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The Ron McCallum debate event coordinating committee:
Mark Perica - AIER Executive
Tim McCauley - AIER Executive
Gary Rothville - AIER Executive
Michael Harmer - AIER President
Jane Kewin - Harmers Workplace Lawyers
Lisa Heap - AIER Executive Director
Jane Ponton - AIER Business Manager

Authors of the Briefing Note:
Lisa Heap
Julia Smith - Harmers Workplace Lawyers
Eliza Hannon - Harmers Workplace Lawyers
Mark Perica

[41]Lowe S (2011), 'Emails at work a grey area under extended Privacy Act', *Sydney Morning Herald*, 26 June 2001.

[42] Griffiths v Rose [2011] FCA 30 (31 January 2011)