

# Dignity & Low Pay

A submission by the Australian Institute of Employment Rights Inc. to the Fair Work Australia Minimum Wage Panel Annual Wage Review 2011

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## Introduction

1. The Australian Institute of Employment Rights (the “Institute”) is an independent, not-for-profit body 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. It is independent of government or interest groups.
2. The purpose of this submission is to identify how proxy measures of the needs of low paid workers can be assessed as pertinent and valuable having regard to the Australian Charter of Employment Rights (“the Charter”). The role of the Institute and the Charter will be explained. The submission will then deal with the assessment of proxy measures before concluding with some observations, based on that assessment, of the measures for assessing needs of low paid workers.
3. The Charter is actively concerned with the rights and circumstances of low paid workers. The Institute submits that the Charter enunciates principles that have direct application to a consideration of the relevant proxy measures of the needs of low paid workers. These principles conform to the objects of the *Fair Work Act 2009*. Fair Work Australia’s assessment of a proposed measure should pay regard to the relevant Charter rights.

## The AIER

4. The AIER is an independent not for profit organisation. The Objectives of AIER state:

### “2. Objects of the Institute

Adopting the principles of the International Labour Organisation and its commitment to tripartite processes, the Australian Institute of Employment Rights will promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework.

In particular it will:

- (a) commission academic research
  - (b) hold conferences and seminars
  - (c) publish and disseminate publications
  - (d) contribute to public discourse on employment issues through the media, community debates and public forums
  - (e) provide training to industrial participants
  - (f) provide advice and other services to industrial participants and governments
  - (g) develop a Charter of Employment Rights for Australia
  - (h) promote models of workplace arrangements which promote economic efficiency while respecting employment rights and standards
  - (i) work co-operatively with academic and community organizations which share similar objectives
  - (j) encourage the participation of members who share similar objectives.
5. The AIER is an organisation independent of government or any particular interest group and will implement these Objects with academic rigour and professional integrity.

6. The AIER includes employer and employee interests in its makeup, membership and operation. It is also fortunate to have included in its governance structure and advisory bodies representatives from the academic and legal fraternity.
7. A list of those involved on the AIER Executive Committee and its panel of experts is included as an Annexure to these submissions.
8. It is AIER's view that any system of industrial regulation must be founded in principles which reflect:
  - (a) Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
  - (b) Values which have profoundly influenced the nature and aspirations of Australian society and which are embedded in Australia's constitutional and institutional history of industrial/employment law and practice. In particular, values integral to what has been described as the "important guarantee of industrial fairness and reasonableness"<sup>1</sup>; and
  - (c) Rights appropriate to a modern employment relationship which are recognised by the common law.

## The Australian Charter of Employment Rights

9. In 2007 the AIER published the Australian Charter of Employment Rights (attached with this submission). The Charter is based on the 3 sources of rights identified above.
10. The Charter's purpose is to unravel the complexity of the regulation of workplace relations and re-define it by identifying the fundamental values which good workplace relationships and good law made to enhance such relationships must be based upon.
11. The Charter of Employment Rights and the book which accompanies it, *An Australian Charter of Employment Rights*, is the work of eminent workplace relations practitioners from both the academic and legal communities who are independent of any stakeholders with vested interests. A list of those persons involved is included in the annexure.
12. The Charter has been through a rigorous assessment process. It was circulated in draft format and public comment was invited and taken during the period March to September 2007. An online survey was developed in order to receive feedback on its content. Public forums were held in Sydney and Melbourne.
13. The Charter was circulated to a large (in excess of 2000) number of human resources practitioners via the Australian Human Resource Institute (AHRI) publication HR monthly.
14. Formal consultations regarding the content of the Charter were held with representatives of every major Australian political party.
15. In his report from the NSW Government Inquiry into options for a new National Industrial Relations system<sup>17</sup>, Professor George Williams, Anthony Mason Professor, Faculty of Law, University of New South developed a set of principles that he believed should found a new national system. Williams cited a number of Australian and overseas sources used to develop the principles and gave particular emphasis to AIER's Charter of Employment Rights.
16. The Charter has become a blueprint for assessing government policy, for legislative reform, for company practice and for education about workplace rights.

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<sup>1</sup> *New South Wales and Others v Commonwealth [2006] HCA 52*, per Kirby J at [523] – [525].

17. The Institute encourages all Australian workplaces to adopt and apply the Charter. To assist in this, the Institute has published the *Australian Standard of Employment Rights*, which converts the ideals and values of the ten Charter rights into a practical form that can be applied in every workplace. The Standard is used by an employer as a tool to assess whether that employer can be accredited as a “Charter employer”.

## Charter rights and the Act

18. The Charter has an active concern with the circumstances of low paid workers. Its foundation is the idea of a “fair go all round” (Charter Right 1). The Charter obliges employers to commit to complying with the minimum standards which are mandated by law and recognizes that these standards should be established and maintained by an impartial tribunal independent of government (Charter Right 8). Workers and employers have the right to be accorded dignity at work and to experience the dignity off work (Charter Right 2). This right to dignity recognises that labour is not a mere commodity. Dignity *at work* includes issues such as fair wages and just conditions of work.
19. The right of workers to bargain collectively through representatives of their choosing to ensure fair and just outcomes (Charter Right 9) has a direct relationship with the setting of the national minimum wage. Low paid workers have inferior access to the benefits of collective bargaining. This inequity explains the need for Division 9 of Part 2-4 and Division 2 of Part 2-5, the low-paid bargaining and workplace determination provisions respectively.
20. The *Act*, in promoting the twin goals of economic prosperity and social inclusion for all Australians, aims to ensure a guaranteed safety net of relevant and enforceable minimum terms and conditions, including through national minimum wage orders. The idea of fairness – the cornerstone of the Charter - permeates the Objects in section 3 of the *Act*.

## Proxy measures of the needs of low paid

21. The rights provided for in the Charter suggest the tests to be adopted for measuring whether work is “low paid” should answer the following questions positively:
1. Is the measure relevant to the needs and capacities of an evolving Australian society?
  2. Do the measures, taken as a whole, ensure that the minimum standards facilitate change with equity?
  3. Are the measures, individually and collectively, fair and balanced?
  4. Does each measure ensure that low paid workers are afforded dignity at work and dignity of work?
22. Without seeking to be either prescriptive or exhaustive, the following matters should be considered in determining the measures:
1. That which is required to sustain the work worker as an individual
  2. That which is required to sustain the worker’s household
  3. The caring responsibilities of workers who are low paid
  4. Disability or disadvantage which can be characteristics of a low paid work
  5. The generally precarious nature of low paid employment, the hallmark of which is often casual engagement
  6. Living standards generally in the Australian community

7. The need to take account of Australia’s changing labour force and social context, for example, the growth of participation of women in the workforce without corresponding equitable outcomes
  8. Allied to the previous point, the need for minimum standards to both lead and respond to change so that they do not become frozen in time
  9. ILO Conventions which identify the needs of workers and their families, the general level of wages in the country, the cost of living, Social Security benefits, the relative wellbeing standards of other social groups, economic factors [including economic development], levels of productivity and the desirability of maintaining a high level of employment.
23. Finally, a general test of overall fairness should be applied: are the measures, when considered as a whole, fairly weighted having regard to the objects of the *Act* and the intent of the national minimum wage provisions.
24. This approach proposed by AIER is consistent with that of the International Labour Organisation. 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.”<sup>2</sup>
- According to the ILO<sup>3</sup>, decent work is:
- Employment in conditions of:
    - Freedom
    - Equity
    - Security
    - Human dignity
  - Opportunities for work that is productive
  - Opportunity for work that delivers a fair income
  - Security in the workplace
  - Social protection for families
  - Better prospect for personal development and social integration
  - Freedom for people to express their concerns
  - Opportunity to organise and participate in the decisions that affect their lives
  - Equality of opportunity and treatment for all women and men.
25. The emphasis within the ILO’s Decent Work Agenda is on the need to ensure that economic and industry development should not occur via a race to the bottom on labour costs. This approach, and the importance of promoting both economic and social sustainability, should be incorporated within the decision making of FWA when considering factors associated with the low paid and minimum wage setting.
26. Both the AIER and ILO approaches are consistent with the Objects of the *Act* and promote the twin goals of economic prosperity and social inclusion for all Australians.

## Measures for assessing needs

27. Measuring the needs of low paid workers, and defining and measuring low pay, is no simple matter. Each of a number of methods has its advantages and its limitations. Adopting the tests set out above, the Henderson poverty lines are an inadequate measure because they have not adapted to current Australian circumstances.

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<sup>2</sup> Constitution of the International Labor Organization, available at: <http://www.ilo.org/ilolex/english/constq.htm>

<sup>3</sup> <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

Beyond that general observation, it is clear that there is no single measurement tool that addresses all of the appropriate criteria with unqualified positive responses. Measures of income, expenditure, wealth, financial stress and deprivation and social exclusion each have a contribution to make to the analysis. In the absence of the definitive test that meets all criteria, the appropriate course is to have regard to all those measures and balance them by reference to their limitations and advantages according to the suggested criteria, as well as their own inherent disadvantages.

Date: 25 October 2011

## Annexure

### Australian Institute of Employment Rights Inc.

#### Patrons

The Honourable RJ Hawke

Professor Ron McCallum AO

#### Executive Members

##### President

Mr Michael Harmer

Harmers Workplace Lawyers

##### Vice Presidents

Employer – Fiona Hardie – Hardie Grant Publishing

Employee – Tim Kennedy – National Union of Workers

Independent – Hon. Paul Munro

##### Members

Sean Reidy – Queensland Bar

Gary Rothville - Gary Rothville and Associates

Mark Irving - Victorian Bar

Mark Perica – CPSU-SPSF

Joel Fetter - ACTU

Lisa Heap – AIER Executive Director

### Charter - Panel of Experts & Advisory Committee

Mordy Bromberg SC, Victorian Bar (now Justice of Federal Court)

Professor Joellen Riley, Sydney University

Professor Greg Bamber, Monash University

Carol Andrades, Ryan Carlisle Thomas

Associate Professor Anthony Forsyth, Monash University

Associate Professor Colin Fenwick, Melbourne University (and now ILO)

Professor Marilyn Pittard, Monash University

Professor David Peetz, Griffith University

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

Justice Paul Munro, former Presidential Member of the AIRC

Professor Ron McCallum AO, Sydney Law School

David Chin, NSW Bar

Anne Gooley, Partner, Maurice Blackburn Cashman (now Commissioner Fair Work  
Australia)

Professor Russell Lansbury, University of Sydney (liaison)

Emeritus Professor John Neville, UNSW

Associate Professor Peter Kriesler, UNSW

Michael Harmer, Harmers Workplace Lawyers

Mark Irving, Victorian Bar

Peter Rozen, Victorian Bar

Bob Russell, Griffith University

Julia Watson, Melbourne University