Australian Institute of Employment Rights

Fair and Just

A submission by Australian Institute of Employment Rights Inc.
to the Fair Work Act Review Panel

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Introduction

The Australian Institute of Employment Rights (AIER) welcomes this opportunity to present this submission to the Fair Work Act Review Panel (the Review Panel).

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.

The AIER is an organisation independent of government or any particular interest group and will implement these Objects with academic rigour and professional integrity.

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.

A list of those involved on the AIER Executive Committee and its panel of experts is included at Annexure 1. Many of those on the AIER Executive Committee and panel of experts are current practitioners within the area of workplace relations and law. AIER is therefore well place to comment on the application of the Fair Work Act in policy and practice.

AIER draws its basis for review of the Fair Work legislation from its belief 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"[1]; and

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

(c) Rights appropriate to a modern employment relationship which are recognised by the common law.

To this end the AIER has developed an instrument, *the Australian Charter of Employment Rights*("the Charter"), based on the three sources of rights identified above which we believe to be both a unique and appropriate reference tool for examining the Fair Work legislation. A detailed outline of the development and uses of the Charter is contained in Annexure 3. A copy of the Charter of Employment Rights is contained at Annexure 4.

AIER has utilised the Charter as its framework for this submission.

To encourage the uptake of the rights contained within the Charter on a practical level the AIER has developed the *Australian Standard of Employment Rights* ("the Standard") as a tool to assist enterprises to adopt a culture and practice that is consistent with both their compliance requirements under the Fair Work Act and also the need for them to operate within a rights based framework. A copy of the Standard is attached at Annexure 5.

We note the terms of reference for the review and the questions that the Review Panel has developed in relation to specific matters. The AIER submission will therefore seek to address the terms of reference and where we have particular experience or expertise answer some of the questions set out by the Review Panel.

The AIER believes it is important to review the application in practice of legislation governing employment relationships within Australia. AIER is also of the view however that particular attention needs to be given to the need for those responsible for achieving culture change in Australian workplaces, including those responsible for public policy, to turn their minds to initiatives beyond, but complimentary to the legislation, that are required to make fair work a reality. We will therefore also highlight some of these matters in this submission.

General observations

1. Limits of the adversarial approach

AIER is concerned that the legislation continues to promote an adversarial approach to workplace relations that has created confusion about the nature of rights and obligations contained within the system and a concern amongst employers and workers of ongoing instability in this area.

At the time that the Government introduced the Fair Work Bill it was often heard to say that if employers and unions were both critical of the Bill, then it must have struck the right balance.

AIER accepts that the Fair Work Bill reinstated a number of universal rights that had been removed under the previous Workchoices legislation, therefore creating a more balanced approach to industrial regulation. At the time however, we expressed our concern that it was not the solution Australia needed. It was, and remains, our view that what was needed was a real consensus not just balanced horse-trading. Without this attempt to build real consensus AIER warned that industrial relations would continue to be a political football and the opportunity to move towards a more mature founding for industrial regulation would be lost. As we move closer to another Federal election, and the political invective mounts, it is clear that our concerns were justified.

The failure to enunciate through the legislation a guiding set of principles and values is of concern. The legislation has no foundational principle or guiding philosophy. Rather, it patches a regulatory scheme around a mixed-pot assembly drawn in part from reassertion of hybrid fairness values, in part from the values reflected in the scheme it replaced, (Workchoices) and in part from approaches associated with an implicit assumption that the rationale for regulating the employment relationship arises from an adversarial character.

The AIER believes that the legislation's fundamental foundation upon the assumption of an adversarial employment relationship causes it to promote a functionalist adherence to legislative standards that reinforces an adversarial approach to the relationship. It also fosters an environment of rhetorical public discourse that keeps workplace relations on the front page of newspapers but does little to help employers and workers to understand their rights and responsibilities and how they could genuinely go about working towards fairer workplaces and respectful relationships.

AIER has long advocated for a new set of guiding principles founded in the concept of 'workplace citizenship' that would encourage employers, employees and their representatives to interact positively in their capacity as industrial citizens. The Charter is one articulation of this.

AIER submits that the Objects of the Act including its aim to "…provide a framework for co-operative and productive workplace relations…"will not be achieved whilst the legislation remains devoid of this guiding set of principles. The Act should therefore be seen as a positive first step towards more genuine reform.

2. The need for genuine tripartism

The AIER is committed to tripartism and is of the view that the loss of a genuine commitment to tripartism in Australian industrial relations is significantly hindering Australia's ability to develop a modern economy committed to industrial fairness and achieving productivity growth.

Opportunities to promote tripartism through the machinery of the legislation have not been taken up. For example whilst the ILO Labour Inspection Convention (Convention 81) requires the government of member nations to make arrangements for promotion of 'collaboration between the labour inspectorate and

employers and workers or their organisations' (Article 5(b)) "the FW Act neither encourages this or prohibits it and accordingly gives limited effect to the requirement."[2]

AIER submits that this and other examples demonstrate a missed opportunity. The legislation could do more to promote tripartite collaboration. AIER notes that this is a matter upon which the ILO's Committee of Experts on the Application of Conventions and Recommendations has commented in both its 2010 and 2011 reports. In relation to the issue of the Labour Inspectorate the CEACR stated in 2011 that

> "*The Committee would be grateful if the Government would furnish information in its next report on arrangements made or envisaged in order to promote collaboration between the Fair Work Ombudsman and employers' and workers' organizations."*

The AIER submits that the industrial parties also need to examine the role that they are playing in hindering the advancement of co-operative and productive workplace relations with a view to significantly overhauling their modus operandi.

One example of the current impasse is in the area of flexibility and the labour market. Employer advocates are calling for "flexibilities" to be introduced into the system, citing the need for flexibilities in order to promote productivity. Where is the evidence of this link? Where can we have a rational discussion about it? The union movement states that this call for flexibilities is simply a call for deregulation and the reduction in labour standards – a move back to Workchoices. And there the discussion ends.

There is no space in the public discourse for a genuine discussion of the policy parameters we want to guide regulation. Do we want a low wage, deregulated industrial relations environment and the social dislocation and inequalities that go with that? What is the alternative? Are there genuine problems impeding productivity that can be addressed without workers rights being trampled? There is no space to have a meaningful discussion of these matters.

Recommendation - The AIER believes that greater effort needs to be put to rebuilding an environment of genuine tripartism. AIER has previously called for support for a Centre for Workplace Citizenship.[3] We renew our call for this initiative via this submission. Our detailed proposal for this Centre is attached at Annexure 6.

3. The key role of an independent tribunal

Embedded in Australian expectations of a fair system of employment rights is the notion of an impartial tribunal independent of government. The Australian Charter of Employment Rights endorsed that notion. Those involved in drafting this Charter saw it as integral to the establishment and maintenance of fair minimum standards for just conditions of work.
Fair Work Australia is an impartial tribunal independent of government. AIER submits that all parties have a responsibility to uphold and protect the reputation of this tribunal and to work together to enhance its effectiveness.

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[2] Howe et al (2011) Working Paper No 14, Study on Labour Inspection Sanctions and Remedies: The case of Australia, ILO Geneva p.33

[3] For a more detailed discussion of Industrial citizenship 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.

4. Education is vital

The system can create rights and responsibilities however this is of little use if workers and employers do not understand how these rights and responsibilities work in practice. This is where a guiding set of principles or values can play a valuable role as a tool for educating to change culture and practice.

The AIER has played a particular role since its inception in 2005 in the area of education and culture change and practice. The Charter has been our framework here. In general our initiatives have been self-funded. AIER, in conjunction with the Teacher Learning Network (TLN) has recently released a multi-component education tool for teaching and learning about workplace rights and responsibilities in Australian secondary schools. This resource, Workright, is freely publicly available. The development of this resource was supported by the previous and current Victorian Governments and although we have had numerous conversations with the Federal Government regarding the promotion and support for the uptake of this resource to date we have not had any success here. AIER firmly believes that if we are to change culture towards a more co-operative industrial relations environment educating the future workers and employers now will be a key.

Recommendation – The AIER recommends that the Commonwealth Government supports the further development of the resource Workright as an education tool for future Australian employees and workers.

5. International Labour Standards

The AIER is reminded that in some key areas the legislation still falls short of ILO standards. In particular in the areas of:

- Freedom of Association & Collective Bargaining (Conventions 87 & 98 respectively) regarding industrial action & multiple business agreements, pattern bargaining, secondary boycotts and sympathy strikes, and prohibited content. Termination of protected industrial action when causing economic harm. Union right of entry. Restrictions in the building industry. Pattern bargaining.

- Labour Inspectorate (Convention 81) regarding the role and actions of the Fair Work Ombudsmen and the Australian Building and Construction Commission

- Termination of Employment (Convention 158) in relation to qualifying periods for small business employees, valid reasons and redundancy and the application of the Small Business Fair Dismissal Code.

These matters will be dealt with in some detail in the relevant section of this submission.

6. Regulation and rights do not reduce productivity[4]

One of the most important objections to the regulation that provides for workplace rights is the view that such rights impose significant economic costs on the economy in the form of reduced output and employment and a negative impact on productivity.

Evidence does not support the contention that rights are costly. Most of the evidence suggests that granting workers' rights causes no loss of output or employment, while also supporting a beneficial relation

[4] Much of this section is a summary of Kreisler (P) and Neville (S) 2007 Economic Perspectives on Workers Rights in the *Australian Charter of Employment Rights* (2007) Hardie Grant Books Melbourne.

between legislation providing for security of employment (Employment Protection Legislation, or EPL) and the distribution of income and equity.[5]

Modern policy is often guided by neo-liberal (economic rationalist) ideology. With respect to the labour market, it is argued that a deregulated labour market, with no employment protection, will allow the forces of supply and demand to establish a price (wage) and conditions which will ensure that all labour that is available to work at that wage can do so.

According to this view, markets, when left alone, will achieve optimal outcomes, and so institutions, representative of this ideology, such as the World Bank and the International Monetary Fund (IMF) have pushed for labour market deregulation and increased flexibility of employment conditions and time. In other words, they argue that deregulated markets can guarantee full employment under conditions that assume competitive market conditions. A consequence of this is that regulated markets with minimum wages and employment protection interfere with the market mechanism, and so will impose costs on the economy, either in terms of job losses or in terms of higher prices. The theory behind this result is derived from neoclassical analysis and relies on markets fulfilling certain conditions, including both perfect competition and perfect information. Perfect competition implies that all agents in the market, especially firms and employees, are so small relative to the size of the market that they cannot exert any market power. This means that they have no influence over wage outcomes, so that they are all price takers. Moreover, the information requirements of the analysis demand perfect knowledge not only of all current activity but also of the future. No reputable economist believes that the conditions for perfect competition exist in any actual economy, but many neoclassical economists consider that departures from perfect competition are not important enough to invalidate the use of the model as a tool for analysing aggregate employment and unemployment.

The limitations of neoclassical theory as a guide to policy are well known in the literature and are particularly well articulated by Joseph Stiglitz, a former senior vice president and chief economist of the World Bank and Nobel Laureate in Economics.[6] Labour market analysis is widely recognised as an area where the use of neoclassical theory is likely to cause analytical problems. By reference to economic theory, there is no credible prima facie case against intervention in labour markets to set minimum employment conditions.

Initially, the OECD unambiguously opposed Employment Protection Legislation ("EPL"), arguing that labour market deregulation was a necessary condition for growth and full employment. However, after strong theoretical and empirical criticism, it has recently reversed its position. In 2004 the OECD Employment Outlook stated that:

> *The net impact of EPL on aggregate unemployment is therefore ambiguous a priori, and can only be resolved by empirical investigation. However, the numerous empirical studies of this issue lead to conflicting results, and moreover their robustness has been questioned…The impact of EPL on overall employment and unemployment rates is ambiguous … Overall, theoretical analysis does not provide clear-cut answers as to the effect of employment protection on overall unemployment and employment … no clear association can be detected between EPL and unemployment rates.*[7]

As summarised by economist Richard Freeman:

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5 Kreisler P & Neville J (2007) *Economic Perspectives on Worker's Rights,* The Australian Charter of Employment Rights, Hardie Grant Books, Melbourne pp 127 – 144.

6 Stiglitz, J, Whither Socialism?, MIT Press, Cambridge Mass., 1996.

7 Organization for Economic Cooperation and Development (OECD), OECD Employment Outlook, OECD Paris, 2004, pp. 63 & 80

> "*Studies of minimum wages … of employment protection legislation … and of diverse other social protection programs … find little or no impact of these institutional intervention on economic efficiency".*[8]

Lack of labour market flexibility as the major cause of unemployment in Europe was the new orthodoxy of the 1990s, especially among the OECD and neo-liberal economists. However, the empirical studies supporting this orthodoxy have been shown to be so flawed that even the OECD, as an institution, was forced to back down. Again Freeman summarises very succinctly what happened:

> *"The OECD Jobs Study came down strongly in favour of deregulation and active labour market policies, but succeeding analyses by the OECD have highlighted the weakness of that case. Countries with very different regulatory practices and policies have surprisingly similar outcomes."*[9]

There is now strong agreement that deregulation of labour markets and the increased labour market flexibility that ensues are not associated to any significant extent with increased levels of employment or falling unemployment. However, they are associated with a deterioration in the distribution of income. In Freeman's words:

> *"The bottom line is that employment protection legislation alters the distribution of work but not its volume."*[10]

The OECD itself has commented:

> *High union density and bargaining coverage, and the centralisation/co-ordination of wage bargaining tend to go hand-in-hand with lower overall wage inequality. There is also some, albeit weaker, evidence that these facets of collective bargaining are positively associated with the relative wages of youths, older workers and women. On the other hand, the chapter does not find much evidence that employment of these groups is adversely affected.*
>
> *No robust associations are evident between the indicators of wage bargaining developed in this chapter and either the growth rate of aggregate real wages or non-wage outcomes, including unemployment rates.*[11]

Another argument against regulation for rights for workers is the "conventional wisdom" that predicts that lower labour standards will be more attractive for foreign direct investment (FDI), which will increase domestic employment and output in the longer term. Some argue that, by increasing the cost of employing labour, workers' rights make countries less competitive and therefore less attractive to foreign investors. This view has been criticised on the basis that employment rights may increase the productivity of workers through their impact on education, skills acquisition and firm loyalty, as well as being associated with higher economic growth. There is no credible empirical evidence to support the "conventional wisdom". In fact, the empirical evidence "suggest[s] that FDI tends to be greater in countries with stronger worker rights".[12]

In short, providing rights for workers do not seem to have any significant negative impact on employment or efficiency, but they do have a significant (positive) impact on equality and the distribution of income.

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8 Freeman, R, (2000) "Single peaked vs. diversified capitalism: the relation between economic institutions and outcomes", National Bureau of Economic Research Working Paper 7556, 2000, p. 18 http://www.nber.org/papers/w7556.

9 op. cit., p. 22

10 ibid.

11 op. cit. p.130

12 Kucera, D, "Core labour standards and foreign direct investment", International Labour Review, vol. 141, nos 1–2, 2002, p. 34.

As suggested above, the evidence overwhelmingly supports the view that greater flexibility in labour markets, especially that which occurs by reducing the power of trade unions, increases earnings inequality. Again the OECD itself has pointed this out:

> *[Our] analysis confirms one robust relationship between the organisation of collective bargaining and labour market outcomes, namely, that overall earnings dispersion tends to fall as union density and bargaining coverage and centralisation/co-ordination increase. It follows that equity effects need to be considered carefully when assessing policy guidelines related towage-setting institutions.*[13]

Income inequality and other undesirable social effects that may flow from increased flexibility may reduce productivity. This is particularly the case as empirical evidence suggests that workers care about social justice and that their incentive to work is influenced by their perception of how they are being treated. More generally, casualisation is likely to reduce the commitment of workers to firms and hence reduce productivity. This may have serious effects on international competitiveness, so "it is likely that [freedom of] association rights would increase output and competitiveness by raising productivity".[14]

There is a large body of evidence supporting the association between stronger workers' rights and higher economic growth as well as improved distribution of income. There are many reasons for this, including improved possibilities for the development of human capital, reductions in industrial unrest, improved firm loyalty and reduced labour turnover.

The provision of reasonable protections to workers, such as those contained in the Charter, is unlikely to impose costs on the economy in the form of reduced employment, output or efficiency. Neither the theoretical nor the empirical evidence supports the case for any loss in output, efficiency or employment resulting from these rights. In fact, there is significant evidence suggesting that the reverse may be true. It is reasonable to suppose, and the empirical evidence confirms, that workers "care" about just conditions and equity, and they react adversely to perceived unfairness and inequality. In addition, there is evidence of a link between better employment rights and improving economic performance through improvements in labour productivity associated with better education and skill acquisition– and in increased foreign direct investment, among other factors.

In a recently published work, *The Precariat : The New Dangerous Class*[15] Professor Guy Standing has analysed a phenomenon that he describes as the emergence of a "precariat". There is sufficient substance and cogency in Standing's analysis to warrant it being drawn to the attention of this Review. Our purpose is not to endorse the specifics of Professor Standing's reasoning or contentions; rather it is to demonstrate that there is abundant evidential material supportive of a view that now is not the time to tie the hands of Australian regulatory institutions and associated representative institutions from dealing with issues about job security and employment security that go to the very heart of fairness in the workplace.

7. Investing in workplace culture a better focus for improving productivity

A person's work and their experiences at work are essential to their wellbeing. Most Australians spend majority of their adult life in the workplace, indicating the centrality of work to their existence. As recognised by Professor Ron McCallum AO, "the performance of paid work, whether as employees,

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[13] op. cit., p. 166.

[14] Martin, W, and Maskus, K, "Core Labor Standards and Competitiveness: Implications for Global Trade Policy", Review of International Economics 9 (2), 2001, p. 317

[15] Bloomsbury Academic 2011 ISBN 978 -1–84966-351-9

consultants or contractors, gives us fulfillment, a broad social network, and remuneration to support ourselves and our families".[16]

Poor workplace culture can have a devastating impact on the physical and mental health of working people. There is significant empirical data to suggest that poor management practices, and-sub-optimal workplace cultures can trigger and lead to the development of physical and mental health problems.[17]

The causal relationship between workplace culture and preventative health is an issue of increasing prominence.[18] There is a growing level of sophistication in our understanding of the dynamics of work environments at a psychosocial level and the potential for chronically adverse psychosocial work environments to impact on the mental and physical wellbeing of employees. At the same time, there is a growing recognition of the effectiveness of preventative, as opposed to reactive, health measures in reducing the harm caused by known health risks.

Numerous studies correlate poor workplace culture and higher rates of cardiovascular disease.[19] This is primarily because poor workplace culture manifests itself in high workplace stress levels.

As our understanding of mental health increases, there is a growing body of compelling evidence to suggest that mental health is directly affected by workplace culture.[20] Workers' compensation claims for mental health problems have more than doubled in the past ten years. While the number of overall workers' compensation claims in Australia decreased by 13% between 1996–7 and 2003–4, workers compensation claims categorised as "Mental Stress" increased by 83% from 4585 in 1996–7 to 8410 in 2003–4.[21] In 2005–6, this increased to 8665 claims.[22] Of these, the overwhelming majority were work-related. 41.1% of claims related to "Work Pressure", 21.5% to "Harassment" and 16.1% to "Exposure to Workplace or Occupational Violence".[23]

Poor work organisation has also been found to increase the incidence of mental illness. Marchand, Demers and Durand reported the results of research into the contribution of occupational and work organisation on psychological distress in the workforce based on a model which also took into account the person's personality, structures of daily life and macro-social structures.[24] The research indicated that pathogenic

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16 R McCallum (2005) "Justice at Work: Industrial Citizenship and the Corporatisation of Australian Labour Law", The Thirteenth Annual Kingsley Laffer Memorial Lecture, University of Sydney.

17 Anthony D. LaMontagne et al (2006) "Workplace Stress in Victoria: Developing a Systems Approach", report to the Victoria Health Promotion Foundation. Chapter One of this report provides an excellent overview of the research in this area.

18 For example, see Rob Moodie & Rachel Jenkins, (2005) "I'm from the government and you want me to invest in mental health promotion. Well why should I?" *Promotion and Education,* 12:37.

19 Schnall PL, Belkic K, Landsbergis P, Baker D, "The workplace and cardiovascular disease", *State of the Art Reviews: Occupational Medicine,* 2000, 15(10, 1-224; Peter R, Siegrist J, "Psychosocial work environment and the risk of coronary heart disease", *International Archives o Occupational and Environmental Health,* 2000, 73 Suppl, S41-5; Belkic K, Landsbergis P, Schnall P, Baker D, "Is job strain a major source of cardiovascular disease risk?" *Scan J Work Environ Health,* 2004, 30(2), 85-128.

20 See Rob Moodie & Rachel Jenkins, (2005) "I'm from the government and you want me to invest in mental health promotion. Well why should I?" *Promotion and Education,* 12:37.

21 Australian Safety and Compensation Council (2007), *Compendium of Workers' Compensation Statistics Australia 2004–5*, <http://www.ascc.gov.au/NR/rdonlyres/E0C9B5C7-9C4E-45A6-A733-475E90F2DA25/0/Completeversion_WorkCompStats0405.pdf>, p. 72.

22 Australian Safety and Compensation Council (2008), Compendium of Workers' Compensation Statistics Australia 2005–6, <http://www.ascc.gov.au/NR/rdonlyres/656E6571-D7B3-4DD6-846B 78C161CA0F4D/0/Compendium_of_Workers_Compensation_Statistics_200506_Full_version.pdf>, p. 33.

23 N2 above, p. 72

24 "Does work really cause distress? The contribution of occupational structure and work organizations to the experience of psychological distress." Alain Marchand, Andree Demers and Pierre Durand Social Sciences and Medicine Volume 61 Issue 1 July 2005 Pages 1-4

work organisation conditions contributed independently of the other factors to the experience of psychological distress.

It is disappointing that studies show that Australian workplace culture is falling behind international benchmarks.

The AIER has documented the breadth of evidence that demonstrates the causal link between poor workplace culture, poor treatment at work, job insecurity and work life balance stress in its submission *Preventative Health and Workplace Culture (2009).* This submission is available at www.aierights.com.au/resources/submission and is made available to the Review Panel.

Recommendation - AIER submits that aspects of workplace culture and management have a significant impact on the health and well-being of workers and therefore their productivity. As a matter of sound public policy more attention should be spent on initiatives to promote adoption of more appropriate cultural and management practices and better work organisation.

Safety Net

Charter Right 8 of the Australian Charter of Employment Rights states that:

> 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.

AIER notes that the legislation has made a number of improvements in the area of identifying and protecting fair minimum standards however we have a number of suggestions about how this system of establishing and enforcing minimum standards could be improved.

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 readily 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
- where the power position of one party cannot be used to undermine the system of regulation and the attainment of fair minimum standards.

The current legislation falls short of our definition of the fair and minimum standards and machinery essential to ensure fairness across the labour market because:

- not every worker has entitlements under the NES, because "employees" covered does not include workers engaged under disguised employment arrangements
- parts of the NES standards do not create enforceable entitlements
- then NES minimum standards are not maintained by an impartial tribunal independent of government.
- 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
- there is limited capacity of a party to enforce the mandated entitlements. With no role for the tribunal here.

1. Coverage of the NES - Defining who is covered

Not every worker has entitlements under the NES.

Whether a worker is an employee governs the provision of a range of social, economic and industrial benefits. Employers and employees cannot ordinarily contract out of those benefits. The contract of employment cannot derogate from the terms and conditions of an industrial instrument which operates with statutory force.[25] The parties cannot contract out of NES entitlements or entitlements in industrial instruments.[26] An estoppel cannot be relied on to defeat an entitlement of an employee to an entitlement

[25] *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 (reversed on other grounds (1940) 62 CLR 451), *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 at 421; 131 ALR 422 at 427 and *Visscher v Guidice* (2009) 239 CLR 361; 258 ALR 651 at [71].

[26] Josephson v Walker (1914) 18 CLR 691 at 700-1, Byrne v Australian Airlines Ltd (1995) 185 CLR 410 at 421; 131 ALR 422 at 427, Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd (2002) 121 IR 250; [2002] FCA 1406 at [23] to [33], O'Shea v

stipulated in an industrial instrument or the Act.[27] This is because those rights are conferred as a matter of public policy and an estoppel cannot arise when it is inconsistent with a statutory purpose.[28] Similar public policy considerations apply when the employer seeks to 'opt out' of those benefits by simply entering a contract whereby a worker states he or she is not an employee. The significance afforded to express terms should depend in part on whether the issue arises as a matter only of private concern or also has a public element.[29]Whether or not the worker desires to be an independent contractor, and whether or not that desire is well informed, should not be determinative, just as a well-informed desire to work for less than the wages set in a modern award is not a sufficient reason to avoid the benefits of the Fair Work Act.

2. Guiding principles for determining who the Act should cover

AIER submits that the principles that should guide the Committee in review of the application of the Act in this area are as follows:

- The Fair Work Act is a socially beneficial law, like anti-discrimination laws, landlord and tenant laws and laws governing enfranchisement.
- Socially beneficial laws are part of the social contract amongst Australians.
- The Fair Work Act not only benefits employees and employers, but benefits the broader community by setting decent standards that are given to those who perform work. It promotes social inclusion.
- Citizens should not be given the option of choosing whether socially beneficial legislation applies to them. Australian cannot opt out of anti-discrimination laws, or laws designed to protect tenants, or laws granting the right to vote.[30] Nor should they be permitted to opt out of the Fair Work Act.
- The parties should not be able to avoid the protections afforded by the Act by choosing to categorise their relationship as one that is not of employment.
- The weight to be given to express labeling by the parties is a worldwide problem and, as a general proposition, the arc of international authority bends towards preferring substance over form.[31]

Heinemann Electric Pty Ltd (2008) 172 FCR 475; (2008) 178 IR 394 at [42], Kidd v Savage River Mines (1984) 6 FCR 398 at 409-410, 9 IR 362 at 370-2, Walsh v Commercial Travellers' Association of Victoria [1940] VLR 259 at 262-263 and 268-269 and Amcor Ltd v Construction, Forestry, Mining and Energy Union [2003] FCAFC 57 at [34] and on appeal in (2005) 222 CLR 241; 214 ALR 56; 138 IR 286 at [144].

[27] Metropolitan Health Service Board v Australian Nursing Federation (2000) 99 FCR 95; 176 ALR 46; 98 IR 390 at [20]-[21], Kidd v Savage River Mines (1984) 6 FCR 398 at 409, 9 IR 362 at 370-1Jackson v Monadelphous Engineering Associates Pty Ltd[1997] IRCA 281, Ace Insurance Ltd v Trifunovski [2011] FCA 1204 at [135]-[143], Walsh v Commercial Travellers Association of Victoria [1940] VLR 259at 263 and Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd (2002) 121 IR 250 at [26]-[32]: see also Part 2-1 of the Fair Work Act.

[28] Metropolitan Health Service Board v Australian Nursing Federation (2000) 99 FCR 95; 176 ALR 46; 98 IR 390 at [21] and Ace Insurance Ltd v Trifunovski [2011] FCA 1204 at [135]-[143].

[29] R v Allan; ex parte AMP Society (1977) 16 SASR 237 at 247, endorsed by a Full Court of the Federal Court in Rowe v Capital Territory Health Commission (1982) 2 IR 27 at 28: see also On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) (2011) 279 ALR 341 at [194]-[197] at [200], A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 AJLL 235 at 268.

[30] In the context of attempts to avoid the statutory protections in various other settings, see Street v Mountford [1985] AC 809; [1985] 2 All ER 289 at 299, AG Securities v Vaughan [1990] 1 AC 417; [1988] 3 All ER 1058 at 1067–8, S Bright, 'Beyond Sham and into Pretence' (1991) 11 Oxford Journal of Legal Studies 136 at 140-1, W Gummow, 'Form or Substance?' (2008) 30 Australian Bar Review 229.

[31] See International Labour Conference, '*The Employment Relationship*', Report V (1) to the International Labour Conference 95th Session 2006, at [26] and [96]-[102], A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford University Press, Oxford, 2001 at 219 and *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 279 ALR 341 at [194]-[197].

The AIER has documented the extent of growth in contract and other forms of insecure work within its submission to the Independent Inquiry into Insecure Work (2012). This submission is available at www.insecurework.org.au or www.aierights.com.au /resources/submissions and is available to the Review Panel.

There is a long history in employment law of searching for the single criterion, or the pithy statement, that can be applied in all situations to determine if the relationship is one of employment.[32] At various times courts have stated the issue to be whether the manner of the performance of the contract was subject to the control of the employer;[33] or whether a contract was to produce a given result as opposed to being for the supply of the worker's labour;[34] or whether the worker was part and parcel of the employer's organisation or whether the worker is carrying on a business on his or her own account.

An approach that defines employment by reference to only one, or a series of factors, will always be incomplete.

One of the more difficult issues in employment law is the weight that should be given to clauses that clearly state that the relationship is not one of employment when those terms are otherwise discordant with the reality of the relationship and the parties' practice. A conceptually analogous issue concerns the effect of an express term classifying the relationship as a partnership[35] or permitting the employee to delegate the performance of work to another.[36]

3. Sham arrangements under the Fair Work Act

Division 6 of Part 3-1 of the Fair Work Act, titled 'Sham Arrangements' contains provisions that appear to be aimed at the proper characterisation of the relationship by the employer and, indirectly, the encouragement of employment as a mode of engagement.

Section 357 prohibits an employer from representing to an employee that the parties' contract is a contract for services. This prohibition does not apply if the employer, when it made the representation, did not know that and was not reckless as to whether the contract was a contract of employment: subsection 357(2).[37]

Section 358 prohibits an employer from dismissing, or threatening to dismiss, an employee in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

Section 359 prohibits an employer from making a statement that the employer knows is false in order to persuade or influence the employee to enter into a contract for services under which the individual will perform, as an independent contractor, the same or substantially the same work for the employer. Sections

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32 See the discussion in *Re Porter* (1989) 34 IR 179 at 182-4 and A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *AJLL* 235 at 272. In the United Kingdom courts tend to use a test originally formulated by Justice MacKenna in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515; 1 All ER 433 at 439-40, most recently endorsed in *Autocleanz Ltd v Belcher* [2011] UKSC 41 at [18].

33 *Federal Commissioner of Taxation v J. Walter Thompson (Australia) Pty Ltd*(1944) 69 CLR 227 at 221, *Attorney-General (NSW) v The Perpetual Trustee Company (Ltd)* (1952) 85 CLR 237 at 299-300.

34 *Barro Group Pty Ltd v Fraser* [1985] VR 577 at 581–2, *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404, *Wright v Attorney-General for the State of Tasmania* (1954) 94 CLR 409 at 413, 414 and 418, *Price v Grant Industries Pty Ltd* (1978) 21 ALR 388 at 393, *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762 at 767-8, *Queensland Stations Pty Ltd v The Federal Commissioner of Taxation* (1945) 70 CLR 539 at 545 and 548 and *Konrad v Victoria Police* (1999) 91 FCR 95; 165 ALR 23 at [104].

35 *Cam and Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 at 163 and *Protectacoat Firthglow Ltd v Szilagyi* [2009] ICR 835.

36 *Autocleanz Ltd v Belcher* [2011] UKSC 41 *and Consistent Group Ltd v Kalwak* [2007] IRLR 560.

37 What is meant by reckless in a civil law context is unclear: see *CFMEU v Nubrick Pty Ltd* (2009) 190 IR 175 at [13]-[21].

357 to 359 are penalty provisions whose contravention attracts a penalty of up to $33,000 for a corporate employer. It is probable that the reverse onus of proof provision in section 361 of the Act applies to sections 358 and 359.[38]

These provisions are insufficient. The term stating the contract is not one of employment and providing a theoretical right to delegate or assign will not contravene these provisions.

4. Shams under the common law

A sham is a term or agreement that takes the form of a legally effective transaction but which the parties intend should not have its apparent legal consequences.[39] A sham has been described as:

> *'a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.'*[40]

A sham involves a common intention to mislead: 'an objective of deliberate deception of third parties'.[41] Or, as it was recently explained in the High Court, a term is a sham when it is not intended by the parties 'to have substantive, as opposed to apparent, legal effect.'[42] No regard should be paid to the term if it is a sham.[43]

However a sham is almost impossible to prove. It involves a common intention to mislead to deceive a third parties. When a labelling term categorises the relationship it is often not the principal's intention to mislead. Rather, it is a reflection of a genuine desire to avoid the operation of the Fair Work Act. The law governing shams sets the bar too high.

5. Inaccurate labelling of the relationship

A term in an agreement can be taken at other than its face value when the language of the document indicates that it falls into one legal category whereas when properly analysed in the light of the surrounding circumstances it can be seen to fall into another.[44] Where the relationship is clearly one of employment, a labelling term cannot alter the truth or substance of the relationship; but an agreed label can resolve an ambiguity:

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38 See also House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements*, Commonwealth, Canberra, 2005, [5.126]–[5.148] and *ACE Insurance Ltd v Trifunovski* [2011] FCA 1204 at [126]-[131] (court rejected the claim that an express term categorising the relationship was a representation that was misleading or deceptive).

39 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*(2004) 218 CLR 471; 211 ALR 101 at [46] and*Golden Plains Fodder Australia Pty Ltd v Millard* (2007) 99 SASR 461; [2007] SASC 391 at [24]-[31].

40 *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 82 ALR 530 at 537; 18 FCR 449 at 454 per Lockhart J referred to approvingly in *Raftland Pty Ltd v Commissioner of Taxation* (2008) 238 CLR 516; 246 ALR 406 at [35] and [112]: see also *Scott v Federal Commissioner of Taxation* (1966) 40 ALJR 265 at 279.

41 *Raftland*, op cit fn 40 at [33], [35], [112] and [148], *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, *Hadjiloucas v Crean* [1987] 3 All ER 1008 at 1019; 1 WLR 1006 at 1019, A Davies, op cit fn 61 at 318: see also Richtsteiger v Century Geophysical Corporation (No 3) (1996) 70 IR 236 at 238-9, *Blake v Sitefate Pty Limited* (1997) 74 IR 466 at 469-70 and *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* [2011] FCA 1176 at [111]-[116].

42 *Raftland*, op cit fn 40 at [58].

43 *Cam and Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 and *Scott v Federal Commissioner of Taxation* (1966) 40 ALJR 265 at 279.

44 *Hadjiloucas v Crean* [1987] 3 All ER 1008 at 1019 ; [1988] 1 WLR 1006 at 1019, *Raftland* , op cit fn 40 at [33], *Hollis v Vabu* (2001) 207 CLR 21; 181 ALR 263; 106 IR 80 at [58], *Damevski v Giudice* (2003) 133 FCR 438; 202 ALR 494; 129 IR 53 at [144], *Re Porter* (1989) 34 IR 179 at 184, *Ace Insurance Ltd v Trifunovski* [2011] FCA 1204 at [114]-: see also *Curtis v Perth and Fremantle Bottle Exchange Co Ltd* (1914) 18 CLR 17 at 25-6 (contract for hire or sale).

'*such a stipulation is not conclusive of the position it postulates; the parties cannot by their agreement change the nature of their relationship. Where, however, the nature of the relationship is otherwise ambiguous such a provision may remove the ambiguity*.'[45]

This approach is useful only in the clearest of cases. A labelling term is unambiguous. Employment contracts containing labelling terms are often not sufficiently ambiguous to allow recourse to the proposition that the label is inaccurate. For example, employment contracts rarely expressly grant the right to control. They often define the work to be performed (which is consistent with the contract being one of employment or an independent contract), state the rate of pay (which is consistent with the contract being one of employment or an independent contract) and define the benefits to be provided (which is consistent with the contract being one of employment or an independent contract). When looking at the terms of the contract alone and not the practice of the parties, a labelling term will often be influential.

6. Reality of the relationship and the parole evidence rule

Appellate courts in Australia and the United Kingdom have repeatedly stated that in determining if a relationship is one of employment it is important to consider the practical reality of the relationship.[46] This in part reflects the proposition that courts can find the terms are a sham or inaccurately label the relationship, but such findings are not the only basis on which a court will refrain from giving unqualified effect to a written term.[47] Courts often state that they look to the substance and not the form of the relationship.[48]

Where there is a conflict between the agreement as a whole and one particular term of the contract, it is permissible to remedy the contradiction by treating the particular term as having failed in its purpose.[49]

But the ability of courts to have regard to the practical reality of the relationship, or the totality of the relationship, is limited by the parole evidence rule.

As the High Court has recently emphasised, evidence of matters extrinsic to the text of the written contract are not admissible unless the text is ambiguous or susceptible of more than one meaning.[50] A contract that contains a labelling clause will often be unambiguous. It will prevent evidence being led about the practice of the parties. Of course there will be occasions when the written contract is not the sole repository of the agreement. In such cases the practice of the parties may be admissible to prove those other terms and the relationship between the parties. For example in *Hollis v Vabu* the written terms did not address fundamental issues such as the remuneration of the workers:

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[45] *ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 232 ALR 69; 153 IR 228 at [32] per Wilcox, Conti and Stone JJ, *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 389-90, *Cam and Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 and *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31; [2004] WASCA 312 at [40].

[46] *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd*(1952) 85 CLR 138 at 151 and 155,*ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 232 ALR 69; (2006) 153 IR 228 at [25] and [31], *Hollis v Vabu*(2001) 207 CLR 21; 181 ALR 263; 106 IR 80 at [47] and [57], *Dalgety Farmers Ltd v Bruce* (1995) 12 NSWCCR 36 at 47.

[47] *Autocleanz Ltd v Belcher* [2011] UKSC 41 at [23], [28] and *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 at 601 and 606.

[48] *Cam and Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 at 163, *Damevski v Giudice* (2003) 133 FCR 438; 202 ALR 494; 129 IR 53 at [172], *Consistent Group Ltd v Kalwak* [2007] IRLR 560 at [57]-[59] per Elias J, approved in *Autocleanz Ltd v Belcher* [2011] UKSC 41 at [25] and [29] and *Tobiassen v Reilly* (2009) 178 IR 213; [2009] WASCA 26 at [100].

[49] *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 at 606, *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 390, *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 at [34] (3), *Staff Aid Services v Bianchi* (2004) 133 IR 29 at [29], *Transport Workers Union of Australia v Glynburn Contractors (Salisbury) Pty Ltd* (1990) 34 IR 138at 143-4: see also *Protective Security Pty Ltd v Bedelph*(2004) 13 Tas R 354at [35] and [38].

[50] *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 at [4]-[5] and *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352; 41 ALR 367 at 374-5.

> '*It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered.'*[51]

The practice of the parties is more reflective of the nature of the agreement between the parties than a labeling term.

7. The UK approach: ascertaining the true agreement

In recent years courts in the United Kingdom have considerably lessened the significance of labelling terms by focussing on what they have called the true agreement between the parties. The argument runs: one purpose of examining the reality of the relationship is to ascertain the true agreement of the parties.[52] And to ascertain what was truly agreed, courts can look to the intentions and expectations of the parties as well as the written terms:

> *'if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.… Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…'*[53]

The fact that a right has not been exercised by the parties does not mean that the right does not exist.[54] The inquiry to ascertain the true agreement does not merely focus on the written terms at the inception of the contract. It is necessary to consider admissible evidence about the practice of the parties to reveal their intentions and expectations:

> 'The court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them….where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties.'[55]

This approach appears to be a development of the somewhat uncertain notion that a term in an agreement can be taken at other than its face value when it is a pretence. A pretence appears to be a non-fraudulent

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[51] *Hollis v Vabu* (2001) 207 CLR 21; 181 ALR 263; 106 IR 80 at [24], quoting *Stevens v Brodribb*, op cit fn at 29 (CLR) and 521 (ALR) where there was no written contract: see also *Neufeld v Secretary of State for Business, Enterprise & Regulatory Reform* [2009] 3 All ER 790 at [85].

[52] *Autocleanz Ltd v Belcher* [2011] UKSC 41 at [29], and [32] and *Autocleanz Ltd v Belcher* [2010] IRLR 70 at [92]-[94].

[53] *Consistent Group Ltd v Kalwak* [2007] IRLR 560 at [57]-[59] per Elias J, approved in *Autocleanz Ltd v Belcher* [2011] UKSC 41 at [25]-[35] and *Protectacoat Firthglow Ltd v Szilagyi* [2009] ICR 835 at [52]-[57], A Davies, op cit fn 61.

[54] *Protectacoat Firthglow Ltd v Szilagyi* [2009] ICR 835 at [55], *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 at 697, both referred to approvingly in *Autocleanz Ltd v Belcher* [2011] UKSC 41 at [19] and [32].

[55] *Autocleanz Ltd v Belcher* [2010] IRLR 70 at [52]-[54] approved in *Autocleanz Ltd v Belcher* [2011] UKSC 41 at [29]-[31]

'less pejorative' type of sham[56] where the term is 'not a genuine statement of the parties' intention'.[57] Some cases in the UK have adopted the view that a term may be a pretence when it has been inserted for the ulterior purpose of avoiding a benefit granted by a statute.[58]

There is much merit in this approach. However in Australia it has not been adopted in employment law. There is a real uncertainty about the validity of the proposition that effect should be given to the expectations of parties.

8. The proposed solution I: paying no regard to certain terms

Express labeling terms are often a reflection of the employer's disproportionate bargaining power. The law recognises this power by imposing the requirement of genuine consent in various contexts: see, for example, section 184 (4) (b), 186 (2), 188, 203 (3) of the Act. The existence of this disproportionate power is the sine qua non of the Fair Work Act. A term categorising the relationship, to be operative and effective, must remove rights from the worker. Principals should not have the right to gain the benefit of an exercise of its disproportionate bargaining power to avoid socially beneficial laws.

Recommendation - For these reasons it is submitted that the meaning of employee should be amended to provide that:

> ***When determining who is an employee under the Act courts and tribunals should not take into account express terms of the contract that categorise the relationship.***

The same approach should apply to terms that govern the substitution of parties, delegation of the performance of work or assignment of the contract. Currently the approach of the law is that an unlimited right of a worker to delegate the performance of the contract to another is a significant indicator that the contract is not an employment contract.[59] It is true that the law pays less regard to such a term when the power to delegate is rarely exercised, or only exercised pursuant to the permission of the employer, or exercised in relation to minor and incidental aspects of the employment,[60] or is a sham, or (in the United Kingdom) does not reflect the realistic expectations of the parties about the delegation of the work.[61] The law should not limit the consideration of the parties' practice to cases in which there is a sham, or pretence, or an ambiguity or where the written terms are incomplete.

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56 *Raftland,* op cit fn 40 at [36] and [47]: cf Kirby J's criticism at [138]. See generally S Bright, 'Beyond Sham and into Pretence' (1991) 11 *Oxford Journal of Legal Studies* 136 at 140-1, A Davies, op cit fn 61.

57 *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 390 and *Narich Pty Ltd v Commissioner of Pay-roll Tax* (NSW) [1983] 2 NSWLR 597 at 601.

58 *Street v Mountford* [1985] AC 809; [1985] 2 All ER 289; *AG Securities v Vaughan* [1990] 1 AC 417; [1988] 3 All ER 1058 at 1067–8 and *Clark v Clark Construction Initiatives Ltd* [2008] ICR 635 at [92].

59 *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240; [2005] NSWCA 96 at [57]-[64], *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 391, *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* (2005) 222 ALR 599 at [192] and [206], *Stevens v Brodribb*, op cit fn **Error! Bookmark not defined.**at 26 per Mason J ('an important factor') and at 38-9 (CLR); 519 and 528 (ALR), *Allen v Clarence Senior Citizens Centre* (1996) 65 IR 164 at 169-71, *Queensland Stations Pty Ltd v The Federal Commissioner of Taxation* (1945) 70 CLR 539 at 548 and 550, *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd*(1952) 85 CLR 138 at 151, *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 at 697 and 699, *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 428 and *Blake v Sitefate Pty Limited* (1997) 74 IR 466 at 468-9.

60 *Vacik Distributors Pty Ltd v Kelly* (1995) 12 NSWCCR 30, *Jennings Industries Ltd v Negri* (1982) 44 ACTR 9 at 15 (occasional engagement of young son, nephew and others aberrations), *Barone v Olympic Industries Pty Ltd* (1984) 8 IR 439 at 442, *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 2 QB 497 at 515; 1 All ER 433 at 439-40 and *James v Redcats (Brands) Ltd* [2007] IRLR 296 at [27]-[28].

61 *Autocleanz Ltd v Belcher* [2011] UKSC 41 at [27]-[35] *Protectacoat Firthglow Ltd v Szilagyi* [2009] ICR 835 at [52]-[57] and *Consistent Group Ltd v Kalwak* [2007] IRLR 560 at [57]-[59].

Recommendation -For these reasons it is submitted that the meaning of employee should be amended to provide that:

> ***When determining who is an employee under the Act courts and tribunals should not take into account express terms of the contract that govern the substitution of parties, delegation of the performance of work or assignment of the contract.***

9. The proposed solution II: paying regard to the parties' practice

The second proposed solution is aimed at circumventing the operation of the parole evidence rule so far as it applies to determining the nature of the relationship between the parties. As discussed above, evidence of the practice of the parties is not presently admissible to prove the nature of the relationship when the written terms are the sole repository of the agreement. This exclusionary effect may prevent evidence being led of the control exercised by the employer during the course of the relationship. It is a triumph of form over substance.

As noted above, express terms are often a reflection of the employer's disproportionate bargaining power. When a worker is subject to the control that is emblematic of employment then evidence should always be able to be led to prove the true nature of the relationship. This is particularly so when statutes, such as the Fair Work Act, are intended to have a socially beneficial operation.

Recommendation - For these reasons it is submitted that the meaning of employee should be amended to provide that:

> ***When determining who is an employee under the Act courts and tribunals should take into account the practice of the parties after the formation of the contract.***

In the longer term the AIER recommends a recasting of legislation such that it presumes an employment relationship for all workers and allows for access to the tribunal to resolve issues in dispute where the nature of the relationship (employee or contractor) is subject to dispute.

The AIER would like to draw the attention of the Review Panel to the many submissions that have formed part of the Independent Inquiry into Insecure Work available at www.securejobs.org.au that document in evidential format the many and variety of ways that workers are being engaged to ensure labour rights are being avoided including

- The use of labour hire and outsourcing in the public sector (CPSU)
- Inexorable use of term contracts and short term placements in education sector (NTEU and AEU)
- The use of labour hire, subsidiary entities outsourcing and the engagement of labour off-shore in the aviation industry (TWU)
- Avoidance of labour rights through insecurity in the construction and mining industries (CFMEU)

10. Casuals

AIER submits that the gap in access to fair minimum standards for workers other than those engaged in standard employment relationships (SERs) represents a form of discrimination against those who are non SER workers. To the extent that a purpose of labour law and regulation is to provide protection particularly to those most vulnerable in the workforce this objective is not being met for non SER workers.[62]

It is widely recognised that Australia's experience of casual work is unique when compared to other liberal

[62] Tham J-G (2007) '*Towards an Understanding of Standard Employment Relationships under Australian Labour Law* 20 AJLL pp 123-158.

democracies. Campbell points out that the Australian distinctiveness includes

> *"not only the size of the casual workforce (both regular and irregular) and the trajectory of growth over the past two decades but also the size of the shortfall in rights and benefits that divides casual and permanent employment and the way in which casualisation is facilitated by the distinctive system of labour regulation in Australia."*[63]

To understand precarious or contingent work we need to understand the limitations of SERs. Historically in Australia the permanent full-time worker was the pivot around which benefits were defined and in fact around which trade unions and social policy activists agitated for industrial and social reform. The emphasis within Australia was on the male- breadwinner as the model for defining benefits and rights. A commitment to the SER was a commitment to a mechanism designed to protect employees against economic and social risks, reduce social inequality and increase economy efficiency.[64] However, the definition of the SER (male, full-time, permanent) and the privileged position afforded to those employed in accordance with it was always gendered and ignored form of engagement that sat outside of the model.

Industrial awards were, and remain still, the mechanism by which the experience of SER and non SER workers was/is framed. Canadian academic, Judy Fudge, notes that given that awards until relatively recently failed to regulate part-time work, the growth in women's employment in Australia was via casual engagement. With most part-time work in Australia being casual in nature.[65]

The negative consequences of insecurity arising from precarious or contingent work are disproportionately felt by women. For many women, given the double load of paid work and unpaid work (in the home) that they continue to shoulder "flexibility" has meant accepting the adversity of insecurity.

There is no definition of the term casual in Chapter 1 – Pt 1-2 Div 2 or in Part 2-2 of the National Employment Standards. Clauses in awards and agreements have and continue to be ill conceived. AIER notes that even in the new Modern Awards the definition of casual worker is commonly expressed as bearing no more detail than being "someone engaged as such". It is arguable that under this formulation contained in many Modern Awards any worker could be employed as a casual worker. It certainly provides a great deal of discretion to employers to make a choice free from any particular constraints to choose to engage workers as casuals. A definition of this type does not provide for any guidance to employers or workers as to when the usual of casual labour would or would not be appropriate, therefore inhibiting transparency and understanding at the workplace.

This almost "free choice" for employers is likely to be encouraged by the fact that the gap in entitlements between casual and other forms of engagement is large in Australia. Campbell notes that the "cashing out" of minimum entitlements for casual workers through the use of the casual loading is something that is unique in Australia and that this legal deprivation of so many standard rights and benefits would be seen as an "archaic form of employment inappropriate to a modern society." [66] All workers should be entitled to access minimum conditions on a pro rata basis.

Recommendation - Greater certainty could be achieved if a definition of casual was included within the Fair Work Act and if this definition include concepts of intermittency and irregular engagement that should be at the heart of casual work.

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63 Campbell I (2004) "*Casual Work and Casualisation: How Does Australia Compare?"* Labour & Industry Vol.15 No.2 December 2004 pp85-111 at p.85

64 Fudge J (2006) "*Precarious Employment in Australia and Canada: The Road to Labour Law Reform* 19 AJLL pp 105-126 at pp. 107-114

65 Ibid p.90

66 Ibid p.100

11. Carers

The AIER is concerned that the safety net of entitlements does not extend to all workers who have caring responsibilities outside of those caring for young children or older children with a disability. The Objects of the Act includes "*assisting employees to balance their work and family responsibilities by providing for flexible work arrangements".* It also aimed at promoting social inclusion(s.3).

Recommendation - The NES, upon which a large number of women rely is limited to caring for young children or for children with a disability. The AIER believes that this provision (s.65) should be extended to allow for caring in other circumstances including for elder care and for the ongoing care of dependent children beyond the age of 18.

Further there is no enforceable right enlivened by the provision. The refusal of the employer on "reasonable business grounds" is not subject to any review under this provision or to any penalty if it is found not to have been made on those grounds. Presumably if the employer demonstrates decision making that equates to discrimination under a different provision of the Fair Work Act or under say the Sex Discrimination Act an action could be taken here. This is not a satisfactory remedy.

Recommendation - The AIER believes that there should be a role for the FWA to review decisions and disputes associated with the application of the NES in practice. This would include allowing FWA to deal with matters arising under s.65.

12. Opting out

The extent to which Australia allows for the "opting out" of minimum entitlements through mechanisms such as the no disadvantage test or better off overall test, via the exclusion and qualification on some groups of workers (casuals, fixed term, those of employed by organisations of a particular size and via qualifying periods) and by the use of individual flexibility arrangements is unique and should be reviewed.

Recommendation - AIER submits that Australian labour law needs to be recast so that every worker has access to a suite of minimum entitlements/rights on a pro rata basis.

There should be no ability to contract out of these including via the bargaining process. This also means that mechanisms to qualify for rights or benefits such as continuity of service, number of hours worked, periods of service or methods of engagement should also be discarded.

The application of these rights in practice should be reviewable by FWA with FWA empowered to assist in the resolution of disputes about the application of minimum standards.

13. Maintaining a fair and relevant safety net

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.

Recommendation - AIER believes there should be capacity created within a Minimum Standards Division of Fair Work Australia to maintain adjust and review the NES and Modern Awards.

AIER is concerned about the loss of the ability for any party, or the tribunal of its own motion, to bring forward Test Case matters for review.

The ability for the tribunal to hear test cases in the past has been an important part of the industrial/social fabric of Australia. This was particularly the case where legislation and public policy trailed behind

established need, particularly in the area of equal opportunity for women and work and family matters. Take as an example here the recent call by the Australian Law Reform Commission to include family violence related entitlements in modern awards and enterprise agreements.[67]

Recommendation - As a minimum FWA should be enlivened with a capacity to inquire (including the ability to call for and review evidence) in relation to matters that impact on the minimum standards with ability to publish reports regarding these matters.

FWA should be provided with the resources to able to carry out the necessary research that supports these activities or be given access to public research facilities where relevant data is being maintained.

There is currently no capacity in the system to review the impact of Individual Flexibility Agreements and there is not capacity for any party to have a dispute or grievance related to their terms reviewed by an independent authority. There is therefore little capacity for any of the industrial parties, the government or any other interested stakeholders to assess whether the safety net of minimum employment conditions is being adhered to or undermined.

Recommendation - Individual Flexibility Agreements should as a minimum be filed within Fair Work Australia and the trends within be open to public scrutiny.

The AIER believes that the parties should have access to an independent dispute resolution process in relation to NES and application of modern awards. Accessing courts to seek enforcement of these matters is not realistic. Further it reinforces an adversarial approach and is unlikely to support ongoing relationships.

14. Minimum wage

AIER recently participated in processes associated with the FWA Review of the Australian minimum wage for 2011-12. AIER was impressed with the processes adopted by the Minimum Wages panel in terms of its inquiry around matters related to the proxy measures to determine the needs of the low paid.

This inquisitorial approach encouraged participation of both the parties and experts. During this process particular concern was raised about the need for research to support this process. It was apparent that the Commonwealth Government was not collating data in this area and that FWA was not funded to produce research or data that was required. The adequate funding of processes to underpin these important functions is a matter that requires urgent attention.

A matter that was also raised in this process was the need for the tribunal to have the capacity to adopt inquisitorial processes to allow the tribunal to hear from those that are low paid. The ACTU raised in these proceedings its concern that bringing forward low paid workers in the past had subjected these workers to hostile interrogation in an adversarial environment to such an extent that they no longer felt it appropriate to do this.

15. Knowledge of rights – access to terms

AIER is concerned that the current schema does not promote adequate knowledge of the terms of conditions of employment.

Employees should have the right to be provided on request with a copy of the modern award and enterprise agreement, if any, applying to the employee's employment.

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[67] ALRC (2011) Family Violence and Commonwealth Laws – Improving Legal Frameworks (ALRC 117, 2011)

Recommendation - Division 3 of Part 3-6 of the Fair Work Regulations should be amended to grant employees the right to be provided on request with reasonable access to any written terms of employment contained in policy manuals that will apply to their employment.

Employees should be told of the conditions of their employment. It is implicit in the notion of an agreement to employ that the parties both know exactly what they are agreeing about. Employees may be bound by terms they have not read or have not been provided with. The provision of documents governing the employee's rights is fundamental to the employee's enjoyment of those rights. The provision of governing documents may also minimise disputes about those rights.

Section 124 of the *Fair Work Act* 2009 (Cth) requires employers to provide each new employee a statement prepared by the Fair Work Ombudsman called the Fair Work Information Statement. The statement sets out information about the National Employment Standards, modern awards, enterprise agreements and some other rights under the *Fair Work Act*.

Under most modern awards there is an obligation to ensure employees have access to the award, either by posting it in a prominent place or by providing a copy electronically. Under section 180 of the *Fair Work Act* the employer must take reasonable steps to provide employees with access to a copy of a proposed enterprise agreement prior to voting on it.

Currently employees are not entitled to be provided with a copy of the employee's contract of employment. Increasingly contracts incorporate policy documents by reference. Employees are not entitled to be provided with a copy of these documents. Employees need to be able to ascertain their rights and obligations. This issue is particularly acute for dismissed employees. Without a copy of their contract they cannot know of their rights.

Prior to employment an employer is not required to tell prospective employees whether a modern award or enterprise agreement will apply to the employment. Nor are employees entitled to a copy of their award or enterprise agreement on request. Nor is there a requirement to post an enterprise agreement on a notice board or make it available to employees. Prior to voting on an agreement, an employer is not obliged to give a copy of the proposed agreement to the employee to take away and consider.

The solution proposed is modest. It will not require the employer to provide every employee with voluminous documentation. The obligation to provide the document would only arise when the employee requests the relevant document.

Recommendation - AIER submits the Fair Work Act should be amended to ensure that prospective employees are entitled to be provided, on request, with a copy of any modern award or enterprise agreement that applies to the employment and, on request, to be provided with reasonable access to any written terms of employment contained in policy manuals that will apply to their employment. If the failure to provide the applicable award or agreement is a penalty provision, then there should be a defence available to an employer in terms similar to the current section 357 (2): that is, where the employer proves that, when the request was made and the documents were provided, the employer did not know and was not reckless as to whether the documents provided were in fact the applicable award or agreement.

Bargaining and Agreement Making

Charter Right 9 of the Australian Charter of Employment Rights states:

> *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.

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.

Under the current legislation there is an emphasis on the need to prescribe, in technical terms, a variety of matters that constrain the bargaining process. These convoluted prescriptions appear to be influenced by historical legacy (the emphasis on enterprise bargaining) and/or inappropriate efforts to corral or restrain worker power in 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 bargain 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.

In a number of areas the legislation is out of step with International Labour Standards in particular in the areas of Freedom of Association and Protection of the Right to Organise Convention No.87 and Right to Organise and Collective Bargaining Convention No.98.

The emphasis within the Fair Work Act on enterprise level bargaining [see s.3(f), Objects at Part 2-4 and s. 186(2)(ii) and s.229(2)]. According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention 98 the determination of the bargaining level should be left as a matter for the discretion of the parties and consequently the level of negotiation should not be imposed be decision of the administrative authority.[68]

[68] Article 4 of Convention 98

Recommendation - AIER submits that the restrictions on bargaining beyond the enterprise should be reviewed.

Similarly restrictions on the content of bargaining should be reviewed. 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.

Adherence to matters pertaining criteria (s.172) is now unnecessary and has the potential to create confusion and litigation.

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.

Further unions, employees and employers have in recent years been entering into deeds to circumvent the restrictions on 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 further restriction on content bargaining by the exclusion of "unlawful terms" (s.186) is unnecessary. Consistent with International Labour Standards workers should be able to pursue any matters that are connected to their economic and social interests that can be progressed through work.

The ILO's Committee on Freedom of Association has noted that "the scope for the term "matters pertaining to the employment relationship" remains elusive.

Further recalling that measures taken unilaterally by authorities to restrict the scope of negotiable issues are often incompatible with Convention No.98, and that tripartite discussion for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties the Committee requests the Government to …review these sections, in full consultation with the social partners…"[69]

Recommendation - AIER submits that it would now be appropriate for the legislation to be reviewed to remove these restrictions on content and that a tripartite process of determining guidelines for collective bargaining be adopted.

AIER is concerned there is the potential within the legislation for collective bargaining for employers to enter into agreements with employees directly even where a union exists and/or is involved in bargaining.

The ILO Committee of Experts on Freedom of Association has noted that s.172 of the FWA could "place employees, and organisations of employees, on equal footing with respect to the conclusion of agreements that are not greenfields agreements" – this being outside of the scope of Collective Agreements Recommendation (No.91) that stresses the role of worker's organisations as one of the parties in collective bargaining and that direct negotiation between the undertaking and its employees, bypassing representative organisations, where these exist, might in certain cases, be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted.[70]

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69 CFA Report Australia (Case No. 2698) Report No.357 (Vol.XCIII, 2010, Series B No.2) para 220

70 Ibid para216

The confusion about the role and status of workers organisations in bargaining under the Fair Work Act is a matter that has been the subject of substantial litigation. Much of this litigation has been brought through the ss228(1)(e)-(f), and specifically in relation to submitting agreements to ballot and direct dealing and communication with employees.[71]

FWA has found that there is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot.[72]

The situation regarding direct communication with employees during bargaining is still unclear with a firm statement of principles enunciated through recommendation by Drake SDP in *Australian Manufacturing Workers Union v Transfield Australia Pty Ltd*[73] however decisions since that time have derogated from these principles.

AIER submits in light of these decisions that the legislation does not protect the role of workers representatives in the bargaining process in the way that is recognised under International Labour Standards. This has allowed employers to utilise direct dealings and balloting as a tactic to frustrate bargaining and go around the union/s.[74]

Recommendation - AIER recommends that the Act should be amended to clarify that all interactions, communications and correspondence in bargaining be conducted through the parties' chosen representatives.

Further, the Act should be amended to make it clear that ballot should not be allowed unless an impasse have been reached. The tribunal should have a role in determining if the impasse has been reached.

AIER believes that the flexibility given to FWA under the legislation to determine the question of majority support where this in dispute is both uniquely Australia and an appropriate way of avoiding the potential for complex litigation in this area. Whilst research in this area is only tentative given the time lapse since the commencement of the legislation there is at least some evidence that provisions such as majority support determinations have facilitated collective bargaining in organisations previously resistant to it including for example Cochlear, Telstra, IBM.[75]

AIER is concerned that little has been done to assist the parties with the cultural shift to good faith bargaining. To date government funds have been directed to employer associations and to the ACTU to assist in the roll-out of education initiatives aimed at raising awareness of the provisions of the Fair Work Act. At the time the legislation was introduced AIER raised concerns that without the development of good faith relations as an Object, and good faith provisions being layered throughout the legislation good faith bargaining would become about technical adherence to minimal formal obligations (or in fact on developing ways to get around these requirements) and little more. The case law demonstrates this.

Recommendation - AIER therefore again calls for public policy support and funds for the development of the Centre for Workplace Citizenship to assist in the translation to genuine good faith bargaining and the development of good faith relationships.

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71 For a detailed summary of comparative good faith bargaining regimes see Forsyth A (2011) The Impact of 'Good Faith' obligation on Collective Bargaining Practices and Outcomes in Australia, Canada and the USA, *Canadian Labour and employment Law Journal* 16:1

72 CFMEU v Tahmoor Coal Pty Ltd [2010] FWAFB 3510 at para [30]

73 [2009] FWA 93 (14/08/09)

74 Examples include Rio Tinto and recent BHP tactics in bargaining.

75 Forsyth (2011) op cit p. 25-30

AIER is concerned that there is no mechanism to review Individual Flexibility Agreements (IFAs) arising from provisions in collective agreements, and no process to remedy disputes associated with their application short of court action. Further because these agreements are not publicly available there is no ability to monitor trends within them or to gauge whether they are furthering the Objects of the Act or not.

Recommendation - AIER recommends that in order to ensure employees are appropriately protected when making IFAs, FWA be empowered to deal with disputes regarding the making and application of Individual Flexibility Agreements.

Further AIER recommends that the Government fund research to support an analysis of IFA and the impact of these on furthering the Objects of the Act, award and agreement standards, the take up of collective bargaining and the rights of workers.

Equal Remuneration

It is difficult to make extensive comment regarding the impact of the changes provided for in Part 2-7 of the Fair Work Act given that there has only been one matter heard under these provisions. In 2010 community sector workers lodged an equal remuneration case. The interim decision from 2010 community sector workers case found that work in this industry had 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".[76]

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 applicants 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. Although the minority judgement of Vice President Watson in the final decision suggests that this is a requirement.

The bench in this interim decision required the parties involved to identify "the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses the situation". It called for more submissions to demonstrate what proportion of the pay gap is a result of gender and what the pay increase should be.

The Full Bench has subsequently accepted the submission made on behalf of the union applicants and the Commonwealth Government regarding a joint position on the new rates that should apply as a result of an equal remuneration order.[77]

The majority decision represents 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. The Full Bench rejected the concept of establishing a set of principles as a guide for determining equal remuneration orders. Further the minority judgement of Vice President Watson has the ability to confuse the criteria that should be used in assessing applications for equal remuneration orders.

Too few matters of this kind have been pursued in Australia's industrial history because they have been seen to be too difficult to progress. This was a matter that each of the two Pay Equity Inquiries (NSW and QLD) identified as a barrier to achieving pay equity.[78]

Recommendation - AIER submits that in order to ensure that these provisions of the FWA are effective Fair Work Australia should be required to establish a set of principles (similar to the Equal Remuneration Principle in Queensland) that would provide the framework around how these matters are to be addressed. Further the AIER submits that the principles should be developed following an inquiry conduct by FWA into this matter.

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[76] [2011] FWAFB 2700

[77] [2012] FWAFB 1000

[78] See (2007) QIRC Pay Equity: *A Time to Act* The report of the Inquiry to examine the impact of the Federal Government's WorkChoices Amendment to the Workplace Relations Act 1996 on gender pay equity.

General Protections

Charter Right 3 of the Australian Charter of Employment Rights states:

> *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.

AIER members have been involved in some of Australia's most high profile discrimination cases and can attest to the costs, delays and impact on complainants and defendants that these processes currently involve. AIER is of the view that the complaints handling processes for dealing with discrimination matters needs to be more efficient and cost effect to give greater opportunity to seek remedy for work related discrimination. The current system is characterised by costly litigation, time delays and processes that involve considerable stress for all parties.

Recommendation - We believe there is genuine merit in considering streamlining legislation such that all work related discrimination matters come before Fair Work Australia and are able to be resolved through processes of conciliation and arbitration at this level. We can see no reason why a tribunal that can validly determine that an employee has been unfairly dismissed and craft an enforceable remedy could not also craft a remedy if it finds that the termination has been discriminatory.[79]

AIER notes question 41 in Attachment B to the Fair Work Act Review Discussion Paper related to s351. AIER raises a concern that mechanisms to establish a Division dealing solely with discrimination matters may pose practical problems when brining claims as complaints may contain of mix of discrimination and non-discrimination based concerns.

[79] McCallum R (2006) *Australian Labour Law After the Work Choice Avalanche: Developing An Employment Law for Our Children,* The Julian Small Lecture, Law Society of New South Wales, 3/10/06

Unfair Dismissals

Charter Right 7 of the Australian Charter of Employment Rights states

> *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 Organization standards.

AIER believes in the necessity for a legal framework providing unfair dismissal protection because of the importance of a job to a person's life. Unlike a physical asset where it is quite clear what is being taken away, with an employee's labour services it is not just an employee's income that is being deprived but potentially many other interests too: an employee's dignity, autonomy, livelihood, sense of self-worth, membership of a union and place in the community.[80]

Whilst we recognize that unfair dismissal law represents a regulatory burden upon business, the AIER is of the view that this burden is a legitimate restraint on managerial prerogative and necessary for safeguarding the job security of individuals.

Our preliminary starting point is to acknowledge that the unfair dismissal provisions of the Fair Work Act 2009 represent a clear improvement upon their predecessor provisions. Under the previous system the cumulative effect of the operational reasons exemption and the exemption of employers with less than 100 employees removed unfair dismissal protection for the majority of Australian employees.

As the Fair Work Act 2009 has reinstated these rights to a large degree it is unsurprising that the number of unfair dismissal claims before Fair Work Australia have increased. It should also be noted that the transition to the national system has meant that many more employees are covered by federal legislation and therefore will be utilising the provisions of the Fair Work Act to pursue unfair dismissal matters rather than utilizing state jurisdictions as they may have done in the past.

1. Telephone conciliations

Whilst the AIER recognises that telephone conciliations provide an efficacious way of processing disputes, we question whether this provides appropriate external and independent scrutiny of the employer's dismissal decision. The strict time limit for conciliations to occur and the pressure on the conciliator to achieve settlement has meant that there is an increasing tendency for the emphasis to be on resolving disputes quickly rather than to get to the truth of whether the dismissal was fair, unjust or unreasonable. This may lead the parties to accept an outcome in order to avoid arbitration that they ultimately believe to be unjustified.

Further members of AIER have had personal experience with parties treating the telephone conciliation process with disrespect (in one case taking the call on a mobile phone whilst outside) in a manner that would not have occurred in a face to face environment. The process needs to be one that maintains due formality and provides all parties with an equal opportunity to participate.

The AIER would support further research as to participants' experiences of the telephone conciliation process and in particular, as to whether this process allows for appropriate closure for the individual employee making the claim. As stated at the outset, to lose one's job is a highly significant life event for an

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[80] John Budd, *The Thought of Work* (Cornell University Press, 2011); Frederick Meyers, *Ownership of Jobs: A Comparative Study* (Los Angeles, 1964); Wanjuru Njoya, *Property in Work* (Ashgate, 2007); Bob Hepple (1981) 'A Right to Work' 10 ILJ 65.

employee which cannot be underestimated. A key objective of unfair dismissal law is to provide employees with a genuine opportunity to contest their dismissal. Questions exist as to whether the telephone conciliation process can achieve this.

Recommendation - The AIER is of the view that an individual making an unfair dismissal claim should have the opportunity to elect to receive face-to-face FWA administered conciliation.

Where telephone conciliation is to be undertaken, the time limit for this should be increased to allow for appropriate resolution of all the issues being discussed. The processes adopted should be such to allow the due formality that a matter of this nature warrants.

2. Small Business Fair Dismissal Code

The AIER welcomes continuing discussion as to how small business owners and individual employees can be adequately protected under unfair dismissal law. The AIER is of the view that the definition of small business under the Fair Work Act 2009 is an appropriate one and a significant improvement on the expansive definition applied under the predecessor regime.

Nonetheless, the AIER does believe that there should be greater protections built into the Fair Dismissal Code given that compliance with this Code effectively removes unfair dismissal rights for employees of small business.

This Code is currently very minimalist in design as it only requires a meeting and a warning before dismissal is valid. This does not effectively protect employees of a small business from arbitrary dismissal and may lead small business employees to believe that the requirements of the Code are best practice in this area. The code allows for an employer to summarily dismiss an employee if they believe the employee has engaged in a single act of theft, fraud or violence. We believe that more guidance should be given to small business employers so as to assist them in developing better procedures for dismissing staff and for managing performance. This could be achieved in one of two ways:

Recommendation - That small business employers receive an Accompanying Guide with the Fair Dismissal Code which outlines best practice procedures for dismissing staff and managing performance. This would provide non-binding guidance as to how small business employers could design a workplace policy for performance management and dismissal. The AIER's Standard of Employment Rights provides one example of how this could be done.

OR

That the FDC be improved so that there are additional obligations inserted into the Code. This could require that the FDC provide for a system of at least two warnings and a positive obligation upon the employer to take steps to assist the employee in improving their performance after the giving of the first warning. Ideally small business employers would be encouraged to devise a 'Performance Management Plan' (PMP) in consultation with the staff member whose performance is under review. This PMP could include additional training, supervision, mentoring, behavioural counseling or other arrangements that would aid and motivate the employee to perform their job to a higher standard.

The above two options would be more in keeping with the Termination of employment Convention No. 158, Article 7 Procedure prior to or at the time of termination. In particular allowing for the worker's opportunity to defend themselves against the allegations made prior to termination.

3. Further Comments

The AIER discourages public and media perception that the unfair dismissal system allows for the payment of 'go away money' to unfair dismissed applicants. This phrase is increasingly being relied upon the make the suggestion that the system allows vexatious litigants to harass employers and receive a monetary payment for a justified dismissal. We challenge the use of 'go away money' as pejorative term that does not respect the dignity of the terminated worker.

We also challenge the public and media perception that the unfair dismissal system is a barrier to job creation. This assertion is not evidence-based and has been consistently refuted by researchers.[81]

[81] Robbins and Voll (2005) 'The Case for Unfair Dismissal Reform: A Review of the Evidence, *Australian Bulletin of Labour,* 25 (3).

Industrial Action

Charter right 9 of the Australian Charter of Employment Rights states:

> *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.

The right to strike is an intrinsic corollary of the right of association protected by ILO Convention No. 87. The Australian Government has been put on notice that a number of provisions of the FWA infringe on the right regarding freedom of association as set out in the ILO's Freedom of Association and Protection of the Rights to Organise Convention No.87 including:

- The provisions of ss408 – 411 that effectively prohibit sympathy strikes and general secondary boycotts. The secondary boycott provisions of the Trade Practice Act 1974 also still remain in force.

- The removal of protected industrial action in support of multiple business agreements s. 413(2).

- Patttern bargaining remains unprotected unless the parties are genuinely trying to reach agreement (s.409(4) and s 412). It in effect remains unprotected given the impact of the threat of litigation.

- Industrial action is unprotected if it is in support of unlawful terms

- The provisions of s.423, s.424 and s.426 which allow for the suspension or termination of industrial action where it may cause significant economic harm are cast too broadly. As is the provision under s.431 that allows for the Minister to terminate industrial action without reference to the parties or to any process.

AIER notes that the government has been asked to review the practical application of these provisions in conjunction with the social partners with a view to bringing them in to full conformity with the Convention.[82]

Further the ILO Committee of Freedom of Association ("the Committee") has previously determined that the conditions under the law in order to render a strike lawful should be reasonable and, in any event not such as to place a substantial limitation on the means of action open to trade union organisations. In reviewing the provisions of the Fair Work Act the Committee found that the requirement to for a decision by over half of all the workers involved in order to declare a strike is excessive and asked for this provision to be reviewed. [83]

[82] CEACR Report 2010

[83] CFA Report Australia (Case No. 2698) Report No.357 (Vol.XCIII, 2010, Series B No.2) para 220

AIER believes that current assumptions regarding the illegitimacy of pattern bargaining need to be confronted and overturned.

AIER believes that recent employer lock out action including in the Qantas, Schweppes, POAG in 2011 demonstrate that provisions that require employer notice prior to lock out and that would require lock out action to be in proportion to the scale of protected industrial action taken by employees should be considered.

Right of Entry

Charter Right 6 of the Australian Charter of Employment Rights states:

> *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.

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."*

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.

The FWA, Part 3–4 and in particular sections 481– 483E enable union representatives to enter premises and investigate suspected contraventions of the FWA or a term of a fair work instrument (i.e., a "modern award", "workplace determination" or order issued by Fair Work Australia, or an enterprise agreement (section 12)) that relates to or affects a member of their organization. However, the exercise of this right is subject to certain conditions concerning the right of entry aimed at maintaining a balance between the right of organisations to investigate suspected contraventions and the right of occupiers of premises and employers to go about their business without undue inconvenience (as stipulated in section 480 of the FWA).

Moreover, trade union representatives are not entitled to exercise general inspection functions under the FWA. According to section 152(b) of the FWA, a "modern award" must not include terms that require or authorise an official of an organization to enter premises to inspect any work, process or object. Further, the conditions under which trade union representatives have right of entry to carry out inspections of suspected contraventions, cannot be modified by enterprise agreement, as provided in section 194 of the FWA.

According to the ILO, "these provisions place certain restrictions on the wide powers traditionally conferred upon trade unions to ensure enforcement of awards and agreements."

Recommendation - 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.

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.

There is a greater need for the system to support more tripartite engagement in the area of enforcement. When referring to the role of the Fair Work Ombudsman in relation to the enforcement procedures and the engagement of employer and union representatives in this process the ILO confirmed that the Committee emphasizes that possible arrangements for collaboration with the social partners normally go beyond the right to communicate complaints to the Ombudsman and can take various forms, ranging from tripartite bodies, to cooperation agreements at various levels (national, regional, sectoral and enterprise).

Recommendation - The AIER recommends that this guidance from the ILO be adopted and appropriate practices adopted to facilitate this.

Annexure 1:

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 – Paul Richardson – National Union of Workers
Independent – Hon. Paul Munro

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Mark Perica – CPSU-SPSF

Members
Sean Reidy – Queensland Bar
Gary Rothville - Gary Rothville and Associates
Mark Irving - Victorian Bar
Anthony Lawrence - HWL Ebsworth
Joel Fetter – ACTU
Tim McCauley - AMWU
Lisa Heap – AIER Executive Director

Annexure 2:

Charter - Panel of Experts & Charter Advisory Committee

Mordy Bromberg SC, Victorian Bar (now Justice of Federal Court)	Professor Barbara Pocock, Centre of Work and Life at the University of Adelaide
Professor Joellen Riley, Sydney University	Justice Paul Munro, former Presidential Member of the AIRC
Professor Greg Bamber, Monash University	Professor Ron McCallum AO, Sydney Law School
Carol Andrades, Ryan Carlisle Thomas	David Chin, NSW Bar
Associate Professor Anthony Forsyth, Monash University	Anne Gooley, Partner, Maurice Blackburn Cashman (now Commissioner Fair Work Australia)
Associate Professor Colin Fenwick, Melbourne University (and now ILO)	Professor Russell Lansbury, University of Sydney (liaison)
Professor Marilyn Pittard, Monash University	Emeritus Professor John Neville, UNSW
Professor David Peetz, Griffith University	Associate Professor Peter Kriesler, UNSW
Michael Harmer, Harmers Workplace Lawyers	Bob Russell, Griffith University
Mark Irving, Victorian Bar	Julia Watson, Melbourne University
Peter Rozen, Victorian Bar	

Annexure 3:

The Australian Charter of Employment Rights - Overview

In 2007, the AIER published the Australian Charter of Employment Rights (attached with this submission).

The Charter is 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"[84]; and

(c) Rights appropriate to a modern employment relationship which are recognised by the common law.

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.

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 Annexures.

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.

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.

Formal consultations regarding the content of the Charter were held with representatives of every major Australian political party.

In his report from the NSW Government Inquiry into options for a new National Industrial Relations system, Professor George Williams, 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.

The Charter has become a blueprint for assessing government policy, for legislative reform, for company practice and for education about workplace rights. AIER recommends the Charter be used in this manner by this Inquiry as a blueprint of factors that would need to be in place in order to promote more security in Australia's workplace relationships.

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 ten Charter rights into a practical form that can be applied in every workplace.
Our experience tells us that the Charter is being used on a daily basis as a resource by practitioners, managers, tribunal members, academics and even teachers who are utilising the Charter's companion resource for secondary schools, Workright, to inform 14 and 15 year old students about their rights and responsibilities in the workplace.

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

Annexure 4:

The Australian Charter of Employment Rights

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 Organization 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.

Annexure 5:

The Australian Standard of Employment Rights

Recognising that: improved workplace culture requires workers and employers to recognise their pivotal role as industrial citizens.

And building upon: the Australian Charter of Employment Rights, this Standard has been framed as a statement of the reciprocal rights and responsibilities of workers and employers in Australian workplaces which have received the distinction of being a 'Charter-Accredited Workplace'.

1. Good faith performance

A. Employers and workers do not seek to mislead, deceive or trick each other but always seek to act in an honest and trustworthy manner.
B. Employers and workers do not abuse any powers or discretions granted to them in the employment contract.
C. No person in or associated with the workplace is subjected to harassment or humiliation so as to cause psychological harm or distress.
D. Workers and employers act in good faith during termination of the employment relationship. Workers are dismissed only for a reason relating to their performance or conduct, or for operational business reasons. Workers are willing to serve the notice period required in their contract if they decide to terminate their employment.
E. Employers and workers do not maliciously damage the reputation of the other.
F. Employers do not seek to place an illegitimate restriction on the freedom of workers to pursue their careers once their employment relationship is over.

2. Work with dignity

A. Employers and workers are committed to recognising and affirming the dignity of every person in the workplace.
B. There is no bullying and harassment in the workplace.
C. The employer regularly invests in the skill formation of workers and appropriate career paths are developed within the workplace.
D. Surveillance of the workplace only occurs with the consent of workers and when used for a legitimate purpose.
E. Every person in the workplace is committed to treating others with respect.

3. Freedom from discrimination and harassment

A. The employer is committed to achieving a workplace that is free from discrimination and harassment based on protected attributes.

B. The employer makes non-discriminatory decisions about all work related matters by giving every worker and job applicant fair access to all workplace opportunities and benefits.
C. The employer has a clear set of policies and procedures for addressing and managing the risks arising from discrimination and harassment in the workplace. This includes:
    i) preparing and distributing a written policy on discrimination and harassment
    ii) ensuring that there is in place a protective investigation process which deals with complaints promptly and properly
    iii) maintaining thorough records and (subject to legal requirements) guaranteeing confidentiality
    iv) promoting the policy throughout the business
    v) providing training on operation of the policy to all workers, including those in leadership positions

vi) if possible, appointing trained discrimination and harassment contact officers
vii) reviewing work practices and regularly monitoring and evaluating the workplace culture to ensure compatibility with appropriate standards
viii) guaranteeing that no worker will be victimised for making a complaint or for supporting someone who has done so
ix) ensuring that all parties to the complaints process are permitted to have a support person, advocate, union official or other similar representative accompany them to any interviews or meetings
x) providing a worker who has suffered discrimination or harassment in the workplace with access to counselling services or other employee assistance programs
xi) dealing with perpetrators in a manner proportionate to the severity of their behaviour

D. All workers are committed to achieving a workplace that is free from discrimination and harassment based on protected attributes.

4. A safe and healthy workplace

A. The employer is committed to making safety part of the lifeblood of the business by minimising exposure to health hazards and taking all steps to minimise deaths and injuries in the workplace.
B. The employer has a systematic, proactive and comprehensive risk management process to ensure the achievement of a safe and healthy workplace.
C. There is consultation with workers about major changes to safety and health measures as well as changes to work that may have safety or health implications.
D. Workers are given the opportunity to be represented in dealings with their employer concerning health and safety issues.
E. There is adequate information, instruction, training and supervision given to workers to enable them to perform their work in a manner that is safe and without risks to health.
F. The workplace is free of bullying, stress, abuse and anxiety that is detrimental to the worker's mental health.
G. All workers are committed to achieving a safe and healthy workplace and to cooperating with management about workplace safety measures.

5. Workplace democracy

A. Both employers and workers reject adversarial workplace relations and commit to seeking mutually beneficial outcomes.
B. The employer does not have a blanket managerial prerogative but is committed to managing the business in a responsible manner.
C. Both employers and workers are committed to engaging in constructive dialogue. As part of this, workers are allowed to express their views in the workplace and have their views considered in good faith by their employer.
D. In the case of business decisions that have significant implications for workers such as workplace restructuring, workers have the opportunity to participate in the decision-making process by being provided with information and meaningful consultation.
E. Workers are committed to cooperating with and supporting the employer's right to responsibly manage their business.

6. Union membership and representation

A. Workers are not discriminated against or treated detrimentally for joining or being a member of a union or on account of their union activities.
B. No job or other employment benefit is offered on the condition that the worker is not a union member or relinquish the right to union representation.

C. The employer does not refuse to recognise a union or punish its members for participating in lawful industrial activity.
D. The employer recognises that the right to collectively bargain is an integral aspect of union membership.
E. The employer does not restrict the role of the union in representing workers within the workplace.
F. Workers and their unions exercise their right to collectivism, responsibly, in good faith and with regard to their ongoing employment relationship and the dignity of every person in their workplace.

7. Protection from unfair dismissal

A. The employer has a systematic and comprehensive risk management process to managing dismissals or terminations of employment in the workplace.
B. The employer has a legitimate reason for termination of employment when that termination relates to the worker's conduct.
C. Prior to termination and where possible, an employer should warn the worker about conduct or performance matters so that the worker has a reasonable opportunity to rectify the conduct or improve performance.
D. Workers who are being dismissed are entitled to procedural fairness in the dismissal process.
E. Where a worker is terminated because of the employer's operational requirements, the termination is to be treated as a redundancy, and procedures for determining and dealing with redundancies are followed.
F. The employer is committed to respecting the dignity of all those involved in the termination process.

8. Fair minimum standards

A. The employer is committed to complying with fair minimum standards imposed externally to the workplace.
B. The employer, in consultation with workers, is willing and committed to providing fair standards that build upon the legislative minimum and which are tailored to the needs of the workplace.
C. The employer respects the need of workers to live a fulfilling life and to attain a fair balance between work and the rest of their lives. In recognising this, the business is committed to developing policies on flexible work practices, parental leave, working hours and workloads, and other conditions within the workplace.

9. Fairness and balance in industrial bargaining

A. Workers have the right to bargain collectively.
B. All parties involved in bargaining for workplace agreements act in good faith and with due regard for the dignity and integrity of all persons in the workplace and relevant third parties.
C. Workers have a right to use representatives of their choosing in the bargaining process.
D. Workers have the right to use lawful industrial action as part of the bargaining process. Employers have a right to respond to this.
E. The use of statutory individual agreements does not undercut collective agreements and is not used as a mechanism to avoid or undermine collective bargaining with workers.

10. Effective dispute resolution

A. The process of dispute resolution is clearly documented and accessible to all workers, offering both formal and informal options.
B. The employer has a well-designed dispute resolution process that aims to:
    i) Guarantee timeliness, confidentiality and objectivity
    ii) Be administered by trained personnel
    iii) Provide clear guidance on the investigation process

iv) Guarantee that no worker is victimised or disadvantaged for making a complaint
v) Be regularly reviewed for effectiveness
vi) Guarantee that the worker can participate in the dispute resolution process without any loss of remuneration
vii) Graduate from informal to formal measures

C. The dispute resolution process is procedurally fair.

D. The process of dispute resolution allows the worker and the employer to be represented. Full access to relevant records and information as to the dispute resolution process is provided to the worker and their representative.

E. If the dispute cannot be resolved at the workplace level, the dispute is referred to an independent and impartial body that has the power to resolve the dispute.

Annexure 6:

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

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

By resource we mean an organisation/Centre dedicated to:

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

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

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

The present aggressive, adversarial workplace culture requires an injection of resources to overcome learned behavior. There is a substantial public benefit warranting the expenditure of public funds in the manner outlined in this proposal.

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

There is also a growing trend internationally for this co-operative approach to promoting innovation and productivity in the workplace.

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

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

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

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

The benefits of establishing this resource

Initiatives of this kind benefit employers, employees and unions. It is logical therefore that employers and the trade union movement will invest in an initiative of this type. There are also substantial public (or third party) benefits associated with the initiative that warrant the injection of public funds.
Without initiatives designed to drive fairness and an understanding of workplace citizenship organisations will continue with their current cost competitive approach and the adversarial industrial relations culture will permeate.

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

New workplace relationships can be fostered that:

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

The public benefits associated with this proposal are:

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

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

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

The role and function of the resource

There is a very clear need for this new resource:

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

This resource should be guided by the following objectives:

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

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

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

Fostering front-end cultural change

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

To this end the resource will:

- Provide information, resources and examples of fair work practices and processes
- Train internal fair work facilitators from amongst the staff and management of organisations
- Be available to provide advice to organisations and act as a resource and train and accredit others to also provide this resource
- Establish a network of organisations that apply fair work practices that can help and support each other.

Promotion/demonstration of models of fair work practices

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

Jurisdictions such as the UK have done this by legislative initiative and providing codes of conduct on a variety of matters. The AIER has attempted to capture the minimum provisions that should exist in any workplace via its Charter of Employment Rights and the Australian Standard of Employment Rights.

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

- Create a model standard or set of benchmarks for fairness which are consistent with, and help organisations to meet, the requirements of new legislation
- Publish and promote this standard/benchmark
- Publish and promote case studies of organisations achieving or striving to achieve this standard/benchmark
- Establish a system of voluntary accreditation against the benchmark or standard Publish voluntary codes of conduct

Educating workplaces, industrial parties and the broader community

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

- engage in initiatives designed to promote an understanding in the Australian community about what is fairness at work
- engage with academia and those involved in the training of HR/IR practitioners about a values based approach to their teaching/learning and
- assist in the production of resources targeting new entrants to the labour market. It should also hold a biennial conference designed to showcase examples of fair work in practice
- Provide a venue for the presentation of research and academic discussion about trends
- Engage and educate practitioners in the achievement of fair work standards.

Collecting and analysing data regarding practices within workplaces

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

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

Relationship to Fair Work Australia & the Fair Work Ombudsman

The work of this new resource and FWA will be complimentary but not overlap.

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