Australian Institute of Employment Rights

Justice @ Work: How do workplace relations shape our society?

The Ron McCallum Debate 2014
Discussion Paper

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Introduction

Previous Ron McCallum debates have explored the question of what justice at work looks like, the relationship between productivity and our workplace relations system, and the many swings of the political pendulum as they have affected industrial relations over the past 10 years.

This year's debate focuses on the role employment and the workplace relations system play in determining the nature of our society. Work, or its absence, is a crucial element around which we organise our lives. How work is regulated, whether by laws, policies, or organizational cultures, resonates throughout our community.

Australian labour law has long acknowledged it has a role to play in shaping society. In 1915, Justice Higgins outlined the social imperatives that underpinned the development of a minimum wage in Australia. In his essay "A New Province for Law and Order" in the Harvard Law Review he identified the elements of the 'living wage' for working men and their families:

> "One cannot conceive of industrial peace unless the employee has secured to him wages sufficient for the essentials of human existence. This, the basic wage, must secure to the employee enough werewith to renew his strength and to maintain his home from day to day."[i]

As a society we are still dealing with the implications of that formulation, for example, in the persistent existence of a gender pay gap. The exclusion of many Aboriginal and Torres Strait Islander people from coverage of our labour laws, including the denial of wages for most of the 20th century, has adversely affected their material wellbeing and is related to the disadvantage and poverty experienced today.[ii]

In contrast to the social ideals at the forefront of the industrial relations system at the beginning of the 20th century, much of the contemporary debate about industrial relations is viewed primarily through an economic lens. Industrial relations law, policies and practices are predominantly evaluated in relation to their impact on productivity, competitiveness and economic efficiency. The focus on such economic indicators is underpinned by the theory that increased economic performance leads to higher living standards.

The Australian Institute of Employment Rights (AIER) takes a different approach. We consider workplace relations from the perspective of human rights. AIER believes that certain industrial and social policies are intrinsically valuable in their own right and should be supported on the basis of their ethical and social merit. Key industrial rights are also basic human rights and include important social protections.

This is an equity based approach. In many cases, AIER believes that an equitable, values based approach will also bear fruit in other respects, including in the generation of economic wealth.

The values supported by AIER are most fully defined in our publication *"Australian Charter of Employment Rights"* which sets out ten principles for fair workplaces. In his introduction to the Charter publication, Mordy Bromberg [now Justice Bromberg] notes:

> "…some of the key values reflected in the Charter are that labour is not to be treated as a mere commodity; that workers and employers should be treated with dignity; that workers and employers should exercise their rights in good faith; and that there should be a balance between the rights of employers, the rights of workers and the public interest – a fair go all round".[iii]

Bromberg also notes the sources of the employment rights identified by AIER, namely

- Rights derived from international labour standards;
- Values derived from Australia's constitutional social and industrial experience; and
- The common law of employment. [iv]

Another useful concept for exploring these issues is that of the "industrial citizen" or the "citizen at work". Recently, Professor David Peetz advocated this perspective arguing that "We need to think and talk about treating people as *citizens at work*, people with a right to respect, job security, income security, and a voice. It means people have the right to decent work and it can be done if we make the right choices."[v]

This discussion paper explores the role of workplace relations law and policies in shaping our society through a consideration of the concepts of work with dignity and decent work; the intersections between economic inequality, poverty, employment and industrial relations; the relevance of the decline in collectivism; and the future of workplace democracy.

Issue 1: Work with dignity

Dignity of work and dignity at work are values integral to the AIER Charter as well fundamental to the International Labor Organisation and its Conventions and policies.

The Australian Charter of Employment Rights Article 2 states:

> "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."

The principle that labor is not a commodity has a considerable history, which cannot be dealt with in full in this paper. Classical economics generally treated labor as if it was a commodity, bought and sold in the marketplace like all other inputs into the activities of enterprises. This concept was increasingly challenged in the late 19th and early 20th centuries.

The most important impetus to the principle that labour is not a commodity was given by the establishment of the International Labor Organisation, created by the Treaty of Versailles which ended the First World War. The ILO is uniquely a tripartite organisation bringing together employers, employees and governments to set and improve core labor standards around the world.

The first principle on which the ILO was founded [and re-affirmed in 1944 by the Declaration of Philidelphia] was that labor is not a commodity:

> "Among these methods and principles, the following seem to the … parties to be of special and urgent importance:
>
> First. — The guiding principle above enunciated that labour should not be regarded merely as a commodity or article of commerce." [vi]

Work has a special importance and status arising from the fact that it is performed by human beings. As a result, work cannot and should not be treated as simply another factor of production, a commodity or input into the production process such as raw materials, energy land or technology. The contract of employment is, as Mark Irving, AIER Executive member and prominent barrister specializing in employment law, has noted, the only contract [other than marriage] where at least one of the parties must be a human being. This gives employment law and workplace relations as a whole special significance and requires it to operate in a particular manner. [vii]

Moreover, work is an activity that is central to the human experience and it performs a number of functions for individuals, their families and society as a whole. It is beyond the scope of this discussion paper to consider all aspects of work, other than to note that it is an activity that is the basis of individual, family and social well-being on both a micro- and macro-economic level. It is an activity that most people are engaged in for a considerable portion of their lives.

The shift in Australia's workplace relations laws from being based on the conciliation and arbitration power in the Constitution to based on the corporations power raises the question, as noted by Ron McCallum, whether "our labour laws would become a sub-set of corporations' law and employees would be regarded as little more than actors in the economic enhancement of corporations." In McCallum's view, shared by the AIER, "For our labour laws to pass the test of "justice and fairness at

work" they must focus equally on the rights, duties and obligations of employees and of employers."[viii]

The human rights of people are not suspended when they enter into employment. The rights of employers and employees are therefore an important part of our understanding of universal human rights.

Rights at work are a fundamental part of the code of human rights. The rights of workers were addressed as part of the Universal Declaration of Human Rights, adopted and proclaimed in 1948 by the General Assembly of the new United Nations:

> **Article 23**
>
> 1. Everyone has the right to work, to free choice of employment, to just and
>
> favourable conditions of work and to protection against unemployment.
>
> 2. Everyone, without any discrimination, has the right to equal pay for equal work.
>
> 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
>
> 4. Everyone has the right to form and to join trade unions for the protection of his interests. [ix]

These rights have been further developed and specified in later Conventions on Human Rights adopted by the UN General Assembly.[x]

In many of its dimensions, of course, work directly impacts the standard of living of workers and their dependents at the micro level of society. Labor productivity is also a factor in wealth creation at the macro or economy wide level. Collectively, the work of all employed persons applied to the natural resources, knowledge and technologies available in an economy generates national income and wealth and provides the base for taxation and the delivery of public services and expenditure of all kinds.

Laws relating to employment relations [as well as contract and other relevant laws] and human resources and industrial relations policies and practices govern the way employment functions in our society.

National policies and approaches to these matters help to the determine equity of outcomes in respect to the distribution of national income and wealth. Australia has traditionally sought to intervene in the operation of workplace relations systems in a particular way to ensure a reasonably just and equitable distribution of national income.

Some, but by no means all, nations have left this endeavor largely to the "unseen hand" of the market. Even in Australia, and particularly in recent times, how these issues have been dealt with has been politically and industrially controversial.

The Australian people however seem to value strongly notions of social justice and equity in workplace relations and have punished those political parties which have strayed too far from the national consensus around these issues.

What does it mean to provide employees with "an existence worthy of human dignity" or "dignity at work"? AIER's Charter sets out a number of responses to this question.

> "Dignity at work refers mainly to the employment relationship in which work is conducted and the need to protect against abuse or disadvantage arising from the nature of that relationship. That aspect raises issues such as fair wages and just conditions or work, freedom of association, fair bargaining processes and protection from unfair dismissal. It refers also to work as a place of social interaction in which all participants have a rights to protection against unsociable behaviors such as discrimination, harassment or bullying"[xi]

The ILO's Decent Work agenda is another response to this question. What this in turn encompasses is dealt with in the next section.

In addition to being treated with dignity at work, human beings must be able to experience the dignity *of* work, that is, they must have access not only to jobs but also to work opportunities that meet their individual and social needs.

Unemployment and underemployment are significant social problems in Australia and elsewhere. While our official unemployment rate is still relatively low by historical standards at 6.1%, there are high levels of youth unemployment and general underemployment. If work is important to people, the absence of work is equally so. If stable, adequately paid work

- is a source of independence - its absence means dependence on others
- is an avenue to personal achievement - its absence may be seen as personal failure
- provides family security - its absence means insecurity
- elicits the esteem of others - its absence may lead to social stigma. [xii]

The incidence and impacts of unemployment and underemployment are relevant considerations in discussing the concept of dignity and work. A related question is whether jobs which do not offer stable and adequately paid work are sufficient to provide dignity of work.

Work with Dignity – Questions for discussion

How do we consider work and employment:

- As a factor of production related to efficient economic outcomes and wealth creation?
- As an activity where equity, social justice and employee voice must be key considerations?
- As an activity where individual workers can develop their skills and full potential?

Is the dignity of work something that we value in Australian workplaces and society? Can there be dignity of work without decent work? What flows from these considerations? Are people human resources, like other inputs into the work process? Should we treat work as a means to an end or as an end in itself? What implications for industrial relations and employment relations do the answers to these questions have?

Issue 2: Decent work and the changing nature of work in Australia

The notion of decent work flows from the fundamental characteristics of human work. The term Decent Work was coined in 1999 by the then Director General of the ILO.

According to the ILO, the Decent Work Agenda promotes a strategy that recognizes the central role of work in everyday life. The ILO aims to tackle major decent work shortcomings through programmes that meet each of the ILO's four strategic objectives. These are to:

- promote and implement the standards and fundamental principles and rights at work;
- enhance the opportunities for men and women to obtain decent employment and wages;
- expand the scope and heighten the effectiveness of social protection for all;
- strengthen tripartism and social dialogue.[xiii]

In his report to the 87th Session of the International Labour Conference, the Director-General recalled the issues inherent in the concept of decent work:

> "The ILO is concerned with decent work. The goal is not just the creation of jobs, but the creation of jobs of acceptable quality. The quantity of employment cannot be divorced from its quality. All societies have a notion of decent work, but the quality of employment can mean many things. It could relate to different forms of work, and also to different conditions of work, as well as feelings of value and satisfaction. The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market." [xiv]

On 10 June 2008, at its 97th Session, the International Labour Conference adopted the ILO Declaration on Social Justice for a Fair Globalization, which is to be implemented in the context of the Decent Work Agenda and its four strategic objectives. The 2008 Declaration was described by the ILO itself as the third major statement of its values after the Treaty of Versailles and the Declaration of Philadelphia and re-affirms and elaborates on its core values and strategies to achieve them. These reflect and support the Decent Work agenda summarized above.[xv]

The AIER Charter contains a number of principles relevant to decent work. Along with Article 2 on the dignity of work outlined above, the most relevant is Article 8 of the Employment Charter concerned with Fair Minimum Standards, which states:

> "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."

Other principles set out in Charter relevant to the notion of Decent Work in the Australian context include those relating to provision of a safe and healthy workplace, freedom from discrimination and harassment, and protection from unfair dismissal.

Since Federation [and even before in the pre-existing colonies], Australia has not been content to leave industrial and social outcomes to market forces or to the outcomes of often bitter struggles between employers and employees. Influenced by the intense industrial disputes of the late 19th

century, Australian law makers have always seen a role for the public interest in ensuring a set of core minimum labour standards, initially established by independent tribunals to assist in the resolution of industrial disputes and for the setting of core minimum labor standards through arbitration and more lately by legislation.

In Australia, this has often been a legally complicated process although the constitutional issues are now largely settled through the agreement of major political parties that industrial relations laws should be based primarily on the corporations power, supplemented by the external affairs and territories powers and the referral of powers by the States. Only Western Australia has not joined this national consensus.

The Australian approach to the establishment of decent wages and working conditions [part of the decent work agenda] has been different that of other countries. In many countries, it has been considered sufficient to allow for freedom of association and collective bargaining to ensure decent wages and conditions.

Australia, on the other hand, has sought to establish awards applying minimum wages across most occupations and industries and nationally. The rates in these awards and the federal minimum wage have been set, since at least the Harvester judgment of 1907, on a needs basis. That concept has a shifting and relative content but broadly addresses the need of a worker and at times the worker's dependents to be able to live at least in "frugal comfort" [using the Harvester formulation].

While the level of minimum and award wages is always hotly contested between the parties, the Australian system sets a floor for the bargaining sector and ensures that all workers classed as "employees", whether or not covered by an enterprise agreement, have access to both a minimum standard of wages as well as to certain core employment standards [now set by legislation] and, for most workers, other core employment standards in occupational and industry awards.

In many countries, Australia included, union density rates are declining. This poses a challenge for those countries seeking to rely solely on the mechanism of collective bargaining to achieve decent wage and conditions outcomes.

Even in the Australian context however, the provision of decent work remains a challenge. Not all jobs provide decent work even with properly fixed minimum wages due to the significant changes occurring in the economy including the rise of the number of workers working in insecure jobs.

While employment remains the norm, employment takes a variety of forms: full- and part-time as well as casual and temporary wage and salary earners, as well as self-employment [some professions, trades] independent contractors, sole-traders, small business operators and the like.

According to the ABS, in November 2013, the Forms of Employment Survey found there were nearly 11.6 million employed persons in Australia aged 15 years and over. Of these, 7.3 million (63%) were employees with paid leave entitlements in their main job, that is, they were entitled to paid sick and/or paid holiday leave, that is they were regular full or part-time employees.

Of the remaining employed persons:

- over 2.2 million were employees without paid leave entitlements (19%), that is they were casual employees;
- just under 1.0 million were independent contractors (9%); and
- just over 1.0 million were other business operators (9%).[xvi]

The ACTU's 2012 Insecure Work report defines insecure work as "poor quality work that provides workers with little economic security and little control over their working lives. The characteristics of these jobs can include unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of security and/or uncertainty over the length of the job; and a lack of any say at work over wages, conditions and work organisation."[xvii]

The report went on to find:

> "The internationalisation of Australia's economy over the past 30 years has undoubtedly improved living standards in Australia. At the same time however, the changes that have occurred in our economy and society have also seen unprecedented growth of insecure work – poor quality jobs that provide workers with little economic security and little control over their working lives.
>
> - Almost one quarter of all employees in Australia (23.9% or 2.2 million workers), and one fifth of the total workforce, are engaged in casual employment.
> - Fixed-term employment accounts for just over 4% of all employees, heavily concentrated in a few sectors such as education.
> - Over one million workers in Australia (9% of the workforce) are independent contractors. Many contractors are in reality economically dependent on a single client, and a significant number of contractors are pressured into sham contracting.
> - Up to 300,000 workers are employed through labour hire agencies, with little or no job security."[xviii]

The issue of insecure or precarious employment has implications for those relying on such forms of work as well as for our society as a whole. The ACTU Insecure Work inquiry heard evidence of people in insecure work having lower standards of living and financial independence. Insecure workers often have trouble securing loans for housing or cars, have difficulty in the private rental market, find their relationships are placed under pressure, and have increased health concerns.

As part of the 2014 review of modern awards, the ACTU has flagged the intention to seek award provisions allowing casual employees to convert to more secure forms of work after six months engagement as a casual employee.[xix] Employer responses to the ACTU claim have been mixed. According to media reports:

> "The Australian Retailers Association has indicated it would be prepared support a union's push to increase the security of casual workers, as long as employers retained flexibility. ARA president Russell Zimmerman told Fairfax Media there was some merit in the Australian Council of Trade Unions' call to make casual workers who work regular hours permanent staff. He said regular casuals could be guaranteed a minimum number of hours a week, but that bosses would be able to request them to leave early or stay longer at short notice. Mr Zimmerman said it was easier to predict busy periods 20 years ago, but the market had changed so rapidly businesses had little warning about when to expect peak trading. 'You can find Monday's are very busy and Tuesdays could fall into an absolute heap'…
>
> …Restaurant & Catering Australia chief executive John Hart said less workplace flexibility would simply equate to fewer jobs." [xx]

The Australian industry Group has rejected the ACTU's likely claim with regard to casual employment and says that employers, employees and society as a whole want or need workforce flexibility:

> "Employers need flexibility to maintain productivity and competitiveness. Employees need flexibility to meet family responsibilities and lifestyle choices. The community needs flexibility to achieve economic growth, high levels of employment and increased workforce participation. [xxi]

AiG has also challenged the claim that casual employment is rising in Australia. AiG says that the proportion of casual workers is stable at around 19% of the workforce and that the number of self-employed contractors and business operators has declined. [xxii]

Despite differing views on the number of casual employees in Australia, often perhaps based on different characterizations of what constitutes casual employment, it is indisputable that a significant number of employers have in recent years elected to source their workforce requirements through entities specifically established to operate as providers of labor.

Commonly referred to as labour hire suppliers, these entities are the actual employers of casual and temporary employees who effectively deploy them into the workplaces of the host employer.

This growing trend in Australian workplaces not only represents an intentional shift of the risk from the entity to the otherwise applicable employer but can be argued seeks to revert to the classification of labor as an input or commodity to the economic functioning of an enterprise.

The shift from an arbitration based industrial relations system to a system underpinned by enterprise bargaining has contributed to the rapid growth of labour hire companies. The use of third party employees by an employer reduces the ability of workers on site to collectively bargain at the enterprise level. This creates an incentive for host employers to outsource their labour obligations to third party providers.

The vast majority of labour hire employees are casual not permanent employees and are expected to be available to work on assignment often at short notice and with little or no security of employment, which further reduces their ability to bargain for wages in any meaningful way.

Labour hire suppliers are both large and small. Some are global operations and whilst others are domestic, often supplying employees in niche markets. As an industry they are unregulated and as entities require little capitalization.

IBIS World's Temporary Staff Services in Australia Industry Report indicates that there are 5406 businesses providing temporary staff solutions and the industry as a whole is worth $19.3 billion dollars.[xxiii]

While the safety net for many Australian workers is reasonably comprehensive, vigilance is always required especially with regard to the potential for exploitation and abuse of vulnerable workers, especially young workers, migrant workers and workers on s457 visas.

The Fair Work Ombudsman is alert to the potential for exploitation in regards to particular forms of precarious work. It commissioned a report into "Experience or Exploitation? The nature, prevalence and regulation of unpaid work experience, internships and trial periods in Australia." Of interest were the report's finding on the increase in use of internships across the Australian business community. The report found that:

> "While unpaid internships are more prevalent in certain industries, the report concludes that the majority of professional industries are affected, including (but not limited to) print and broadcast media, legal services, advertising, marketing, PR and event management. Such arrangements are often considered a prelude to paid work.
>
> The report concludes that there is reason to suspect that a growing number of businesses are choosing to engage unpaid interns to perform work that might otherwise be done by paid employees…
>
> …There is a clear need for cases to be brought before the courts to test out the legality of arrangements that appear to undermine the standards established by the Act.
>
> The report extrapolates that, if the trend in unpaid internships is left unchecked, it is likely to gather pace as it has done in other countries like the United States, where employers are forced by their competitors into a 'race to the bottom'. However, the report also notes that concern about unpaid work arrangements, especially as they impact on young people, has become a focus in other developed economies in recent years, especially since the Global Financial Crisis. In the United Kingdom, for instance, the present government has made a concerted effort in recent years to end any exploitation and to ensure fair access by all to the labour market." [xxiv]

The changing nature of work is posing significant policy challenges for governments and civil society in Australia and around the world. There are numerous choices to be made about how our workplace relations laws and policies can be configured to meet these challenges. The AIER believes the concepts of dignity and decent work must be central to all policy considerations.

Decent Work – Questions for discussion

What constitutes decent work in contemporary Australia? Does it include: a living wage; security of employment; reasonable working hours; balanced rewards for different types of work; a voice in the workplace; the ability to balance other aspects of our lives with work? What are the implications of decent work for providing a sufficient tax base for the provision of essential public services, social security and infrastructure?

Does the rise of insecure work in its many forms undermine the concept of decent work in Australia? What have been the social implications in the increase in insecure forms of work? What have been the economic implications in the increase in insecure forms of work? Should these trends be addressed by workplace relations laws or policies or left to develop within the current frameworks? If so, what policy settings should be changed?

Issue 3: Work and society

The 'Australian settlement' at Federation was based on a number of fundamental policy platforms, including the regulation of industrial relations by "conciliation and arbitration" overseen by independent tribunals advised by representative bodies of employers and employees. This was envisaged as a social good contributing to a more egalitarian society with strong social justice intentions and outcomes [as well as the means of settling industrial disputes other than by strikes and lockouts].

This 'settlement' was designed with certain modes of employment and employees in mind, principally adult male employees. As Professor McCallum has noted, the system did not operate as beneficially for other groups of employees, for example women and Aboriginal and Torres Strait Islander Australians. [xxv]

Since then there have been dramatic changes in employment and the Australian economy, particularly in the last few decades: the increase in women in the workforce, both full time and part time; the decrease in adult men in full time work (men working full time are now less than half the workforce); and the rise of casualisation and other forms of precarious work.

There have also been significant changes at a social level. Income and wealth inequality has been increasing. As the Australia21 Report, "Advance Australia Fair? What to do about growing inequality in Australia" found:

> "The wealthiest 20 per cent of households in Australia now account for 61 per cent of total household net worth, whereas the poorest 20 per cent account for just 1 per cent of the total. In recent decades the income share of the top 1 per cent has doubled, and the wealth share of the top 0.001 per cent has more than tripled. In Australia the top twenty per cent of income earners have over 50% more income than the lowest twenty per cent, while on a calculation of wealth the disparity is 71 times more."[xxvi]

The ACTU has pointed to a decline in the share of national income going to labor and a 'decoupling' of the link between productivity growth and the earnings of employees. [xxvii] Australia has traditionally sought to temper the outcomes of economic activity by ensuring socially just and equitable shares of enterprise and national income and productivity gains accrue to employees.

The ACOSS report "Poverty in Australia 2014" has found that despite being a wealthy country poverty, including children living in poverty, is increasing in Australia. Almost 14% of Australians in 2012 lived in poverty as measured by 50% of medium income, including over 17% of children. One third of people living poverty rely on wages as their main source of income.[xxviii]

The implications of growing inequality have been exercising the minds of politicians and policy makers. The relationship between employment, social security and the tax system is crucial to addressing poverty and inequality. Numerous reports over the years, including the Henry Tax Review and Harmer Pension Review under the pervious government and the McClure Welfare Review under the current government, take a close look at the intersections of these policy areas. AIER contends our workplace relations laws and policies must also play a crucial role in any policy response.

The level of minimum wages is an important factor in delivering socially just incomes in Australia. While only a minority of employees are minimum wage or award dependent employees, the minimum wage and minimum award wages remain important policy settings in Australia.

Comparatively, Australia has a robust mechanism for reviewing the minimum wage. The FWC Minimum Wage Panel takes into account the needs of the low paid, relative living standards and promoting social inclusion as well as economic indicators in their annual reviews.

This year the panel noted:

> [56] "The real weekly earnings of full-time workers have become progressively less equal over the past decade—for each decile, the lower the earnings, the lower the rate of growth in earnings—although this rising inequality has become less pronounced in the past five years. No party disputed the fact that the distribution of earnings has become more unequal in Australia over recent decades and the Panel acknowledges that annual wage review decisions have a role to play in ameliorating inequality.
>
> [57] While real earnings have generally increased over the past decade, earnings inequality is increasing. Over the past five years, the rate of growth in average earnings and bargained rates of pay have outstripped growth for award-reliant workers. This has reduced the relative living standards of award-reliant workers and reduced the capacity of the low paid to meet their needs—needs being a relative concept." [xxix]

The Panel also noted that

> "[399] Single-earner families that receive the NMW or a low award rate have had declines in their equivalent real disposable income, to the point where today a couple with two children would be in poverty as conventionally measured. Households that rely on earnings as their principal source of income comprise about one-third of all families below a 60 per cent median poverty line." [xxx]

Despite the Panel once again finding no evidence that modest increases in the minimum wage have any effect on employment, some sectors of the community continue to call for a reduction in the minimum wage as a means of dealing with youth unemployment.[xxxi]

Major employer groups are more measured in their response, supporting a minimum wage system but calling for future increases to be lower to maintain competitiveness and provide opportunities for more employment. In its Minimum wage submission this year, AiG argued:

> "Raising minimum wages by too much would dampen the prospects of unemployed people finding a job and, for underemployed people it would reduce opportunities for securing more work.
>
> If the increase in Australian minimum wages is to large this would further damage Australian competiveness. Our minimum wage levels are already amongst the highest in the OECD.
>
> In setting minimum wages this year, Ai Group proposes a 1.6 per cent wage increase."[xxxii]

These calls come alongside other calls for reductions in or removal of other remuneration such as penalty rates. Penalty rates form part of the minimum standards for many workers through the award system and are particularly important for workers in insecure work.

The Australian Chamber of Commerce and Industry has backed calls for a reduction in penalty rates to combat youth unemployment:

> "The Australian Chamber of Commerce and Industry, the business group that speaks on behalf of more small business people than any other, has praised Liberal backbencher, Alex Hawke, for his call today for a cut in penalty rates.

> "The western Sydney MP is reported saying that Australia's youth unemployment "crisis" warrants immediate action on penalty rates.
>
> "You can't have unemployment at a twelve-year high, with the youth jobless rates double the national average, and NOT be concerned," ACCI CEO Kate Carnell said.[xxxiii]

The argument is made that the value of work is itself of such importance to young people that reductions in minimum standards, including in pay, are justified, even if that means remuneration is insufficient to live on without being in poverty.

Such arguments have also been used by governments in recent years to justify reductions in social security payments and measures to make it more difficult to access income support payments. In this years' budget speech for example the Treasurer argued:

> "I say to the Australian people, to build a workforce for the future, those who can work, should work. The benefits of work go far beyond your weekly pay packet. Work gives people a sense of self, and work helps to build a sense of community. That is why young people should move into employment before they embark on a life on welfare. Australians under 30 years of age should be earning or learning. From next year, unemployed people under 25 will get Youth Allowance, not Newstart. People under 30 will wait up to six months before getting unemployment benefits, and then will have to participate in Work for the Dole, to be eligible for income support."[xxxiv]

The logic of these arguments is concerning from a perspective that values decent work along with dignity of work.

The impacts of work on women, children and family life is another area where workplace relations laws and policy have a role in shaping the society we live in.

Working hours, whether long hours, uncertain hours or unsocial hours, impact on time spent with family and friends. The competing demands of caring responsibilities and employment can place significant burdens on people, particular women. Shift work and the "fly-in-fly-out" phenomenon can contribute to familial pressure and adverse health impacts.

The work of the Work + Life Centre at the University of Adelaide in the "Australian Work Life Index" have charted how work intersects with other life activities. The 2014 Index found that:

> "Work-life interference remains a persistent challenge in Australia despite some changes in childcare, parental leave and employment law in the past two decades. Work life interference affects a wide range of workers, their families and communities. Its effects fall particularly hard upon women, mothers and other working carers. AWALI 2014 confirms that the length of working hours and the fit between actual and preferred hours are critical issues. Time strain is common, particularly for women. It is also important to highlight that not all working hours are the same: those who work on Saturday and particularly Sunday have worse work life interference - an issue that is relevant to the current debate about penalty rates in Australia." [xxxv]

The structure of the labour market and workplace laws and policies continue to impact sectors of the population differently. Today, despite the equal pay cases of the 1970s and the application of pay equity provisions in State and Federal workplace relations legislation, pay equity has not been achieved for women workers. In fact, there is evidence that the gender pay gap [GPG] in Australia is widening. According to Sara Charlesworth and Fiona Macdonald:

> "The GPG both reflects and sustains gender inequality. It also has direct links with women's poorer retirement incomes (Cameron, 2013). In 2013, the gender gap in full-time average weekly ordinary-time earnings was 17.5%, higher than the gap of 15.5% evident in 2005 (Australian Bureau of Statistics, 2013c). While the gap is much lower in the public sector than in the private sector – 13.1% compared with 20.8% – there has been no reduction in either sector.[xxxvi]

The regulation or otherwise of matters such as minimum pay rates and other remuneration, working hours, working patterns and the nature of employment all play a role in shaping our society and how we live in our community.

Work and Society – Questions for discussion

What role should the industrial relations system have a role in addressing increasing inequality and poverty? Is it limited to minimum wage and award wage determinations? How does the Fair Work Act currently operate to address inequality? What are the barriers in the Fair Work Act addressing these matters?

Are the drivers of work-life interference matters pertaining to the relationship between employer and employee? Should it matter to the regulatory system if they are or are not? Are Australia's current set of legislated and award minimum standards adequate for the current workforce? What is the relationship between social and economic outcomes in assessing our workplace laws and policies?

Issue 4: Freedom of association and the decline in collectivism

Freedom of association is a core human right. Simply stated Freedom of Association in the industrial context means that employees have the right to form and join unions without interference from employers or governments. This right is found in core statements of human rights adopted by international bodies. They acknowledge the right of workers to act collectively to protect and advance their economic and social interests.

Having a voice in the workplace is also a key element of treating people with dignity.

Article 6 of the Charter of Employment Rights provides:

> "**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 own 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."

Charter Article 9 reads [in part]

> "**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…."

The character of Australian workplaces and workplace relations is changing rapidly. A significant factor is the decline in union density in Australian workplaces. This section of the discussion paper considers the role of unions in the system and the implications of a weakened union movement.

The AIER starts from the premise that the right to form and join unions is not just a fundamental human right, but a right that brings with it important social and economic benefits to individual employees, to workers collectively and to society as a whole. Although the formal foundation for this premise is more or less intact, today in practice, it is under challenge. The right to form and join unions may be acknowledged but the exercise of it is discouraged by ideology, employer ethos and flexible work categories, structures and practices. However, AIER remains committed to the values that underpin the Charter of Employment Rights and the social and economic consequences that, in the Institute's belief, flow from it:

> "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."[xxxvii]

If unions promote more equitable social outcomes and other social benefits along with economic growth, what are the effects of declining rates of unionism? What should society's response be?

These questions are particularly significant in an increasingly deregulated and decentralized system. They are important for both organised workers as well as for those employees who are not union members and for those who are on collective agreements and those who are award dependent or minimum wage workers.

While individual employee rights are important, it has been the collective action of employees through representative organisations that has driven improvements in standards and conditions of employment over time.

The reputation and standing of Australian unions has been under severe challenge over the past few years, following the emergence of evidence of fraud and mis-management in the Health Services Union.

In the wake of these revelations, the previous Labor Government moved to tighten trade union governance and reporting standards and the current Government has announced its intention to do more, including the creation of a special Registered Organisations Commission, along with establishing a Royal Commission into Trade Union Governance and Corruption.

In Australia, unions have never been exempt from a level of government regulation if they sought to be registered organisations and participate in arbitral tribunals at the federal level [the same applies to employer organisations].

A balance needs to be found between the right of registered organisations to manage their own affairs [a part of freedom of association] and the need to ensure that they are properly run in the interests of members.

Unions are, and must be, democratically controlled membership based organisations. Recent developments have highlighted the need for even greater control by members and better ethical and governance practices in some organisations. If unions are important in society, then it is vital that they be well-run and well-managed, acting only and always in the best interests of rank and file members. How is this to be achieved without destroying the legitimate independence of employee organisations?

If unions are to survive and grow again, it will be necessary to address the multiple drivers of their decline. Now more than ever the trust and support of members and workers generally is essential to union viability. Part of the response must be a revitalisation of union democracy and greater genuine rank and file interest and participation in the affairs of the union.

In the view of AIER, unions still have a vital role to play in the exercise of employee voice in Australian workplaces and in the protection and improvement of standards of employment.

Workers under union collective agreements still appear to do better than workers under agreements with no union involvement. Precise figures are not available since there is no longer a defined union or non-union enterprise agreement making stream.

However, the Federal Department of Employment still publishes data in which it compares outcomes between agreements where a union is sought to be covered by the agreement [a process available under the Act] and where no such coverage is sought. Even where a union seeks coverage it does not necessarily follow that the union played a major role in the negotiation of the agreement. However, the latest report from the Department notes that ‘union’ agreements provide slightly better wages outcomes:

> "Agreements approved in the June quarter 2014 that formally covered unions had an AAWI of 3.4 per cent whereas those with no unions formally covered had an AAWI of 2.9 per cent."

A slightly narrower margin exists for all agreements current in the quarter. [xxxviii]

Union covered agreements still account for about two-thirds of all current agreements by number of agreements and the overwhelming majority of the employees.

The benefits of union agreements are under threat. In advance of the Productivity Commission's inquiry and report, the Minister has also announced that the Government will legislate to require industrial parties to consider productivity improvements to offset wage increases agreed upon. [xxxix]

Non-union workers and workplaces cannot influence national standards nor effectively press for greater employee involvement in the management of enterprises.

For example, the Fair Work Act gave the federal tribunal new powers to deal with inequities of pay based on gender. However, it required an application by five unions in the social and community services sector [and an agreement with the Federal Government] to begin to give effect to the new pay equity principle. The same is true about other pay equity or low pay cases underway or attempted.

Some minimum standards are now legislated and not contained in awards at all. This means that they can only be changed by legislative action by a government willing to do so and are vulnerable to removal by future governments.

Individual bargaining and individual grievance resolution is also on the rise. Not long ago, individuals had little or no access to industrial tribunals. While statutory individual agreements are no longer part of the formal regime, with the extensive unfair and unlawful dismissal jurisdiction and the emerging general protections and bullying jurisdictions, thousands of individual cases are finding their way into tribunals each year and into the courts.

The Fair Work Commission's Annual Report 2013-14 noted what it described as "the most significant change" in the composition of the Commission's work: "from collective to individual dispute resolution". Until the year 2005-06, collective disputes significantly exceeded individual matters [e.g. unfair dismissals]. The balance changed during the WorkChoices period [when the number of collective matters fell sharply. While the number of collective matters has recovered under the Fair Work Act, the number of individual matters coming before the Commission has jumped sharply. [xl] Amongst these individual matters in 2013-14 were 2800 matters relating to general protections involving dismissal. This is in addition to other general protections matters, unlawful terminations and more than 14,700 unfair dismissal cases. [xli]. By contrast, the number of applications for approval of collective agreements has fallen from 8565 in 2011-12 to 6403 in 2013-14. [xlii]

The new bullying jurisdiction given to the Commission also provides another avenue for individual disputes to come before the tribunal. This new situation presents challenges for employers and unions [as well as for the tribunal].

Individual grievance resolution is important and central to the Australian notion of a "fair go all round" in workplace relations. But individual matters do not usually address or advance systemic or society wide issues. Individual cases may expand the understanding of the law in some matters, but more often simply reflect the situation of 'what is' rather than 'what ought to be'. In AIER's vision, we should all collectively continue to ask the question about what sort of society we want Australia to be.

Little discussion takes place in Australian society about how we can expand employee voice in decision-making at the workplace to the benefit of all actors in our community. The AIER Charter calls for greater employee participation in decisions in the workplace. There is little evidence of any trend in this direction in Australia. There is further discussion of this in the next section below.

Freedom of association and the decline in collectivism – Questions for discussion

Given the decline in rates of unionism, has the collective model had its day? Is the rise of individualism in the workplace inevitable or desirable? How will changes in workplace standards be brought about in the future if unionism is further weakened? What should Australia's policy response be? What social impact can we expect from the decline of collectivism? Is there another way?

What are the implications of these developments for Australian enterprises and their employees? Should we commit ourselves to the re-invigoration of employee voice in workplaces by encouraging unionism and or by developing other means of encouraging employee voice? What are the implications of doing so, and of not doing so? Are there available means to encourage worker voices across a number of enterprises and communities?

Issue 5: Industrial citizenship and ethical workplaces

Beyond institutional workplace relations frameworks, it is also relevant to consider how individual workplaces function. Do enterprises operate on the 'command and control' model whereby employers and their representatives make all key decisions and employees are expected to simply put these decisions into effect? Or are there mechanisms to seek the views and input of employees into management decision making?

Traditionally, Australian policy and legislation appears to have concentrated on the legislative framework governing employer-employee relations and said little about collaborative decision-making at the enterprise level.

Employers are required to consult about decisions to retrench more than 15 employees and must consult with relevant unions about measures to minimize or avert such terminations. Beyond this, however, employers are not required to consult about other matters in the workplace.

Notions of industrial democracy, works councils or other means to involve employees in decision making at the enterprise level have been given little sustained attention in Australia. AIER believes that this should change.

Article 1 of the Charter provides

> "**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"."

Article 5 of the Charter provides:

> "**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."

The Australian Standard of Employment Rights, designed to flesh out how the Charter may be operated in practice, gives some guidelines as to how workplace democracy might work in practice:

> "**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 the 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."

The existence of conflict between employers and their employees is normally taken as a given in discussions of workplace relations. It was the impetus for the Australian conciliation and arbitration system.

With the replacement of conciliation and arbitration by enterprise bargaining, Australian labor law does not greatly seek to control the ways in which owners operate their businesses. Even the "all's fair in love and war" doctrine applied to the processes of bargaining reflects in part the approach of American labor law to a hands off stance where parties are struggling in collective bargaining to establish their terms and conditions of employment.

The Australian law does allow for intervention when the economy or significant parts of it are threatened by industrial action during bargaining [for example, in relation to the Qantas dispute].

Otherwise management is free to get on with its business subject to compliance with laws relating to minimum standards, including a certain level of job protection and security [usually compensation to employees laid off as a result of redundancy].

No level of employee involvement in enterprises is mandated and little is expected. Some employers voluntarily run employee involvement schemes. In some cases these are designed as a union avoidance tactic, in other cases they reflect a genuine attempt to improve workplace relations practices and outcomes for both the enterprise and the employees.

Many enterprises in the private sector and particularly small and medium enterprises still operate on the command and control method of management. Some enterprises seek to take full advantage of the possibilities for the engagement of workers with little or no job security: casuals, sessional employees, labor hire employees or contract out whole activities and functions to "arm's length" employers to whose employees the "real" employer owes no legal obligation.

Employees often work in a climate of fear – fear of insecurity of employment through reduced hours or dismissal. Many employees do not enjoy the benefits of employee involvement and engagement in the operation of the businesses in which they work.

Outside of the public sector, employment by corporations or other legal entities [trusts, partnerships, etc.] is the norm. In Australia, other forms of economic ownership such as worker cooperatives are rare [those cooperatives that do successfully exist tend to be consumer or producer co-ops].

Employee relations are predominantly managed in larger enterprises by professionally trained "human resources" managers. Industrial relations is a declining profession largely being replaced by employee relations and personnel managers.

These professionals operate in the best interests of the corporation for which they work, rather than in the best interests of employees. This is their legal obligation. Little data is available on the extent to which enterprises seek to operate to provide "mutually beneficial outcomes" for both employers and their employees. Emphasis tends to be on shareholder value and not the interests of other stakeholders or mutual obligation between corporate employer and the employed.

Some observers and economists suggest that this is the only proper function of enterprises; others suggest that a broader view is essential if enterprises are to function sustainably in the longer term and to operate in a socially beneficial manner.

Little consideration appears to have been given in Australia in recent times of means to encourage co-operation between employers and their employees and to seek "win win" outcomes for both. AIER supports a less adversarial and more co-operative relationship between these two interest groups:

> "The recognition of workplace democracy rights involves a rejection of adversarial workplace relations [based as they often are on the pursuit of cost cutting strategies]. Considerable international evidence shows that embracing an alternative partnership-oriented, 'high performance' approach leads to productive outcomes for firms while also giving workers greater 'voice' on key issues such as job security. Workplace democracy rights form a critical component of the high performance approach". [xliii]

AIER believes that this can be achieved while maintaining the rights and responsibilities of both employers and employees. But this will require new attitudes in both employment relations and workplace relations.

Industrial citizenship and ethical workplaces – Questions for discussion

What does/would an ethical workplace look like? How different would it be from today's norm? Are there examples of such workplaces in Australia? Do they or would they have benefits for enterprises, individuals and society? How would we bring such workplaces about?

Most workplaces still operate on the command and control model: who has the power in the workplace? Do workers have the ability to positively influence workplace outcomes? Can we make our workplaces more collaborative? Is this desirable?

Conclusion and key issues for discussion

The Federal Government is preparing the terms of a reference for a Productivity Commission inquiry. In its 2013 election platform, the Coalition parties promised to task the Productivity Commission to undertake "a thorough analysis of Labor's Fair Work laws and the impact they have on our economy, productivity and jobs". [xliv]

While the Government has not yet released the terms of reference, the Productivity Commission Inquiry risks being an investigation carried out by market oriented economists rather than incorporating a broader investigation into the values which should underpin workplace relations in our society.

AIER believes that workplace relations have a significant impact on our society, on individuals, families and the nation as a whole. In this discussion paper, which is intended to prompt discussion and debate at this year's Ron McCallum Debate, we have looked at various, inter-related aspects of the Australian approach to these issues.

The paper has asked the question: how do workplace relations shape our society? It has considered the notion of dignity at work and of work. It has sought to explore how we might understand and apply the concept of decent work in modern Australian workplaces. It has considered the impact of declining union membership on these matters and sought to ask the big question of how work impacts the economic and social experiences of individuals and the common good.

Finally, it raises the question of whether Australia needs a fundamentally new approach to workplace relations: a consideration of industrial citizenship for all workers so that all workers can be full participants in work and economic activity, not just industrial conscripts.

AIER poses these questions because of their inherent worth but also because we believe that these issues are important to the nation. Australia has a unique industrial history and our culture and institutions reflect our belief in a "fair go all round" at work and a society based on social justice for all.

But are we delivering on this vision in 2014? Do our enterprises operate as well as they could? Do the industrial parties contribute as much to individual and national well-being as they might? What can we do better? Should we leave it all to the Productivity Commission? Will a new vision of industrial citizenship assist? Polices, practices and legislation reflect what society values. What do we value at work?

Perhaps the last word can be given to AIER's patron, Professor Ron McCallum, who has considered the implications of the notion of industrial citizenship in the Australian context drawing on [largely] overseas writings on this issue. In a 2011 paper, Prof McCallum wrote:

> "In relation to Australia, now that compulsory conciliation and arbitration has been displaced by collective bargaining and by an ever increasing level of individual bargaining, much work is required to determine the appropriate level of rights and obligations of Australian industrial citizens. Minimum terms and conditions of employment must continue to be the birthright of Australian industrial citizens, and of course laws on working hours, on unfair dismissal, on discrimination at work and on occupational health and safety must be retained and enhanced. In areas of employment where collective bargaining does not operate, thought needs to be given to establishing consultative mechanisms to at least ensure that the views of industrial citizens are made known to their employers.

"However, it is also obvious that a re-working of industrial citizenship is essential to take account of the needs and aspirations of part-time and casual employees and of those workers who are receiving remuneration as independent contractors and consultants. A revised form of industrial citizenship must also embrace immigrant workers who come to our shores, either as short-term employees or to build new lives in our nation. Citizenship must also concern itself with the needs and aspirations of home workers, of labour hire employees and of those persons undertaking voluntary labour. There is much work to do in order to forge a new Australian industrial citizenship for the deregulated labour market of the twenty-first Century."[xlv]

About the Australian Institute of Employment Rights

Founded in 2005, the Australian Institute of Employment Rights (AIER) is an independent, not-for-profit organisation that works in the public interest to promote the recognition and implementation of the rights of employers and workers in a cooperative industrial relations framework.

AIER is independent of government or any particular interest group. It is governed by some of Australia's finest and most respected experts in industrial law and relations, including employers, employees, unions, academics and lawyers, who collaborate to promote positive work relationships. The governance structure of the Institute is based on the principle of tripartite representation of employees, employers and independent persons, as exemplified by the International Labour Organization of the United Nations.

At the heart of AIER's work and philosophy is its Australian Charter of Employment Rights, a simply expressed blueprint that defines and articulates the rights of employers and workers by identifying the fundamental principles on which fair and balanced workplace laws and relationships should be based. The result of extensive research drawing upon a range of international and uniquely Australian sources, the Charter is a template of rights and obligations that all workplaces are encouraged to adopt and observe and upon which any legislative system of industrial relations should be based.

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