

IRSQ Convention – Workplace Relations: Back to the Future

A New Workplace Relations Architecture

Clare Ozich, AIER

6 Oct 2017

Firstly I would like to acknowledge the traditional owners of the land on which we are meeting and pay my respects to their elders, past, present and emerging. I acknowledge that sovereignty over this land was never ceded.

At an industrial relations conference with the theme of back to the future, I also want to acknowledge that First Nations people continue to live with the legacy of being denied access to the industrial fairness that was the hallmark of Australian society for the better part of the 20th century. And it is a legacy that continues today when you consider the nature of the discriminatory Community Development Program.

I want to thank the Queensland Teachers Union for sponsoring this session and giving me this opportunity to talk about the AIER and our work.

Introduction

Today I want to talk about a new project the Australian Institute of Employment Rights is embarking on. It is a project to envisage a new workplace relations architecture.

The AIER - for those of you who don't know of us - is an independent policy and advocacy organisation focused on issues of work and workplace relations.

Before getting to what the project is I want to start with why. Why do we need explore what a new workplace relations architecture could look like?

Each year the AIER holds a public debate in honour of Professor Ron McCallum. Last year the topic was inequality and insecurity and the links between in the two in the context of work. In the course of the debate Ron proclaimed that “the system is clearly broken” and the

rest of the panel including people from union, business and academic perspectives all agreed.

And I think there is a growing recognition across the community that the workplace relations system is indeed broken, that it is not serving the needs of our society.

To know whether something is broken we need to think about what purpose it seeks to serve - why do we regulate work in the first place. Some of the reasons include:

- Human dignity, social and economic justice and the well-being of society requires a fair distribution of economic resources;
- There is an inherent power imbalance between employers (or those that provide work) and workers that requires regulation to ensure fairness;
- To ensure dignity and a fair go all round for people who work (social cohesion);
- To provide the conditions for a certain standard of living (material needs) for our community;
- Protect people's physical and mental health and safety at work;
- Research has demonstrably shown that fair and safe workplaces are vital to prosperous, stable and resilient businesses and economies.

If the system isn't meeting these needs, it is no longer working.

How do we know the system isn't working? There are a few indicators:

Wide spread exploitation and insecure work

One of the current indications that the workplace relations system is broken is the amount and the nature of worker exploitation, particularly of vulnerable workers, that is occurring. The scandal of the 7-11 franchise, followed by other franchises; the ongoing plight of temporary migrant workers; the wage theft experienced by many young people as well as other workers; and the increasing use of largely unpaid interns all point a significant problem.

The significance of these stories of exploitation is not just that there are employers or businesses that exploit their workforce. There are always people who think they can get away with defying the law.

What is more important is the systemic and structural forces that both facilitate and to a certain extent encourage this degree of exploitation.

For example, the nature of the franchise business model that relies upon low wages to be profitable. The systemic problems through supply chains is another example, where it is difficult if not impossible to hold the businesses at the top of the supply chain accountable for exploitative practices down the supply chain. High youth unemployment rates are putting downward pressure on wages and adding to the exploitation of young people in places they are more likely to work such as cafes, restaurants and shops. The difficulty of obtaining good quality work is driving a need for experience leading to voluntary internships.

Along with 40% of the workforce in some form of insecure or non-standard employment relationship - this is all pointing to a system that is failing significant part of the workforce.

Wage stagnation

Another indicator is wage stagnation. As we all know Australia is currently experiencing record low wage growth, with wages grew by less than 2% to the year ending March 2017. Furthermore, the ABS national accounts show that in June quarter this year the wages share of income dropped to its lowest level since 1964, while the profit share was at its highest in five years.

Stagnant wages and the inequality produced by productivity increases flowing disproportionately to profits and not wages have economic, social and political consequences. The Reserve Bank Governor, Phillip Lowe, has identified low wage growth as one of the key risks to the Australian economy.

Income and wealth inequality coupled with various forms of insecurity is driving political disruption as well. Creating the fertile ground for a far right politics that feeds on discontent while offering false solutions and scapegoating.

Gender pay gap and discrimination and harassment

The gender pay gap remains a stark reminder of the failings of the workplace relations system. Gender pay inequality is getting worse not better. The current gender pay gap at 16%, similar to what it was 20 years ago, despite being lower at different times. The *Fair Work Act* has so far proved incapable of addressing the gender pay gap.

The success of the 2012 equal pay claim for social and community service workers demonstrated the significance of a wide ranging and powerful public campaign and a government prepared to negotiate a fairer outcome. Rather than I think being a reflective of the legislative framework operating well.

There is also increasing evidence of dangerous work cultures of bullying, harassment and discrimination. Recent investigations into the hospitality industry, for example, have shown exceedingly high levels of sexual harassment at work.

Future work

All of the above looks at a fraction of what is happening now in workplaces and across our society.

There are also growing challenges ahead with the changing nature of work. Our system is currently unable to deal very well with non-standard forms of work – with up to the 40% of Australia workforce in insecure or non-standard forms of work – let alone modes of work utilising new technologies such as the growing ‘gig’ or ‘on demand’ economy – more discussion on that later today.

Then there are the future technological challenges that are and will re-shape work such as intensifying automation and the digital revolution, increasing surveillance technologies and artificial intelligence.

On top of that is the climate crisis, which will fundamentally affect work as it will all other parts of our lives. Global warming will be a major force in transforming work and restructuring jobs. In fact it already is. The world of work is a place of deep ecological impact. If we are ever going to address global warming in such a way as to provide for a safe climate and create a just society then work must change as our economy transforms.

And it is not just that industries like coal mining will no longer be viable but addressing the climate crisis will necessitate the restructuring of most if not all other industries to reduce carbon emissions but also to manage the consequences of global warming. If, for example, as recent research predicts Melbourne and Sydney will see temperatures of 50 degrees Celsius by 2040 – leading I assume to even higher temperatures in Queensland and other parts of the country – then how we structure our working days will change dramatically.

So the workplace relations system will come under increasing pressure in circumstances where it is currently not working particularly well.

How did we get here

There are lots of different answers to how we ended up here and why at this conference the theme is “back to the future”. We can look to the fundamental economic shifts that have occurred with the globalised economy, the decline of organised labour, the politics of deregulation, the finalisation of the economy and the embrace of economic growth as the marker of a nation’s success.

These changes are now usually referred to under the rubric neoliberalism. We get to blame everything bad on neoliberalism these days but it can be a phrase that means something different to different people.

I want to talk explicitly about neoliberalism less as a set of economic policies and more as a political rationality. The US academic Wendy Brown talks about it in this way – “Neoliberal rationality, while foregrounding the market, is not only or even primarily focused on the economy; it involves extending and disseminating market values to all institutions and social action...and configures human beings exhaustively as market actors, only and everywhere as homo economicus”

One of the most significant changes over the last 30-40 years has been this ideological shift in how our political, economic and social institutions function and how it has invaded our public discourse, and provides the basis the present common sense. That Economic

Man (person) has replaced political man (person). Or the consumer has trumped the citizen.

And the workplace relations system has not been immune from this shift. I think we can see that quite clearly in changes to the regulation of work in Australia over the last 30-40 years. In the objects of the Fair Work Act; in the changes to how the Commission operates; in the shift to a more individualised approach rather than a collective one.

The Fair Work Commission's decision in the penalty rates case and the adoption of key elements of the Productivity Commission's approach is one example of the shift I think. The Productivity Commission being of course the embodiment of neoliberalism in Australia's governing institutions.

And I also think that what we are now seeing come to fruition are the warnings of people like Ron McCallum and former High Court Justice Michael Kirby about the consequences of shifting the regulation of work from the conciliation and arbitration power to the corporations power. Neoliberalism at work!

As Professor McCallum warned back in 2005: "In time our labour laws will become little more than a sub-set of corporations law because inevitably they will fasten upon the economic needs of corporations and their employees will be viewed as but one aspect of the productive process in our globalized economy."

And that in shifting the constitutional basis of regulating work from the conciliation and arbitration power to the corporations power, the notion of industrial fairness and reasonableness that Justice Kirby so eloquently defended in his WorkChoices dissent is being superseded.

So we have shifted from a more explicit understanding that workplace relations is concerned with the relationships between people and is directly connected to a achieving a fair and equitable society to it becoming a subset of economic regulation.

Now I am not suggesting we can just go back in time or that everything was perfect in the past. I am pretty sure I wouldn't have enjoyed living the 1950s or 60s very much.

But if, as John Buchanan argues, “employment is now the bearer of inequality and unfairness”, we need a re-think.

And I think the question before us is how can we reinterpret Justice Kirby’s notion of industrial fairness and reasonableness or Professor McCallum’s call for justice at work into the future.

And to do that we have to consciously reject the neoliberal approach, and refocus on people as full human beings – not as consumers, or entrepreneurs, or human capital.

This is what the AIER is looking to do with our new project – A new workplace relations architecture.

A new workplace relations architecture

At the AIER we are of the view that the situation confronting Australia is beyond tinkering around the edges with minor reform or compromising for politically palatable solutions. We believe we need a reimagining of how we regulate work to provide a pathway to fairness in this time of significant and rapid change. This does not involve relegating to the past important principles or structures but it does involve reconceptualising those principles and structures for an uncertain future.

The AIER bases all our work on the [Australian Charter of Employment Rights](#). The Charter consists of 10 principles including freedom from discrimination and harassment; a safe and healthy workplace; workplace democracy; union membership and representation; protection from unfair dismissal; fair minimum standards; fairness and balance in industrial bargaining; and effective dispute resolution

And there are two principles in the Charter that underpin all the others and are crucial to the project of developing a new architecture:

- Good faith – captures the principle of the “fair go all round” that has been an important feature of the regulation of work since the inception of Australia’s industrial relations system. It is the expectation that employers (people who provide work) and workers will co-operate with each other so that each can

enjoy the mutually expected benefits of their working relationship.

- Work with Dignity – that all people have the right to a dignified life, including when they are working, along with all other parts of their lives. Dignity and meaningful work encompasses meeting material needs as well as the ability to participate fully and equally in society, free from discrimination.

These two principles explicitly place people as whole human being, their relationships and notions of fairness and justice at the centre.

So having said that what is the project going to do.

We propose to explore the elements of a new architecture through five modules.

The first module will focus on the overall approach we are proposing and its underlying principles. Taking the Charter of Employment Rights as a basis we will explore the broad rights and obligations of those who provide work and those that undertake work. These obligations will provide the overarching framework for the regulatory model. We will look to think through how the model adopted by OHS regulation capturing different forms of work and different forms of workplaces can be expanded.

The following modules then focus on key elements that a regulatory system needs to address.

Module 2 will look at the question of the state, either legislatively or via other mechanisms, setting minimum standards of work. The content of the standards, how they are set and to whom they apply are key issues to be explored, including having minimum standards that apply to all workers, not just employees.

Module 3 will focus on workplace democracy. We will explore frameworks for workers to collectively pursue their interests and for means of promoting genuine collaboration and engagement within and across enterprises and industries and along supply chains. With union density at less than 10% in the private sector, the question of how workers can engage with their workplaces is urgent – whether that is reviving the union movement in its current institutional form,

contemplating a different form of unionism or other forms of workers engaging collectively in decisions about their work.

Module 4 will explore how the above propositions can be reflected in specific regulation of work in relation to its different aspects, that is, industrial relations; health and safety; and providing for discrimination and harassment free workplaces.

Finally, Module 5 will look at how people within the system can access justice when obligations are not met; minimum standards are avoided; workplace democracy processes are undermined; health and safety is put at risk; and equality is being denied. We will consider options for the best models for dispute resolution and for accessing justice, including considering the role of arbitration. Do we stick with a system of hundreds of pages of rules and complicated enforcement or do we rethink arbitration and what might that look like today?

Conclusion

It is a big project. And we want it to be an ambitious one. We want to explore bold ideas, ideas that might seem a little out of the box, that don't fit the current model of common sense that now dominates. But that also draws on the best of Australia's tradition in innovation in regulating work.

At the moment we have a lot of questions but are looking forward to coming up with a range of answers. And we are looking for help! So if you agree with our analysis or parts of it, have ideas about how the system can be reimaged, get in touch. I would love to talk to you!