



The System is Broken. What is the fix?

The Ron McCallum Debate 2017 Discussion Paper

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The 7th Annual Ron McCallum Debate 2017

Discussion Paper

The system is broken. What is the fix

There is a growing recognition across the community that the workplace relations system is broken.

Large scale exploitation of workers, low wage growth and declining levels of unionisation point to the system failing workers.

Business, particularly small business, finds the system too complicated and cumbersome.

There are also growing challenges ahead with the changing nature of work. Our system is currently unable to deal with modes of work utilising new technologies such as the growing 'gig' economy, let alone technological challenges such as intensifying automation, increasing surveillance and artificial intelligence.

Key Questions:

- 1. Do you think the workplace relations system is broken? If so, what for you is the most significant indicator that something is wrong? If not, what is working best?**
- 2. If there was one thing you could fix or improve first, what would it be?**

Note: The purpose of this Discussion Paper is to inform the Ron McCallum Debate. It sets out the approach of the Australian Institute of Employment Rights (AIER) to the issues and proposes discussion questions that speakers and participants may wish to reflect upon and discuss during the Debate. The paper represents the views of AIER and its authors and in no way represents the views of any participant.

About the AIER

The Australian Institute of Employment Rights is an independent, not-for profit organization with the following objectives:

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.

The AIER is an organisation independent of government or any particular interest group and seeks implement these objectives with academic rigor 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.

AIER draws its basis for this paper from its belief that any system of industrial regulation must be founded in principles which reflect:

- Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
- 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; and
- Rights appropriate to a modern employment relationship which are recognised by the common law.

The AIER has developed an instrument, the [Australian Charter of Employment Rights](#), based on the three sources of rights identified above. The Charter is both a unique and an appropriate reference tool for examining the rights and responsibilities of employers and employees in Australia, evaluating the existing system of regulation and when considering the challenges of the future of work.

“The system is clearly broken”

Ron McCallum at the 2016 Ron McCallum Debate.

Last year’s Ron McCallum Debate focused on [inequality and insecurity](#). As Ron put it, “we are not the egalitarian and equal society we were 50 years ago when I was growing up.”

The [panel](#) spoke about:

- the experiences of workers in insecure work;
- the reality faced by small and medium businesses in today’s economy;
- the regulatory deficiencies that provide the conditions for the exploitation of temporary migrant workers;
- the importance of education and leadership in building a strong society; and
- some of the causes of and solutions to rising economic inequality.

The take-home message of the night was provided Ron McCallum himself when he reminded us that there is always another way. He encouraged us to think big and to think outside the box when considering how to respond to the challenges of insecure work and economic inequality.

Inequality is not inevitable. As John Falzon, CEO of St Vincent de Paul Society, [argues](#)

“It is a political choice to fight for tax cuts for corporations and high-wealth individuals while pretending the economic inevitability of penalty rate cuts, effective pay cuts through heightened workplace insecurity, and cuts to social security and social supports.”

At this year’s debate, we are putting our focus on the workplace relations system; how we know it broken; and what are some of the approaches to fixing it. We are taking to heart Ron’s encouragement to be bold because how we regulate work has a profound impact on our society’s wellbeing and the sustainability of our economy.

There is now widespread understanding that Australia’s workplace relations system is failing. Our newspapers are filled with stories of workers being exploited, underpaid and denied safe working environments. Wages are stagnating with adverse social and economic impacts.

The [ACTU](#) is calling to “change the rules” citing growing inequality, low wage growth and 40% of the workforce in insecure work to argue that “the Australia we once knew, that our parents experienced, is not the reality anymore because the rules that made our country fair are broken.”

The business lobby have long argued the workplace relations system is too complex and inflexible to allow businesses to grow and flourish, particularly small businesses in growing sectors of the economy. Kate Carnell, the Small Business Ombudsman, [argued](#) in last year’s McCallum debate,

“One size does not fit all. A flexible workforce is essential to ensure more women are in the workforce, more young people are in the workforce and increasingly that more older people have the capacity to get jobs that are flexible and suit their lifestyle.”

The *Fair Work Act* is not living up to its name, and along with the other laws and regulations that make up the system of workplace regulation, it is failing workers, employers and our society.

1. What is the system supposed to do?

For the purposes of this paper, when we talk about “the system” we are primarily referring to the workplace relations system and the bundle of laws, regulations, policies and cultural norms that determine the conditions under which (paid) work is offered and performed. The *Fair Work Act* is the key legislative framework along with occupational health and safety laws, anti-discrimination and harassment laws and laws that regulate unions and employer representative bodies.

There are other “systems” that have an impact on work and contribute to inequality and hardships in our society. The taxation system, the social security system, and corporate regulation, for example, are also areas that need fixing for a fairer and more equitable society. But we are focused more specifically on the workplace.

Before we consider various indications that point to the system’s failings, it is useful to remind ourselves of why we regulate work in the first place.

The AIER proceeds from the following premises as to why regulation of work is necessary:

- Human dignity, social and economic justice and the well-being of society requires a fair distribution of economic resources and investment;
- There is an inherent power imbalance between employers 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 and strong businesses and economies.

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

Questions:

Are there other reasons to regulate work?

Is the current workplace relations system meeting these objectives?

2. How do we know the workplace relations system is broken

In this section we look at some of the key indications that suggest that the current workplace relations system is broken.

Exploitation and wage theft

One of the key pieces of evidence that indicates the workplace relations system is broken is the significant 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 [migrant workers](#); the wage theft experienced by many [young people](#); and the increasing use of largely unpaid interns all point to a system in crisis.

The significance of these stories is not just that there are employers or businesses that exploit their workforce. There are always rogue elements, 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 degree encourage large-scale exploitation. For example, the nature of the franchise business model that relies upon low wages to make a profit. 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 puts downward pressure on wages and is leading 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.

As Jo Howe forcefully argues in [Employment Rights Now](#) in relation to the exploitation of temporary migrant workers,

“Our ability to protect the rights of temporary migrant workers to be accorded dignity in the workplace is seriously deficient because of the regulatory disjuncture between immigration law and labour law that allows information to be channelled from the labour inspectorate to immigration authorities.”

The deliberate underpaying of minimum wages, or wage theft, is another growing concern. It is occurring throughout the economy, but particularly in specific industries such as hospitality, and also on a large scale as the 7-11 scandal showed along with the ongoing revelations about migrant workers in industries such as horticulture. The Government has been forced to act introducing the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, which seeks to address some of the problems outlined above.

At the moment the system relies on a mix of individuals knowing their rights and seeking enforcement through the Fair Work Ombudsman and the Ombudsman’s own investigations. But it is of course literally impossible for the FWO to enforce the rights of every worker. Unions also play a role but with less than 10% of the private sector workforce a member of a union, the majority of workers are on their own. The FWO acknowledges the potential for particularly vulnerable workers to be ripped off. Its new [Record My Hours app](#) makes it easier for employees to document their hours to check they are being paid correctly and have information on hand if there are any issues.

There have also been examples of wage degradation occurring through the bargaining system. The now infamous [SDA/Coles agreement](#), for example, facilitated wages less than the relevant award for key groups of workers. Similar agreements have been found in various other parts of the fast food and retail industries.

The [Senate Standing Committee on Education and Employment](#) recently completed an inquiry into corporate avoidance of the Fair Work Act, including minimum wages and conditions. There are a multitude of lawful ways employers and businesses can avoid minimum conditions and other regulations, for example, using casuals, contractors, labour hire. Around one fifth of Australia's workforce is casual and around 40% of the workforce is in some form of insecure or non-standard work arrangement. The use of labour hire is growing across industries and Australia is near the top of Organisation for Economic Co-operation and Development country rankings for the use of agency work.

The Committee's recommendations to reduce the means to avoid workplace obligations include proposals for more extensive regulation of labour hire arrangements; amendments to the bargaining system; implement casual conversion rights as a National Employment Standard; greater penalties for wage theft; changes to the relationship between the *Fair Work Act* and migration laws; stronger sham contracting provisions; and minimum wages for "gig" workers.

The advent or re-emergence of the "gig" or on-demand economy using new technology is another phenomenon that [challenges](#) the current workplace relations system: "Australia's industrial relations system seems ill-equipped to regulate for emerging forms of work, given that it continues to struggle to define long-established forms of contingent employment (such as casual work)." In the "gig" economy workers bring not only their labour but capital to the work. Risk is shifted from the enterprise to the worker yet workers have little control over the enterprise. While the Fair Work Ombudsman is currently investigating Uber as to whether its drivers are contractors or employees, the business model of the on-demand economy is predicated on workers not being employees nor having access to the benefits of being employees.

A recent [paper](#) by Andrew Stewart and Jim Stanford set out five approaches to regulating work in the "gig" economy:

1. Confirm and enforce existing laws;
2. Clarify or expand definitions of employment;
3. Create a new category of 'independent workers';
4. Create rights for workers, not employees; or
5. Reconsider the concept of an employer.

AIER has consistently advocated for rights for workers, not just employees as essential to providing for fairness at work into the future.

It is a feature of industrialised economies around the world that there is a shrinking cohort of workers who decent secure work with a range of conditions, and a growing cohort of workers with neither security nor access to minimum conditions. The AIER looked at the

broader implications of insecure work in our [discussion paper](#) for last year's Ron McCallum debate.

Questions:

How do we address these systemic problems? Do we need to redefine work and reorient the system away from the employment relationship?

Is there a better approach to enforcement?

Low wages growth

Australia is currently experiencing record low wage growth. Wages grew by less than 2% to the year ending March 2017. Furthermore, the ABS national accounts show that in June quarter of 2017 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. [Ross Gittens](#) points out that when labour and capital don't each get their fair share of economic progress:

“This doesn't just widen the gap between rich and poor. By directing so much income growth away from the high spenders at the bottom and middle to the high savers at the top, it slows growth in consumption and thus production.

It also adds to the disillusionment of ordinary voters, making them more likely to lash out and vote for the cunning wacko celebrity-de-jour candidate, such as Clive Palmer, Pauline Hanson or Donald somebody.”

We discussed these consequences more fully in our discussion paper for last year's debate.

There are a number of factors that are contributing to low wages. The Reserve Bank identifies a number of them including spare capacity in the labour market or unemployment and underemployment, job insecurity and perceptions of insecurity, and the reduced bargaining power of workers. Another is the changing structure of the economy, including the financialisation of the economy, leading to a disconnect between worker productivity and corporate profits.

The workplace relations system has a role to play in this mix as well. One of the reasons we regulate work is to redistribute economic resources. Minimum wages and conditions have a key role to play.

The Fair Work Commission found in its most recent [minimum wage decision](#) that “employees who are award reliant and/or receive low pay comprise substantial parts of the employee workforce.” Approximately 23 per cent of employees are paid the equivalent of the National Minimum Wage or a modern award minimum rate. It also found that “while 86 per cent of award-reliant employees are adults, they are disproportionately young, female, single, have no children, work part time, work as casuals and work for small businesses. The proportion working for large businesses has risen recently.”

[John Buchanan](#) suggests, “Historically Australia has had the great benefit of having institutional arrangements that balanced these [market and social] forces well. The key elements of this were a network of industrial tribunals that regularly assessed the overall economic and social situation and determined what rates and movements in pay were sustainable.”

He argues that:

“Until the 1990s [minimum wages] were part of an interconnected system that ensured wages gains of the strong were widely shared. Today they provide the ultimate safety for those with the weakest levels of bargaining power – [currently about 15% of the workforce](#) directly and a further 15% indirectly.

Today our wages system has a different logic. The recent cut in penalty rates is a case of the wages of the weak putting pressure on the wages of the strong. While the Fair Work Commission quarantined the rest of the workforce from this cut by limiting its recent decision to low paid service workers – the precedent is there. Future movement in wage standards for anti-social hours will be down and not up”.

The potential for further reductions in minimum conditions following the logic of the Fair Work Commission’s penalty rate decision is cause for further concern.

Questions

Is increasing worker power the answer to low wages, as suggested by the RBA governor? How can we, as John Buchanan suggests, build on Australia’s legacy of workplace relations institutions to remedy low wage growth?

Equity

The gender pay gap remains a stark reminder of the failings of the workplace relations system. Pay inequality is getting worse not better. The current gender pay gap is 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.

Recent comments from the FWC in decisions such as the penalty rates decision and the domestic violence leave decision demonstrate the limitations of the formulation in the *Fair Work Act* of the objective of equal work for equal and comparative value. If that is to be taken merely as a work value test then the Act provides no means to understand and address the systemic inequity that underpins women's participation in the workforce.

There is also increasing evidence of dangerous work cultures of bullying, harassment and discrimination. [Investigations](#) into the hospitality industry, for example, have showed exceedingly high levels of sexual harassment at work.

As the [Work and Family Policy Roundtable & the Women + Work Research Group](#) remind us:

“For the growing proportion of women at work the issue of persistent, wide and increasing gender pay inequities is of growing importance, as well as issues of discrimination at work including pregnancy discrimination, care-giver discrimination and the threat of sexual harassment. Workplaces can be powerfully protective in the event of domestic violence. They can help identify and prevent mental and physical illness. These important and growing 21st century workplace challenges should form an important aspect of any serious workplace relations reform.”

Questions:

What role should the workplace relations system have in addressing pay inequality, and its social and economic consequences?

What is the connection between the way the system is constructed and the cultural change needed provide workplaces free from harassment and discrimination?

Worker democracy

A significant feature of industrialised countries over the last 40 years has been the decline in organised labour. It can be argued that the destruction of collective labour was the primary purpose of neoliberalism. There is now broad acknowledgement that the reduction in the power of collective labour has been detrimental both socially and economically.

In Australia union density is now less than 10% in the private sector and under 20% overall. The vast majority of workers are not members of a union. Like all the issues discussed in this paper there are various factors that have led to the current situation.

Australia's workplace relations system is one of those factors. As Sara Roberts and Ken McAlpine argue in their paper, ["The Future of Trade Unions in Australia"](#):

"There is no other comparable country in the world where unions face all of these challenges:

- no general right to take industrial action, and
- no right to merit based arbitration, and
- no right to capture the benefits of their collective bargaining for members or make non-members contribute, and
- no right to bargain at the industry level, and
- no exclusive right to enter into binding collective agreements (i.e. there are non-union 'collective' agreements).

In some comparable countries, unions have only 2, 3 or 4 of these rights, but only in Australia do we have none. The hostility to unions of the system in Australia is masked somewhat by the standard of minimum entitlements of workers, which by international standards, is fairly good. However, while independent and democratic trade unions are allowed, successful trade unionism is barely possible in Australia."

A key failing of the current system is enterprise bargaining. It is exhausted and exhausting for workers, employers and the economy. It is no longer a tool for increasing productivity and sharing the rewards. The ability of employers to terminate agreements in situations where workers would be worse off is an example of the bargaining system privileging not just employers but as the recent [Murdoch University decision](#) showed also elevating an enterprise's financial position over previously negotiated conditions to satisfy a public interest test.

Addressing workplace democracy is not only about restoring the role of unions in the system, that is, balancing out the power of capital with collective labour. It is also about ensuring that unions and other potential ways workers can organise collectively are democratic. A factor in the decline of unions is their own institutional rigidity and the corruption scandals that give unions a bad name.

Questions

What do low rates of unionisation mean for the system based on representative bodies of employers and unions?

Is re-establishing the institutional power of unions the answer, or should other means of workers acting collectively in their interests be explored?

Complexity and justice

Almost everyone agrees that the system is too complex. The *Fair Work Act* on its own is a hundreds of pages of complicated regulation. Business owners and workers alike can be bamboozled attempting to navigate their way through the system. A system based on an attempt to address everything via complicated rules runs the risk of creating cultures based on minimum rule adherence or the search for loopholes, rather than encouraging workplace cultures that aim to satisfy broader objectives of mutual cooperation.

A consequence of complexity is the inability of the system to provide access to justice. Complicated and expensive processes mean workers being denied wages or conditions, or suffering discrimination or harassment often do not seek or receive remedy or justice. Likewise employers, particularly small business owners, can find the system unfair. What counts are the financial resources you have to engage with the system.

Questions:

How can complexity be reduced but protections remain?

Should arbitration be given a boarder role in the system?

The Future?

All of the above looks at what is happening now. But we also know that the world of work is undergoing profound changes. Work, how it is organised and performed, may look very different in the not so distant future. The current workplace relations system is incapable of meeting the objectives we laid out above in the face of these changes.

The system is already struggling to cope with the “gig” or “on-demand economy” as discussed above. How is a system based on an industrialised economy going to be placed to deal with increasing automation and the digital economy, more sophisticated surveillance technologies, or the increased use of artificial intelligence?

It is in this context that we need to start considering the possibility that work as we know it will not be able to provide economic security. John Buchanan already argues that “employment is now the bearer of inequality and unfairness”. Grappling with these realities is leading to ideas such as a universal basic income attracting more attention, which in turn will affect why and how we regulate work into the future.

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 – and assuming even higher temperatures in other parts of the country – then how we structure our working days will change dramatically.

3. What are the solutions?

In this section we look at some of the broad approaches to the failings of the workplace relations system, including AIER’s approach. Like the rest of the paper we are focusing in this section on the workplace relations system. There are, however, broader social and economic reforms and changes that are necessary to establish a fairer society for all of us.

The context of increasing fragmented and segregated workforces and of structural shifts in the economy and society, along with mass migration and the crisis of climate change, are not issues facing Australia alone. They are shared by similar nations around the world. We should be open to learning from what other nations are doing to respond to these issues.

But Australia has a legacy of innovation in workplace relations, founded in a notion of fairness, that we should be cautious about ignoring. What can we keep from our history and re-purpose for the future?

Reform approach

There is a school of thought that there is nothing fundamentally wrong with the current workplace relations system. This was the conclusion the Productivity Commission reached after its inquiry. It reported in 2015 that:

“Despite some significant problems and an assortment of peculiarities, Australia’s workplace relations system is not systemically dysfunctional. Many features work well — or at least well enough — given the requirement in any system for compromises between the competing and sometimes conflicting goals the community implicitly has for the system.”

While it made a number of recommendations to “improve the system to improve productivity, increase employment, and aid flexibility for employees and employers, without destabilising the system”, it did not agree with either employer representatives or unions that a more fundamental shake-up of the system was needed.

Business approach

The business community in Australia has long argued that the current workplace relations system, particularly the *Fair Work Act*, tips the balance towards union power and away from the needs of business to grow and compete internationally and to strengthen the economy. Business organisations such as BCA and ACCI have continued to argue for reinstatement of broader managerial prerogative; more flexibility via individual agreements; further simplification of the award system; and the reduction of union power.

Union approach

Unsurprisingly, the union movement has a different view. As mentioned before the union movement is looking to mobilise its members and the broader community to “change the rules” that are allowing inequality and insecurity to increase. They want to address union decline and entrench the institutional power of unions in the system. In particular in its recent report on [Rising Inequality](#), the ACTU identifies the following priority areas for our industrial relations framework:

- More secure jobs by taking away the incentives to casualise work
- Restoring a strong, fair and independent industrial umpire
- Ensuring a level playing field for bargaining
- Rebuilding a relevant, modern and strong safety net for all workers

AIER approach

The AIER's [Australian Charter of Employment Rights](#) and the [Australian Standard of Employment Rights](#) provide a principles-based approach which guides all our work. The Charter consists of 10 principles many of which are reflected below in the discussion on the approach we are taking to this project. However, 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 essential to the regulation of work since the inception of Australia’s industrial relations system. It is the expectation that employers and workers will co-operate with each other so that each can enjoy the mutually expected benefits of their working relationship.
- 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.

The AIER is of the view that the situation confronting Australia is beyond tinkering around the edges with minor reform or compromising for politically palatable solutions. Our latest publication [Employment Rights Now](#) takes a look at the current system and evaluates it compared to the Charter principles. It doesn’t match up well. We believe that only a wholesale reimagining of how we regulate work, within the context of its structural, physical, social and economic environment, can 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 principles and structures for an uncertain future.

We propose to explore the elements of [a new architecture](#) through five modules.

The first 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 regulation of work and all people involved in work.

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.

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 or 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 collectively 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, remuneration and conditions; health and safety; and providing for equality. 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.

AIER's [“A New Workplace Relations Architecture” project](#) will consist of a series of papers and events on each of the modules. We are looking for people to be involved with the project so if we have grabbed your attention, [get in touch and get involved!](#)