

# THE FAIR WORK BILL AND BEYOND

SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO THE FAIR WORK BILL 2008

## SUBMISSION OF THE AUSTRALIAN INSTITUTE OF EMPLOYMENT RIGHTS

1. The Australian Institute of Employment Rights (AIER)<sup>1</sup> welcomes the opportunity to make this submission to the Senate Education, Employment and Workplace Relations Committee.<sup>2</sup>
2. Prominent Australian academic Margaret Gardener has said when considering the task of altering Australia's system of employment regulation, that we face a "Higgins moment" in Australian industrial relations: "*when we can negotiate an outcome that draws on our history but can respond flexibly to the future; when we can lay down the bases of a system that should serve for many decades*".<sup>3</sup>
3. The significance of the task and the opportunity it creates should not be lost.

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<sup>1</sup> The composition of the AIER Executive is described in Annexure A.

<sup>2</sup> AIER would like to acknowledge and thank Ms Joanna Mascarenhas for her research and assistance with the writing of this submission.

<sup>3</sup> *ELRR* 18 (2008) May.

Over the next few months, the Parliament will make decisions about the regulation of our work relationships that will shape how workers and employers think, feel and relate to one another.

4. This is a unique opportunity, a chance to change workplace culture and bring fairness to Australian workplaces. Unfortunately, although the Bill represents a vast improvement on the existing legislation and can be regarded as a very large step forward, the AIER believes that genuine long lasting reform requires workplace cultural renewal and a further round of legislative change.
5. The Government is often heard to say that if employers and unions are both critical of this Bill, then it must be getting the balance right. Whilst this asserted 'balance' is far better than the largely one-sided approach taken by the Howard government, this kind of balance is not the kind of balance Australian industrial relations is looking for. What we need is consensus not just balanced horse-trading. Consensus is possible if both employers, employees and unions are each willing to recognise the legitimate rights of the other. Rather than simply acclaiming the fact that both employers and unions are equally critical of the Bill, what Australia needs to hear is that both employers and unions are supportive of and committed to a new consensual approach to industrial relations.
6. The failure to enunciate through the Bill a guiding set of principles and values amounts to a major flaw. The Bill has no foundational principle or guiding philosophy. Rather, it patches a regulatory scheme around a mixed-pot assembly drawn in part from reassertion of hybrid fairness values, in part from the values reflected in the scheme it replaces and in part from approaches associated with an implicit assumption that the rationale for regulating the employment relationship arises from an adversarial character in that relationship extending to most processes that pertain to it. The AIER believes that the Bill's fundamental foundation upon the assumption of an adversarial employment relationship causes the Bill to promote a functionalist

adherence to legislative standards that reinforces an adversarial approach to the relationship.

7. The AIER believes that the Bill should be based on a foundation of 'workplace citizenship' that would encourage employers, employees and their representatives to interact positively in their capacity as industrial citizens. Such an assumption would enable all parties in the industrial relations system to reject conflict in favour of a new spirit of cooperation.
8. Given the foundational flaw upon which the Bill sits, it is unproductive to dissect it and examine its detail. Whilst acknowledging that the Bill represents a significant improvement to the current legislation, the AIER seeks to make the point that the Bill should be seen as a first step towards more genuine reform.
9. The Bill's inadequacies ought not be simply attributed to the Government or to the Parliament, which may now enact it into legislation, The Bill's failure is a reflection of the existing industrial culture. The Bill is a mirror of who we are at this point of time.
10. Australia requires workplaces that are open, participative and conducive to learning and parties that are prepared to work in an environment of mutual respect. Changing legislation alone will not achieve this result. A mixture of mechanisms is required to create the environmental factors conducive to this change. The Government and the Parliament should provide the leadership, but the industrial parties and workplace participants need to take responsibility for making the necessary cultural change a reality.
11. The AIER recommends three immediate initiatives are pursued in furtherance of establishing the workplace relations system that Australia deserves. The first

initiative involves amendment of the Bill and the other initiatives call for Executive action leading to a second phase of legislative change.

## **GOOD FAITH RELATIONS**

12. One of the key aspects of the AIER's Charter of Employment Rights<sup>4</sup> is the right of every worker and their employer to good faith performance of the agreed terms of their working relationship. Good faith performance describes the reasonable expectation that employers and workers will co-operate with each other so that each can enjoy the mutually expected benefits of the relationship. Good faith relations are achieved when both the employer and the worker recognise and adhere to the legitimate rights and expectations of the other. The touchstones of good faith relations are mutual respect and fair dealing.
  
13. The Bill recognises the value of encouraging good faith relations but implements good faith requirements only in relation to collective bargaining. However, a good faith approach implies a commitment to honesty, fair dealing and cooperation in all aspects of the employment relationship – from bargaining, to performance and termination. Such an approach requires parties to adopt a less adversarial approach, recognising and taking into account the interests of the other party in all of their dealings.
  
14. Looking at good faith with this broader lens would assist to move away from notions of the employment relationship as adversarial. Layering good faith requirements throughout the new Act and making one of the objects of the Act the achievement of work relationship based on good faith and mutual trust and confidence would provide substantive levers beyond bargaining to encourage necessary cultural change.

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<sup>4</sup> See Annexure B.

***AIER recommends that good faith requirements be layered throughout the Act (and in particular in the Objects) in order to promote the cultural change that is needed to build trust and confidence in the employment relationship.***

## **ESTABLISHING AND PROMOTING CENTRES TO ENCOURAGE CULTURAL CHANGE**

15. The AIER proposes that the Government establish and promote institutions that foster cultural change in Australian workplaces. Through the activities of such centres new workplace relationships can be fostered that:
- promote good faith relations and industrial fairness
  - shift the industrial relations climate to one of engagement around issues of mutual interest
  - help to re-orient firms towards developments which improve quality, innovation and responsiveness to emerging market opportunities
  - provide a positive role for trade unions to play in the workplace.
16. The potential public benefits are substantial and include:
- reduced transactional costs in forming and maintaining workplace relationships
  - reduced levels of industrial disruption and loss of productivity via hidden dissatisfaction and low morale
  - more adaptive production base
  - accelerated pace of organisational and cultural change
  - improved social cohesion resulting from greater satisfaction with work and improved productivity and economic sustainability.

17. Cultural change centres should be guided by the following objectives:
- improving the quality of working lives of individual Australians
  - creating conditions for business success
  - enhancing social cohesion via the promotion of respectful workplaces and workplace partnerships
  - educating the Australian public about fair work practices.
18. Co-operative approaches to stakeholder engagement are being adopted in broader social and economic contexts both within Australia and internationally. There is a growing trend internationally for this co-operative approach to promoting innovation and productivity in the workplace.<sup>5</sup> For example:
- New Zealand - Partnership Resource Centre, Equal Employment Opportunity Trust
  - United Kingdom -Advisory Conciliation and Arbitration Services (Acas)
  - Republic of Ireland- National Centre for Partnership Performance
  - Canada- Federal Mediation and Conciliation Service – Preventative Mediation Program
19. These initiatives should include supporting organisations such as AIER who work collaboratively (and in our case from a framework of tripartism) to promote cultural change. For the Government to achieve its stated policy objectives<sup>6</sup>, there is a need

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<sup>5</sup> Forsyth A and Howe J (2008) *Current Initiatives to Encourage Fair and Cooperative Workplace Practices: An International Survey: Report for the Victorian Office of the Workplace Rights Advocate, Monash University Workplace & Corporate Law Research Group and Melbourne University Centre for Employment & Labour Relations Law.*

<sup>6</sup>“We confront the challenge of keeping our nation competitive in the global economy and ensuring fairness at work for all Australians. Our opponents believe we must choose between economic prosperity and fairness. Our opponents have chosen to throw fairness out the back door for Australian working families. Labor believes we can have both economic prosperity and fairness. We believe our

to rebuild an environment of trust and partnership in workplaces and between the industrial parties. There is also a need to provide education to the industrial parties and to the broader community of what constitutes fairness in the workplace.

20. This is not a role that Fair Work Australia can play alone. A regulatory and administrative agency such as FWA or the Fair Work Ombudsman will not readily be able to foster the front-end cultural change that is required. New collaborative institutions should be established.

***The AIER recommends that the Government support the establishment and promotion of Centres for Workplace Partnerships.***

#### **A FOUNDATIONAL CHARTER OF EMPLOYMENT RIGHTS**

21. As stated earlier, a major problem with the Bill is that it has not been founded upon a set of agreed common principles reached by co-operation and consensus. The AIER urges that the Bill be regarded as a first step in workplace reform and that further reform should involve the Commonwealth, the States, and key stakeholders agreeing on the foundational elements of a revised national system. It is AIER's submission that what is needed is a foundation of principles that is comprehended by all and which is beyond partisanship. Our system of workplace regulation has suffered greatly because of an absence of consensus about the founding principles, which should underpin workplace relations. Good faith relations and the cultural change that the AIER is calling for depend upon the development and widespread acceptance of a charter of rights.

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economy can go forward, but with fairness." (ALP Policy Document Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces, April 2007).

22. In an attempt to provide some leadership in this regard the AIER developed the Australian Charter of Employment Rights.<sup>7</sup> The Charter is a back-to-basics attempt to define the rights of workers and employers. It is a simply expressed contemporary document that draws upon a range of international as well as uniquely Australian sources to create a template of rights and obligations, which all workplaces are encouraged to adopt and observe and upon which a national workplace relations system may be built.
23. A Steering Committee of eminent persons was formed by the AIER to identify the rights embodied in the Charter.<sup>8</sup> It was the Committee's view 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, in particular, values integral to what has been described as the "*important guarantee of industrial fairness and reasonableness*"<sup>9</sup>; and rights appropriate to a modern employment relationship that are recognised by the common law.
24. The wisdom of establishing broad principles and values upon which the system of workplace relations in Australia should be founded has also been emphasised by Professor George Williams, in the Report emanating from the William's Inquiry commissioned by the NSW Government.<sup>10</sup> Williams refers to three broad sources of rights upon which a foundational set of principles should be based - those rights embodied in international instruments that Australia has adopted; Australian values which have shaped the foundations and contours of Australian society and underpin

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<sup>7</sup> See Annexure B.

<sup>8</sup> The panel of experts is identified in Annexure A.

<sup>9</sup> *New South Wales and Others v Commonwealth* [2006] HCA 52, per Kirby J at [523] – [525].

<sup>10</sup> *Working Together – Inquiry into Options for a New National Industrial Relations System*, <http://www.industrialrelations.nsw.gov.au/action/inquiry.html> (the Williams Report).



our constitutional and institutional history and framework; and rights which reflect the true, current and evolving nature of modern working relationships.<sup>11</sup>

25. A detailed description of the Charter and AIER's new initiative the Australian Standard of Employment Rights is contained at Annexure C.

***AIER calls on the Government to adopt via a process of co-operation and consensus involving the Commonwealth, the States, and other key stakeholders, the Charter of Employment Rights or a like set of principles or values as a standard to promote a second phase of workplace law reform and positive work relationships in Australia.***

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<sup>11</sup> *The Williams Report p.64. Williams cites a number of Australian and overseas sources used to develop the principles. He gives particular emphasis to the AIER's Charter of Employment Rights, the Productivity Commission's Checklist for assessing regulatory quality and a report prepared by Professor Harry Arthurs for the Canadian Government entitled Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century.*

## **Annexure A**

### **AIER Executive Members**

#### *AIER President*

Mordy Bromberg SC

#### *Vice Presidents*

Employer – Fiona Hardie

Employee – Cath Bowtell

Independent - Hon. Paul Munro

Treasurer – Bev Myers

#### *Members*

Michael Harmer

Sean Reidy

Professor Joellen Riley

Gary Rothville

Mark Irving

Tim Kennedy

Lisa Heap – AIER Executive Director

### **Charter - Panel of Experts**

Professor Joellen Riley, University of Sydney

Professor Greg Bamber, Department of Industrial Relations, Griffith University

Carol Andrades, Consultant, Ryan Carlisle Thomas

Dr Anthony Forsyth, Senior Lecturer in Law at Monash University

Associate Professor Colin Fenwick, Director, Centre for Employment and Labour Relations  
Law

Professor Marilyn Pittard, Monash University

Professor David Peetz, Head of the IR Department at Griffith University

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

Paul Munro, former Presidential Member of the AIRC

Mordy Bromberg SC, Victorian Bar

Professor Ron McCallum, Dean of the University of Sydney Law School

David Chin, NSW Bar

Anne Gooley, Partner, Maurice Blackburn Cashman

Professor Russel Lansbury, Professor of Work and Organisational Studies at the University  
of Sydney (liaison)

Emeritus Professor John Neville, School of Economics, UNSW

Associate Professor Peter Kriesler, School of Economics, UNSW

Michael Harmer, Chairman and Senior Team Leader, Harmers Workplace Lawyers, Sydney

Mark Irving, Victorian Bar

Peter Rozen, Victorian Bar

Julia Watson, Melbourne University

## **Annexure B**

### **Australian Charter of Employment Rights**

Recognising that

improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers

And drawing upon

Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

#### 1. Good Faith Performance

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith. They have an obligation to co-operate with each other and ensure a “fair go all round”.

#### 2. Work with Dignity

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:

- treated with respect
- recognised and valued for the work, managerial or business functions they perform
- provided with opportunities for skill enhancement and career progression
- protected from bullying, harassment and unwarranted surveillance.

#### 3. Freedom from Discrimination and Harassment

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- race, colour, descent, national, social or ethnic origin
- sex, gender identity or sexual orientation
- age
- physical or mental disability

- marital status
- family or carer responsibilities
- pregnancy, potential pregnancy or breastfeeding
- religion or religious belief
- political opinion
- irrelevant criminal record
- union membership or participation in union activities or other collective industrial activity
- membership of an employer organisation or participation in the activities of such a body
- personal association with someone possessing one or more of these attributes.

#### 4. A Safe and Healthy Workplace

Every worker has the right to a safe and healthy working environment.

Every employer has the right to expect that workers will co-operate with, and assist, their employer to provide a safe working environment.

#### 5. Workplace Democracy

Employers have the right to responsibly manage their business.

Workers have the right to express their views to their employer and have those views duly considered in good faith.

Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace.

#### 6. Union Membership and Representation

Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.

Workers have the right to require their union to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference.

Every worker has the right to be represented by their union in the workplace.

#### 7. Protection from Unfair Dismissal

Every worker has the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker. This right is subject to exceptions consistent with International Labour Organization standards.

## 8 Fair Minimum Standards

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

## 9 Fairness and Balance in Industrial Bargaining

Workers have the right to bargain collectively through the representative of their choosing.

Workers, workers' representatives and employers have the obligation to conduct any such bargaining in good faith.

Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.

Conciliation services are provided where necessary and access to arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires.

Employers and workers may make individual agreements that do not reduce minimum standards and that do not undermine either the capacity of workers and employers to bargain collectively or the collective agreements made by them.

## 10 Effective Dispute Resolution

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy.

The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.

## **Annexure C**

### **Charter of Employment Rights**

1. In 2007 AIER published the Australian Charter of Employment Rights.
2. The Charter's purpose is to unravel the complexity of the regulation of workplace relations and re-define it by identifying the fundamental values which good workplace relationships and good law made to enhance such relationships must be based upon.
3. The Charter of Employment Rights and the book that accompanies it *An Australian Charter of Employment Rights*,<sup>12</sup> is the work of eminent workplace relations practitioners from both the academic and legal communities who are independent of any stakeholders with vested interests.
4. The Charter has been through a rigorous assessment process. It was circulated in draft format and public comment was invited and taken during the period March to September 2007.
5. An online survey was developed in order to receive feedback on its content.
6. Public forums were held in Sydney and Melbourne.

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<sup>12</sup> Australian Charter of Employment Rights, Mordy Bromberg and Mark Irving (ed) Hardie Grant Books, Melbourne, 2007.

7. The Charter was circulated to a large number of human resources practitioners via the Australian Human Resource Institute (AHRI) publication *HR monthly*.
8. Formal consultations regarding the content of the Charter were held with representatives of every major Australian political party and with the current Federal Workplace Relations Minister prior to her taking up this role.
9. The Charter is a simply expressed contemporary document, which draws upon a range of international and uniquely Australian sources to create a template of rights and obligations, which all workplaces are encouraged to adopt and observe and upon which any legislative system of industrial relations should be based. It has received widespread support.
10. In response to requests from organisations for assistance to implement the Charter as a standard in the workplace the AIER has developed a tool called the Australian Standard of Employment Rights. The primary job of the Standard is to translate the ideals and values embodied in the ten Charter rights and show how a workplace would achieve this in practice. The Standard consists of a handful of key components, which are essential across workplaces regardless of their size, industry and background. Businesses are free to apply these components to the specific circumstances of their workplace and indeed the AIER's objective is that businesses realise there is no one formula or prescription of how to achieve workplace fairness but that the best businesses are those that build upon the principles inherent in the Standard in a dynamic, unique and innovative manner.
11. The Australian Standard of Employment Rights forms part of the AIER's accreditation program to be launched in June 2009.