

Striving for Decent Work to End Insecurity in Australian Workplaces

A submission by Australian Institute of Employment Rights to the
Independent Inquiry into Insecure Work in Australia

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Introduction

1. The Australian Institute of Employment Rights (“AIER”) is an independent, not-for-profit body 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. It is independent of government or interest groups.
2. AIER welcomes the opportunity to present this submission and to address the Inquiry about this important issue. AIER congratulates the Australian Council of Trade Unions (“ACTU”) on the establishment of this Inquiry and the utilisation of this broad based, publicly accessible process to inform its policy development and decision making at its next ACTU Congress 15-17 May 2012. AIER wishes to encourage the ACTU to take all steps available to it to ensure that information presented to it through this Inquiry is incorporated into ACTU policy and action, and the action of all ACTU affiliates into the future.
3. AIER does not seek to address each of the terms of reference for the Inquiry individually in detail. Rather in this submission AIER has focused on key issues concerning the regulation of employment relations and the nature of workplace relationships in which we have particular experience and expertise. Our reference point for this submission is the Australian Charter of Employment Rights (“the Charter”). The role of the Institute and the Charter will be explained.
4. AIER has taken a broad view of insecurity for the purpose this submission and we encourage the Inquiry to take up this broad view. We therefore provide our definition and our rationale for this. Our definition of insecurity includes insecurity that arises from the nature of engagement (standard employment relationships versus atypical or contingent relationships) and that which arises from the experience that workers have in the workplace (in particular the type of culture and that is present).
5. The bulk of this submission has been drawn from AIER’s publication *The Australian Charter of Employment Rights*¹. The AIER therefore wishes to acknowledge and thank the contributors to this book, who include many of Australia’s leading labour lawyers, barristers, academics and practitioners who contributed to this seminal work. Our submission is supplemented by further research that we acknowledge throughout.
6. AIER believes that there is an urgent need to address factors that are negatively impacting on the experience of work in Australia. Insecurity is one of the manifest outcomes from this experience. We do not however believe that insecurity can be removed or minimalised through regulation alone. At the heart of our approach is a concern about loss of, and undervaluing of tripartism and the influence of neo-liberal philosophy on workplace culture. As a result AIER’s submission to this Inquiry raises some broader issues which on their face may appear to be outside the scope of the Inquiry however we argue are fundamental to strategies to address insecurity. The relationships between workers and their employer are of particular importance given the fact that it is the success of these relationships that shapes the workplace. From the

¹ Bromberg M & Irving M (eds) (2007) *The Australian Charter of Employment Rights*, Hardie Grant, Prahran.

prosperity of the business to the emotional well-being of each worker, the quality of workplace relations has a crucial role to play.

7. Australian labour law academic Rosemary Owens describes the significant role of work as follows:

“In Australia, as in most contemporary societies, work has acquired an abiding significance. The meaning of work in our society is intimately linked with human dignity. It is not simply that for a great many people a very large part of their life is spent working. Nor that work is for most the primary means to gaining a livelihood, and thus ensuring their material survival. Rather in present day society work has a more complex meaning intricately entwined in the creation of a sense of self. ...The significance of work is also larger than simply its meaning to the individual person. Work plays a critical role in the very constitution of a society. The interdependence of citizens through their work is one of the most important structural bonds of any community”²

8. It is therefore distressing to acknowledge that for an increasing number of Australians their experience of work and their treatment within the workplace is a negative one. In this submission we have not set out in detail what AIER believes to be these negative consequences. We refer the Inquiry to our previous publication and other relevant research.³ We believe the “costs” of insecurity as defined by us in this submission include:

- Greater career instability
- Higher unemployment risks
- Lower upward mobility
- Lower levels or remuneration
- Income stress
- Lower investment in training and skills development
- Long term economic penalties (particularly for women)
- Higher levels of job dissatisfaction
- Higher propensity to mental health issues
- Coronary heart disease
- Family stress and breakdown.

² Owens R 2002 *Decent Work for the Contingent Workforce in the New Economy* 15 AJLL 209

³ For more details regarding this see the AIER’s comprehensive submission regarding Preventative Health and Workplace Culture available at the AIER website <http://www.aierights.com.au/2009/08/aier-presents-its-preventative-health-and-workplace-culture-submission/#more-308> . See also Scherer S (2009) ‘*The Social Consequences of Insecure Jobs*’ Department of Sociology and Social Research, Trento University Italy; Laszlo KD et al (2010) ‘*Job Insecurity and health: A study of 16 European countries*’, *Social Science and Medicine* 70 (2010) 867 -874, D’Souza R et al (2006) *Work Demands, job insecurity and sickness absence from work. How productive is the new, flexible labour force?*, *Australian and New Zealand Journal of Public Health* 2006 vol 30 no.3 pp205-212

9. The growing incidence of workplace insecurity is a global phenomenon. This does not however, give Australia a license to accept this growing insecurity, to somehow shrug its shoulders and walk away from the issue as if it, and the negative consequences that flow from it, are inevitable. Around the globe international institutions such as the ILO, and various countries are working to limit or end employment insecurity.
10. Australia is yet to articulate a comprehensive plan of attack to end employment insecurity and its negative consequence. In fact, AIER would argue that this issue is not yet even accepted as a problem requiring resolution by all parties to the industrial landscape. This is particularly of concern given the unique features of Australian insecurity including the fact that Australia has one of the highest levels and fastest growing rates of casualisation within the Organization for Economic Cooperation and Development ("OECD") and the gender segmentation of the workforce and inequality associated with this continues to persist here. These factors have the potential to undermine Australia's social cohesion and any attempts to improve productivity.
11. A comprehensive case against insecurity and for reasonable regulation of the labour market needs to be advocated. As does the case for educating to remodel work place relationships and culture on the ground. This is a task that AIER has been advocating since its inception in 2005.

Summary of AIER's Recommended Actions

The AIER recommends that the ACTU adopt and promote the Australian Charter of Employment Rights as representing the rights that should exist within the law in every Australian workplace in order to promote security in workplace relationships and the Australian Standard of Employment Rights as the tool to achieve that goal.

The AIER recommends that ACTU policy and strategy should move to an emphasis on establishing rights that are universally accessible for all those who work without distinction.

- Minimum employment protections should be available to any person defined as a worker.
- A person is a worker within a business that takes the benefit of the worker's labour ("the employer") if the person meets two or more of the following indicators:
 - the person is subject to the control of the employer in relation to how the work is performed
 - the person usually works for the one employer and only that employer
 - the person is treated as, or portrayed to others as, part of the employer's organization
 - the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer
 - the person has regularly worked for the employer over a three month period
 - the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade)

and the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer. Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.

The AIER recommends that the following test be adopted for determining whether a worker is a worker of the entity that gets the benefit of the worker's work (the true employer) in circumstances where a third entity purports to be the employer.

- A worker is a worker of the true employer, where the person meets two or more of the following indicators:
 - the person is subject to the control of the true employer in relation to how the work is performed
 - the person usually provides work in the business of the true employer and only that business
 - the person is treated as, or portrayed to others as, part of the true employer's business organization
 - the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the true employer
 - the person has regularly worked for the true employer over a three month period
 - the person uses equipment or other facilities needed to perform the work provided by the true employer (other than the usual tools of trade)

but not where the third entity which is contracted to provide the person's labour to the end-user business has a contract with that business which provides a commercial return to the third entity and which by reason of the provision of the labour under the contract, as compared with the use of direct employees, provides the end user business significant and genuine economic efficiencies unrelated to the comparative cost of employing that person's labour directly and unrelated to any intent on the part of the end user business to undermine the capacity of workers working in its business to collectively bargain together.

In addition AIER recommends amendments to legislation that presume an employment relationship for all workers and allow for access to the tribunal to resolve issues in dispute where the nature of the relationship (employee or contractor) is subject to dispute.

AIER recommends that in the near term the ACTU conduct a review of Modern Awards to appraise provisions in relation to the definition of casual employees and the rights and benefits afforded to them.

- **In the interests of transparency, and to remove ambiguity, the AIER recommends the inclusion, within Modern Awards of a standard definition of a true casual worker that provides greater clarity to the appropriate use of casual work. This common definition to include concepts of intermittency an irregular engagement that should be at the heart of casual work.**
- **The AIER suggests that the ACTU give consideration to developing materials for ACTU affiliates to facilitate their review of casual provisions in collective agreements in order to refine these provisions to provide clearer and more appropriate protections here. To assist in this process the AIER recommends that ACTU encourages a discussion amongst its affiliates of the limitations of working predominantly to protect the Standard Employment Relationship (SER) and the impact that this approach has had on the development of insecure work in Australia.**

AIER submits that Australian labour law needs to be recast in the following ways

- By rethinking work relationships, consciously acknowledging the impact of the bread- winner model on our industrial regulation and practice and committing to overturning the impact of this. In particular to address the discrimination that has resulted for women workers.
- By recasting our law so that every worker has access to a suite minimum entitlements/rights on a pro rata basis. There should be no ability to contract out of these. This also means that mechanisms to qualify for rights or benefits such as continuity of service, number of hours worked, periods of service or methods of engagement should also be discarded.

The AIER therefore recommends that all parties including governments, social parties and in fact individual employers and workers adopt the ILO definition of decent work as their policy objective and framework and utilise this for the development of appropriate new forms of industrial regulation, policy, cultural change and educative initiatives and on the ground practice.

The AIER recommends that the ACTU joins with organisations such as AIER in order to make a strong public case for labour market regulations based on a rights based approach as adopted in our Charter of Employment Rights. This includes actively educating about the benefits of a rights based approach and promoting a greater understanding of international rights based instruments and how they apply to the world of work.

The AIER believes that greater effort needs to be put to rebuilding an environment of genuine tripartism. AIER has previously called for support for a Centre for Workplace Citizenship. We renew our call for this initiative via this submission.

The AIER

12. The AIER is an independent not for profit organisation. The Objectives of AIER state:

“2. Objects of the Institute

Adopting the principles of the International Labour Organisation and its commitment to tripartite processes, the Australian Institute of Employment Rights will promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework.

In particular it will:

- (a) commission academic research
- (b) hold conferences and seminars
- (c) publish and disseminate publications
- (d) contribute to public discourse on employment issues through the media, community debates and public forums
- (e) provide training to industrial participants
- (f) provide advice and other services to industrial participants and governments
- (g) develop a Charter of Employment Rights for Australia
- (h) promote models of workplace arrangements which promote economic efficiency while respecting employment rights and standards
- (i) work co-operatively with academic and community organizations which share similar objectives
- (j) encourage the participation of members who share similar objectives.

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

14. 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.

15. A list of those involved on the AIER Executive Committee and its panel of experts is included as an Annexure to this submission.

16. It is AIER’s view that any system of industrial regulation must be founded in principles which reflect:

- (a) Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
- (b) Values which have profoundly influenced the nature and aspirations of Australian society and which are embedded in Australia’s constitutional and

institutional history of industrial/employment law and practice. In particular, values integral to what has been described as the “important guarantee of industrial fairness and reasonableness”⁴; and

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

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

The Australian Charter of Employment Rights

18. In 2007 the AIER published the Australian Charter of Employment Rights (attached with this submission). The Charter is based on the 3 sources of rights identified above.
19. 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.
20. The Charter of Employment Rights and the book which accompanies it, *An Australian Charter of Employment Rights*, is the work of eminent workplace relations practitioners from both the academic and legal communities who are independent of any stakeholders with vested interests. A list of those persons involved is included in the annexures.
20. The Charter has been through a rigorous assessment process. It was circulated in draft format and public comment was invited and taken during the period March to September 2007. An online survey was developed in order to receive feedback on its content. Public forums were held in Sydney and Melbourne.
21. The Charter was circulated to a large (in excess of 2000) number of human resources practitioners via the Australian Human Resource Institute (AHRI) publication HR monthly.
22. Formal consultations regarding the content of the Charter were held with representatives of every major Australian political party.
23. In his report from the NSW Government Inquiry into options for a new National Industrial Relations system, Professor George Williams, developed a set of principles that he believed should found a new national system. Williams cited a number of Australian and overseas sources used to develop the principles and gave particular emphasis to AIER’s Charter of Employment Rights.
24. The Charter has become a blueprint for assessing government policy, for legislative reform, for company practice and for education about workplace rights. AIER recommends the Charter be used in this manner by this Inquiry as a blueprint of factors that would need to be in place in order to promote more security in Australia’s workplace relationships.
25. The Institute encourages all Australian workplaces to adopt and apply the Charter. To assist in this, the Institute has published the *Australian Standard of Employment Rights*,

⁴ *New South Wales and Others v Commonwealth* [2006] HCA 52, per Kirby J at [523] – [525].

which converts the ten Charter rights into a practical form that can be applied in every workplace.

26. Our experience tells us that the Charter is being used on a daily basis as a resource by practitioners, managers, tribunal members, academics and even teachers who are utilising the Charter's companion resource for secondary schools, *Workright*, to inform 14 and 15 year old students about their rights and responsibilities in the workplace.
27. The AIER therefore also recommends that the ACTU adopt and promote the Australian Charter of Employment Rights as representing the rights that should exist within the law and in every Australian workplace in order to promote security in workplace relationships.

Definitions of Insecurity

28. For the purposes of this submission the AIER has adopted a broad definition of insecurity. One form of workplace insecurity arises from the nature of engagement (standard employment relationships versus atypical or contingent relationship).
29. Another form of insecurity arises from the experience that workers have in the workplace, their treatment and the culture that is promoted. It is important that this Inquiry addresses both of these aspects of insecurity. AIER believes that the terms of reference for the Inquiry support this broad approach. It is AIER's view that without a broadly focused and multifaceted approach to the problems of insecurity in the workplace, the culture of workplaces, and the frameworks informing our regulatory regime, insecurity (and its negative consequences) will continue to be a common feature.
30. Insecurity is not just a feature for those in precarious or contingent relationships. Insecurity can be experienced by those who have a permanent or ongoing relationship.⁵ For example, workers who are not engaged in decision making or consulted about change often feel insecure and experience anxiety when changes are introduced in their workplace. The relationship between a worker and an employer is unique because of its humanness. The balance between the expectations of the worker and what they bring to the relationship and how they are treated in the workplace is often referred to as the psychological contract. Kein and Wilkinson note:

*"The psychological contract is based on the belief that "hard work, security and reciprocity are linked. From an employee's perspective, the psychological contract guarantees job security, fair wages benefits, and a sense of self worth for doing the job well. The employer obtains and retains dedicated workers who perform their jobs well, are satisfied in their jobs and are committed to the organization."*⁶

Insecurity arises when the psychological contract is shaken or broken.

31. A useful framework that the Inquiry may wish to adopt is that developed by Burgess and Campbell utilising the work of Guy Standing. This work identifies eight forms of insecurity that impact on workers in today's workplaces
 - Employment insecurity—when workers can be dismissed or laid off or put on shorter time without difficulty

⁵ Brosnan P & Underhill E (1998) *Introduction: Precarious Employment* 8 Labour & Industry p.1

Burgess J & Campbell I (1998) *The Nature and Dimensions of Precarious Employment in Australia* 8 Labour & Industry p.5

⁶ Kein C & Wilkinson A (2011) *The Broken Psychological Contract: Job insecurity and Coping*, Business Perspectives, Fall (2010/Winter 2011) pp 22-26 at p.24

- Functional insecurity — when workers can be shifted at will or where the content of the job can be altered or redefined
 - Work insecurity — when the working environment is unregulated polluted or entails other things making it dangerous to continue
 - Income insecurity — when earnings are unstable, contingency based or not guaranteed or near poverty
 - Benefit insecurity — when access to standard benefits is limited or denied
 - Working-time insecurity — when hours are irregular and at the discretion of the employer or insufficient to generate adequate income
 - Representation insecurity — when the employer can impose change and need not, or may refuse to, negotiate with the workers’ representatives; and
 - Skills reproduction insecurity — when opportunities to gain and retain skills through access to training and education are limited.⁷
32. As noted above these aspects of insecurity can be experienced by all workers however the AIER acknowledges that they are more likely to be present and more acutely felt for workers in particular circumstances including those that are engaged precariously or contingently, those in workplace where representation is not available to workers and those whose employment conditions are not “settled” collectively.
33. The AIER’s Charter of Employment Rights addresses the above aspects of insecurity. Firstly, where the Charter refers to “workers” it obviously includes employees, but it also includes dependent contractors and other workers who personally perform work under a contract that seeks to conceal, distort or disguise the true nature of the underlying employment relationship. Because common law approaches have so far failed to adequately address the problem of disguised employment relationships, the Charter aims to spell out how a true employee and a true employer is to be identified.
34. The AIER recommends that this is an approach that should be taken in policy development, regulation and practice. The emphasis should move to establishing rights that are universally accessible for all those who work.
35. Secondly, the Charter and its accompanying Standard define key components, beyond the form of engagement, that go together to promote work relationships founded on good faith and dignity and recognition of mutuality and the need for reciprocity. In this way the Charter promotes ways of “being” and “doing” that will aid in eliminating insecurity and its negative consequences via changing the experience that workers have in the workplace and the culture of workplaces.
36. Our submission will address these matters in further detail.

⁷ see Owens R (2002) op cit

Definitions of employment – promoting insecurity

37. The last thirty years have seen profound changes in the way work is performed in Australia. New forms of working relationships that do not easily fit the traditional mould have proliferated, among them engagement through labour hire companies and the use of self employed contractors.

38. The growth in atypical modes of employment is an international phenomenon. As the ILO stated in its 2006 *Report on the Employment Relationship*:

*The profound changes occurring in the world of work, and particularly the labour market, have given rise to new forms of relationship that do not always fit within the parameters of the employment relationship. While this has increased flexibility in the labour market, it has also led to a growing number of workers whose employment status is unclear and who are currently outside the scope of protection normally associated with the employment relationship.*⁸

39. In 2000 a meeting of experts of the ILO recognised this problem and stated that recent transformation in the way work was being performed resulted in situations in which the legal scope of the employment relationship did not accord with the realities of working relationships. The Experts found that this had resulted in a tendency whereby workers who should be protected by industrial laws were not receiving that protection.

40. The current industrial laws protect many of these different types of workers but not others. We need to recognise that the current way our industrial laws are framed, protecting employees recognised as such under common law, and not other workers, institutionalizes discrimination against a growing number of workers.

41. A purpose of industrial laws, and one of the purposes of the Charter, is to redress the inequality of bargaining power between those who perform work and those for whom work is performed. In a similar vein, the ILO's 2006 *Recommendation Concerning the Employment Relationship* states:

“Labour law seeks to address what can be seen as an unequal bargaining position between parties to an employment relationship ... The protection of workers is at the heart of the mandate of the ILO.”

42. Modern democracies implicitly recognise the inequality of bargaining power and throughout the twentieth century sought to redress it by enacting minimum employment conditions and allowing for collective representation of workers. However the common law and parliaments have used the concept of employment to distinguish

⁸ para 6

between those workers who merit protection from the inequality of bargaining power and those who do not merit that protection. Many laws that protect employees provide limited protection to labour hire workers and virtually no protection to self-employed contractors. In Australia the emphasis given within our system to the concept of the male bread-winner and the concept of standard employment as the norm has also meant that part-time and casual workers have suffered significantly because of the limitations enshrined within the law.

43. If one of the purposes of industrial laws is to protect people who perform work, who are vulnerable to exploitation and who suffer as a result of an inequality of bargaining power, the current laws exclude a range of workers that logic and fairness suggests should be protected.
44. AIER has addressed this issue in defining the scope of the Charter. The Charter grants rights to employers and workers. Where the Charter refers to “workers” it includes employees, but it also includes dependent contractors and other workers who personally perform work under a contract that seeks to conceal, distort or disguise the true nature of the underlying employment relationship.
45. Because common law approaches have so far failed to adequately address the problem of disguised employment relationships, the Charter aims to spell out how a true employee and a true employer is to be identified. Beyond the Charter, this formulation is proposed as a way for all labour laws to deal with the issue.
46. From the mid-nineteenth century through the twentieth century the concept of employment was developed by the common law and a distinction was recognised between employees and independent contractors. Parliaments commonly adopted this distinction and conferred the protection of industrial laws on employees but left independent contractors relatively unregulated. Over time it has become increasingly difficult to distinguish between employees and independent contractors, with courts and industrial commissions using various tests to define the distinction.
47. At times the difference was thought to lie in the issue of control: an employer could control what, where, when and most importantly how work was performed by employees, whereas independent contractors were relatively free of control by the principal contractors.
48. At times the test was variously stated as: is the worker integrated into the employer’s organisation? Or is the worker in business on his or her own account? Or is the essence of the contract for the supply of the work and skill of the worker? Or is the worker part and parcel of the employer’s organisation? Or is the worker engaged to produce a given result?
49. The current approach adopted by Australian courts is a multifactor test: it permits courts to consider a wide range of indications, none of which is determinative in itself. Courts have recognised that there is no magic touchstone; the search for a single distinguishing factor is futile. In the words of Justice Deane in the High Court, the distinction between employment and other relationships “has become an increasingly amorphous one as the

single test of the presence or absence of control has been submerged in a circumfluence of competing criteria and indicia”.

50. One problem with an ambiguous distinction between employees and independent contractors is that employers can often avoid laws meant to protect employees. They do this by structuring their relationship with the worker so as to avoid recognising the worker as an employee and instead categorising the worker as though she or he is self-employed. This is often achieved by the contract between the employer and the worker expressly stating that the relationship is not an employment relationship. Such contractual declarations of intent are not conclusive, but courts often place great weight on them when determining whether the relationship is one of employment.
51. Another means of avoiding obligations imposed by laws intended to protect workers is to interpose another entity between the employer and the worker. For example, the employer may arrange for a labour hire agency and not the employer to engage the worker directly. Alternatively, as a condition of obtaining the job, the employer may insist that the worker become a “one person company” that the employer then engages under a supposed commercial contract.
52. The effect of these legal devices is to avoid industrial laws, awards and in some cases collective agreements, that should apply given the true nature of the relationship between the worker and the business receiving the benefit of the worker’s work.
53. The ILO has focused on the issue of contracts that conceal, distort or disguise the true nature of a relationship between employer and worker. The 2006 Report on the Employment Relationship defines a disguised employment relationship as

“one which is lent the appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law”.

54. The 2006 recommendation accords with the 2003 ILO Resolution on the Employment Relationship, which declares that *“all workers, regardless of employment status, should work in conditions of decency and dignity”*. The approach adopted corrects the tendency recognised by the ILO Meeting of Experts on Workers Needing Protection for workers who should be protected by industrial laws not to be afforded that protection due to limitations on the legal scope of the employment relationship.

Solutions to the problem

55. In the last few decades parliaments in Australia have adopted a range of solutions to deal with the problem of the inadequacy of the common law meaning of employment.
56. One solution is to deem specified classes of workers to be employees for the purposes of particular laws.

57. Another solution, adopted in payroll tax legislation, is to treat contractors who personally perform work as employees, even though the contractor may be engaged through a one person company. In the United Kingdom many industrial laws apply to “workers”, not just employees. The Canadian Labour Code extends certain benefits to dependent contractors. While useful, these laws have not addressed the problem in the comprehensive way that is proposed here.
58. The solution adopted in the Charter is that it grants rights to employers and workers. A “worker” means an employee and includes a dependent contractor. Where, by reason of the use of an agency or labour hire arrangement, a triangular relationship exists which disguises the true employer of the worker, the Charter extends to the true employer.
59. The Charter adopts a relatively simple yet comprehensive definition of “worker”. A person is a worker within a business that takes the benefit of the worker’s labour (“the employer”) if the person meets two or more of the following indicators:
- the person is subject to the control of the employer in relation to how the work is performed
 - the person usually works for the one employer and only that employer
 - the person is treated as, or portrayed to others as, part of the employer’s organisation
 - the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer
 - the person has regularly worked for the employer over a three month period
 - the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade)
- and** the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer. Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.
60. As noted above, the Charter will also apply to dependent contractors. Dependent contractors personally perform work under a contract and are directly or indirectly economically dependent on one principal contractor. For the purposes of the Charter, the principal contractor is regarded as the employer. This includes: contractors whose sole or predominant source of income is earned from one principal contractor (most outworkers will fall into this category.); workers who personally perform work for an entity (such as a company, partnership or trust) where the entity’s sole or principal source of remuneration is payment for the work provided by the worker. This point deals with one of the interposed entity problems: the fact that the services of the worker are provided to the principal contractor, through a one person company.
61. There is a third problem. This involves addressing conduct that disguises the reality of a relationship by masking the identity of the real employer. Such a situation usually occurs where a worker is engaged by the true employer through an intermediary, such as an

agency or an entity that purports to be a labour hirer. Recent Australian experience suggests that the use of this kind of device is not confined to small fly-by-night operations but is used from time to time by major corporations. Its detrimental effect on workers is threefold and potentially very severe. Firstly, it enables the true employer to avoid direct responsibility for the payment of the worker's wages and other entitlements, denying workers access to the wealth of the business which has taken the benefit of their work.

62. Secondly, by this device the true employer is able to distance itself from wage claims or other grievances raised by the workers whose labour it takes the benefit of. The imposition of an intermediary "employer" means that workers are unable to collectively bargain with and take action against the true employer; are unable to join with regular employees of the true employer for collective bargaining, thus weakening the collective; and are unable to take up grievances directly with the true employer despite the source of the grievance being the conduct of that entity.
63. Thirdly, because agreements usually impose obligations only on the particular employer(s) named by those instruments, those obligations can be avoided by the named employer devolving the role of employer to an intermediary not named by those instruments.
64. The law should apply to the true employer despite the imposition of an intermediary or third party "employer". A test is required to distinguish between legitimate third party arrangements where the business taking the benefit of the work should not be regarded as the employer and illegitimate third party arrangements designed to avoid employment obligations, in which case the business is to be regarded as the true employer. The traditional common law tests have proven difficult and a test directed at the purpose of the use of the intermediary is likely to provide a more appropriate dividing line. The test proposed acknowledges that agency and labour hire arrangements can be used for legitimate purposes by the end user business because, in a wide range of circumstances, such arrangements generate economic efficiencies that have nothing to do with the avoidance of labour costs or employment obligations.
65. The Charter adopts the following test for determining whether a worker is a worker of the entity that gets the benefit of the worker's work (the true employer) in circumstances where a third entity purports to be the employer. A worker is a worker of the true employer, where the person meets two or more of the following indicators:
 - the person is subject to the control of the true employer in relation to how the work is performed
 - the person usually provides work in the business of the true employer and only that business
 - the person is treated as, or portrayed to others as, part of the true employer's business organization
 - the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the true employer
 - the person has regularly worked for the true employer over a three month period

- the person uses equipment or other facilities needed to perform the work provided by the true employer (other than the usual tools of trade)

but not where the third entity which is contracted to provide the person's labour to the end-user business has a contract with that business which provides a commercial return to the third entity and which by reason of the provision of the labour under the contract, as compared with the use of direct employees, provides the end user business significant and genuine economic efficiencies unrelated to the comparative cost of employing that person's labour directly and unrelated to any intent on the part of the end user business to undermine the capacity of workers working in its business to collectively bargain together.

66. Wedded with the above definitions could be a recasting of to legislation such that it presumes an employment relationship for all workers and allows for access to the tribunal to resolve issues in dispute where the nature of the relationship (employee or contractor) is subject to dispute.

Access to Fair Minimum Standards

67. Charter Right 8 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.”

68. AIER believes that all workers regardless of employment status should have access to a series of minimum standards to enable workers to be justly rewarded for their work, to ensure fairness across the labour market (especially for vulnerable workers) and to enable employees to live a fulfilling life and attain a fair balance between work and the rest of their lives. However, workers engaged precariously or contingently do not generally have this access in Australia.

69. The gap in access to fair minimum standards for workers other than those engaged in standard employment relationships (SERs) represents a form of discrimination against those who are non SER workers. To the extent that a purpose of labour law and regulation is to provide protection particularly to those most vulnerable in the workforce this objective is not being met for non SER workers.⁹

70. It is widely recognised that Australia’s experience of casual work is unique when compared to other liberal democracies. Campbell points out that the Australian distinctiveness includes

“not only the size of the casual workforce (both regular and irregular) and the trajectory of growth over the past two decades but also the size of the shortfall in rights and benefits that divides casual and permanent employment and the way in which casualisation is facilitated by the distinctive system of labour regulation in Australia.”¹⁰

71. To understand precarious or contingent work we need to understand the limitations of SERs. Historically in Australia the permanent full-time worker was the pivot around which benefits were defined and in fact around which trade unions and social policy activists agitated for industrial and social reform. The emphasis within Australia was on the male- breadwinner as the model for defining benefits and rights. A commitment to the SER was a commitment to a mechanism designed to protect employees against economic and social risks, reduce social inequality and increase economy efficiency.¹¹ However, the definition of the SER (male, full-time, permanent) and the privileged position afforded to those employed in accordance with it was always gendered and ignored form of engagement that sat outside of the model.

⁹ Tham J-G (2007) *‘Towards an Understanding of Standard Employment Relationships under Australian Labour Law* 20 AJLL pp123-158.

¹⁰ Campbell I (2004) *“Casual Work and Casualisation: How Does Australia Compare?”* Labour & Industry Vol.15 No.2 December 2004 pp85-111 at p.85

¹¹ Fudge J (2006) *“Precarious Employment in Australia and Canada: The Road to Labour Law Reform* 19 AJLL pp105-126at pp. 107 -114

72. Industrial awards were, and remain still, the mechanism by which the experience of SER and non SER workers was framed. Canadian academic, Judy Fudge, notes that given that awards until relatively recently failed to regulate part-time work, the growth in women's employment in Australia was via casual engagement. With most part-time work in Australia being casual in nature.¹²
73. The negative consequences of insecurity arising from precarious or contingent work are disproportionately felt by women. Australian unions should examine the role that they have played in establishing hierarchies around the SER that have facilitated this. For many women, given the double load of paid work and unpaid work (in the home) that they continue to shoulder "flexibility" has meant accepting the adversity of insecurity.
74. Clauses in awards and agreements have and continue to be ill conceived. AIER notes that even in the new Modern Awards the definition of casual worker is commonly expressed as bearing no more detail than being "someone engaged as such". It is arguable that under this formulation contained in many Modern Awards any worker could be employed as a casual worker. It certainly provides a great deal of discretion to employers to make a choice free from any particular constraints to choose to engage workers as casuals. A definition of this type does not provide for any guidance to employers or workers as to when the usual of casual labour would or would not be appropriate, therefore inhibiting transparency and understanding at the workplace.
75. This almost "free choice" for employers is likely to be encouraged by the fact that the gap in entitlements between casual and other forms of engagement is large in Australia. Campbell notes that the "cashing out" of minimum entitlements for casual workers through the use of the casual loading is something that is unique in Australia and that this legal deprivation of so many standard rights and benefits would be seen as an "archaic form of employment inappropriate to a modern society."¹³
76. AIER notes further that provisions in modern awards are confusing as to just exactly what benefits or rights have been traded off by the loading with at least one award containing the following provision
- (a) *An employee may be engaged as a casual and must be paid an hourly rate calculated by converting the appropriate annual rate for the classification prescribed in clause 15 to an hourly rate and adding a loading of 25%.*
- (b) *Such loading is paid to compensate such casual employees for lack of continuity in employment, paid leave, termination **and other employment benefits of a full-time or part-time employee.**¹⁴*

Based on the above formulation it would appear that the 25% loading is designed to cover any other employment benefits. Was this intended? Whilst the amount of

¹² Ibid p.90

¹³ Ibid p.100

¹⁴ MA000065 - Professional Employees Award 2010

loading (25%) appears common across all of the modern awards that AIER reviewed, the expression of what this covers in terms of compensation varied quite widely.

77. AIER recommends that in the near term the ACTU conduct a review of Modern Awards to appraise these provisions. Further that the ACTU raise this disparity in the review of Modern Awards.
78. Furthermore, in the interests of transparency, and to remove ambiguity, the AIER recommends the inclusion, within Modern Awards of a standard definition of a true casual worker that provides greater clarity to the appropriate use of casual work. This common definition to include concepts of intermittency and irregular engagement that should be at the heart of casual work.
79. The AIER also suggests that the ACTU give consideration to developing materials for ACTU affiliates to facilitate their review of casual provisions in collective agreements in order to refine these provisions to provide clearer and more appropriate protections here.
80. The above strategies do not resolve the inherent problems experienced by casual workers. The concept of a casual loading recognises that fundamental rights can be traded off. This is a matter that we deal with in some detail later in this submission. This in turn reinforces the concept of a commodification of casual labour. The loading itself is not sufficient to fully compensate for what is lost. Casual workers are unlikely to progress up classification scales regardless of experience. They are less likely to have access to training and career or skills development etc.¹⁵
81. In reality many casual workers do not receive the casual loading. Alternatively they work in circumstances where it is difficult to find a permanent equivalent worker with who to compare rates of pay in order ascertain whether a casual loading has in fact been applied. Enforcement is an issue. The Fair Work Ombudsman has a role to play here, however given the difficulties in definition described in the paragraphs above it may be a difficult task to ascertain the appropriate benefits accruing to casuals in a range of circumstances.
82. The extent to which Australia allows for the “opting out” of minimum entitlements through mechanisms such as the no disadvantage test or better off overall test and via the exclusion and qualification on some groups of workers (casuals, fixed term, those of employed by organisations of a particular size and via qualifying periods) is unique and should be reviewed.
83. AIER submits that Australian labour law needs to be recast in the following ways
 - By rethinking work relationships, consciously acknowledging the impact of the bread- winner model on our industrial regulation and practice and committing to overturning the impact of this. In particular to address the discrimination that has resulted for women workers.

¹⁵ Campbell (2004) op cit pp 92-93

- By recasting our law so that every worker has access to a suite of minimum entitlements/rights on a pro rata basis. There should be no ability to contract out of these. This also means that mechanisms to qualify for rights or benefits such as continuity of service, number of hours worked, periods of service or methods of engagement should also be discarded.

Decent Work & Dignity - new foundations to underpin security

84. Charter right 2 Work with Dignity states

“Recognising that labour is not a 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.”*

85. In an enlightened democratic society, given the impact of work on individuals and community, people should be afforded the opportunity to experience decent work. The concept of decent work as a policy, legislative and practical framework for regulating work relationships is gaining purchase around the globe.¹⁶

86. The ILO describes decent work as follows :

*Decent work means productive work in which rights are protected, which generates an adequate income, with adequate social protection. It also means sufficient work, in the sense that all should have access to income-earning opportunities. It marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers’ rights and social standards.*¹⁷

87. Central to this concept of decent work is the concept that work should be performed in an environment of freedom, equality and security. Workers experience of insecurity at and of work undermines the ability to obtain decent work.

88. The Declaration of Philadelphia, which defined the aims and purposes of the ILO, states that *“all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”*.¹⁸

¹⁶ Owens 2002 *op cit* p.7

¹⁷ International Labour Office, Report of the Director General, *Decent Work*, International Labour Conference, 87th Session, Geneva, 1999, p 11.

¹⁸ Annex, II(a) of the ILO Convention

89. One of the core founding principles of the ILO is that “labour is not a commodity”. As the economist Karl Polanyi put it, the commodity status of labour is simply a convenient fiction that momentarily greases the wheels of commerce but is detrimental for society. The growing emphasis on “flexibility” and increased casualisation of the workforce has increased the commodification of labour.
90. In recent years the common law has increasingly recognised that workers have an interest in performing work, not just being paid. This is because the benefits of work for an employee can include satisfaction of performing the work, the opportunity to keep the worker’s “hand in”, and the opportunity to develop experience to ensure employability in other fields. As the English Court of Appeal has noted: “As social conditions have changed the courts have increasingly recognised the importance to the employee of the work, not just the pay”.¹⁹
91. The United Nations Universal Declaration of Human Rights states that
- “Everyone who works has the right to just and favourable remuneration ensuring for himself and his [sic]family an existence worthy of human dignity”.²⁰*
88. The European Union (EU) Charter of Fundamental Rights (2000) proclaims that “Human dignity is inviolable. It must be respected and protected.” The EU Council has also adopted a policy on decent work. Recent European Foundation studies have focused on five key dimensions:
- quality of work and employment
 - ensuring career and employment security
 - maintaining the health and well-being of workers
 - developing skills and competencies and
 - reconciling work–life balance.²¹
89. Definitions of dignity usually stress notions of worth, esteem or honour, which are bestowed by others. This includes feelings of pride and self-respect. These definitions denote an abiding sense of respect from others as well as a corresponding sense of *self*-respect. Work can enhance or diminish dignity.
90. AIER is concerned that the notion of dignity at work, including a respect for employment security have been lost in public policy frameworks and public discourse around work in Australia.
91. The validity of achieving dignity at work as a regulatory/policy setting was clearly challenged by the adoption of the “*Workchoices*” legislation. The public repudiation of *Workchoices*, has meant that no parties have been prepared to publicly endorse that

¹⁹ William Hill Organisation Ltd v Tucker [1999] ICR 291, see also Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539 at 566.

²⁰ www.ilo.org/public/english/bureau/inf/download/ecosoc/decentwork.pdf

²¹ www.eurofound.europa.eu/areas/qualityofwork/index.htm

policy however there has not been a declared abandonment of the neo-liberal philosophy that underpinned this.

92. Recent calls from various employer groups to increase Australia's productivity by regulating to reduce labour standards demonstrate that neo liberal philosophy is still dominant here. To emphasise the point by example, dignity at work includes the capacity to *effectively* participate in determining the terms and conditions of work. This involves the rights of freedom of association, union recognition, collective bargaining, the right to strike and the right to be consulted and participate in decision making. These are all rights that in recent times have been highly contested either in public discourse or indeed in matters before courts and the tribunal.

93. The UN International Covenant on Economic, Social and Cultural Rights prescribes equal opportunity for everyone to be promoted in their employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.²² This depends on all workers being provided with opportunities for skill enhancement and career progression.

97. Accumulating personal human capital is not only an economic right of individuals recognised by the UN covenant; it is also in the longer-term economic interests of employing enterprises to maximise the opportunities for training, development and promotion of the people who work there. Retaining a highly skilled workforce should facilitate the quality of output as well as the competitiveness, productivity and innovation of enterprises.

98. However, some employers are tempted to adopt "low-road" strategies. These can involve adopting short-term mindsets, minimizing investment in the skill formation of their workforce and attempting to purchase enhanced skill from the external labour market. The pressure to maximise short-term financial returns tends to induce employers to adopt these strategies.

99. Through and examination of the concept dignity of and dignity at work, and through the Charter in general the AIER has established a set of indicators that reflect key elements of the decent work agenda. This concept of decent work establishes a framework more expansive than that which has been traditionally the domain of labour law and industrial relations legislation. The AIER submits however that the solution to the problems associated with insecurity at work can only be found in a multipronged, multilayered approach to the issue.

100. The AIER therefore submits that all parties including governments, social parties and in fact individual employers and workers adopt the ILO definition of decent work as their policy objective and framework and utilize this for the development of appropriate new forms of industrial regulation, policy, cultural change and educative initiatives and on the ground practice.

²² www.unhchr.ch/html/menu3/b/a_ceschr.htm

101. Within this framework we can reflect a new purpose for industrial regulation which includes policy parameters those associated with the traditional SER including

- To protect workers against economic and social risks
- Reduce social inequality
- Increase economic efficiency

and adds new purposes taking account of deficiencies within the old SER in today's economy such as

- to promote equal access for men and women to the employment system
- support lifelong learning in order to improve employability and increase flexibility in the workplace.²³

²³ For further details of this approach see Bosch G (2004) *'Towards a New Standard Employment Relationship in Western Europe'* British Journal of Industrial Relations 42:4 December 2004 pp 617-636

Economic Perspectives on Worker's Rights – A rights based approach is sustainable

102. One of the most important objections to the implementation of workers' rights is the view that such rights impose significant economic costs on the economy in the form of reduced output and employment. This is based on neo-liberal ideology drawing on neoclassical economic theory. However, both internal and external theoretical criticisms of this conclusion argue that it is based on a specification of the theory which cannot describe actual economies. When the theory is modified so as to incorporate essential features of contemporary economies, the conclusion that rights impose costs is no longer sustainable, as the theory can no longer make predictions about the implications of the imposition of rights.
103. This means that the question of economic costs must be tested empirically. Here again, the evidence does not support the contention that rights are costly. Most of the evidence suggests that granting workers' rights causes no loss of output or employment, while also supporting a beneficial relation between legislation providing for security of employment (Employment Protection Legislation, or EPL) and the distribution of income and equity.
104. Modern policy is often guided by neo-liberal (economic rationalist) ideology. With respect to the labour market, it is argued that a deregulated labour market, with no employment protection, will allow the forces of supply and demand to establish a price (wage) and conditions which will ensure that all labour that is available to work at that wage can do so. According to this view, markets, when left alone, will achieve optimal outcomes, and so institutions, representative of this ideology, such as the World Bank and the International Monetary Fund (IMF) have pushed for labour market deregulation and increased flexibility of employment conditions and time. In other words, they argue that deregulated markets can guarantee full employment under conditions that assume competitive market conditions. A consequence of this is that regulated markets with minimum wages and employment protection interfere with the market mechanism, and so will impose costs on the economy, either in terms of job losses or in terms of higher prices. The theory behind this result is derived from neoclassical analysis and relies on markets fulfilling certain conditions, including both perfect competition and perfect information. Perfect competition implies that all agents in the market, especially firms and employees, are so small relative to the size of the market that they cannot exert any market power. This means that they have no influence over wage outcomes, so that they are all price takers. Moreover, the information requirements of the analysis demand perfect knowledge not only of all current activity but also of the future. No reputable economist believes that the conditions for perfect competition exist in any actual economy, but many neoclassical economists consider that departures from perfect competition are not important enough to invalidate the use of the model as a tool for analysing aggregate employment and unemployment.
105. The limitations of neoclassical theory as a guide to policy are well known in the literature and are particularly well articulated by Joseph Stiglitz, a former senior vice president and

chief economist of the World Bank and Nobel Laureate in Economics.²⁴ Labour market analysis is widely recognised as an area where the use of neoclassical theory is likely to cause analytical problems. By reference to economic theory, there is no credible prima facie case against intervention in labour markets to set minimum employment conditions. Accordingly, an empirical analysis is necessary.

106. In the important case of minimum wages, theoretical ambiguity occurs in part because wages are both a cost to the employer (hence, increases are likely to reduce employment) and an income for the employee and therefore a source for their spending and demand (hence, increases are likely to increase employment). In addition, it is a standard result of microeconomic theory that when employers have market power, so that perfect competition does not hold, minimum wage legislation can increase employment. Especially in this case, the theoretical position with respect to the economic costs of employment rights is ambiguous, and reference needs to be made to the empirical evidence. This is true of labour market regulation more generally and is reflected in recent OECD reports.
107. Initially, the OECD unambiguously opposed Employment Protection Legislation (“EPL”), arguing that labour market deregulation was a necessary condition for growth and full employment. However, after strong theoretical and empirical criticism, it has recently reversed its position. In 2004 the OECD Employment Outlook stated that:

*The net impact of EPL on aggregate unemployment is therefore ambiguous a priori, and can only be resolved by empirical investigation. However, the numerous empirical studies of this issue lead to conflicting results, and moreover their robustness has been questioned...The impact of EPL on overall employment and unemployment rates is ambiguous ... Overall, theoretical analysis does not provide clear-cut answers as to the effect of employment protection on overall unemployment and employment ... no clear association can be detected between EPL and unemployment rates.*²⁵

108. As summarised by economist Richard Freeman:

*“Studies of minimum wages ... of employment protection legislation ... and of diverse other social protection programs ... find little or no impact of these institutional intervention on economic efficiency”.*²⁶

109. Lack of labour market flexibility as the major cause of unemployment in Europe was the new orthodoxy of the 1990s, especially among the OECD and neo-liberal economists. However, the empirical studies supporting this orthodoxy have been shown to be so

²⁴ Stiglitz, J, *Whither Socialism?*, MIT Press, Cambridge Mass., 1996.

²⁵ Organization for Economic Cooperation and Development (OECD), *OECD Employment Outlook*, OECD Paris, 2004, pp. 63 and 80

²⁶ Freeman, R, (2000) “Single peaked vs. diversified capitalism: the relation between economic institutions and outcomes”, National Bureau of Economic Research Working Paper 7556, 2000, p. 18 <http://www.nber.org/papers/w7556>.

flawed that even the OECD, as an institution, was forced to back down. Again Freeman summarises very succinctly what happened:

“The OECD Jobs Study came down strongly in favour of deregulation and active labour market policies, but succeeding analyses by the OECD have highlighted the weakness of that case. Countries with very different regulatory practices and policies have surprisingly similar outcomes.”²⁷

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

“The bottom line is that employment protection legislation alters the distribution of work but not its volume.”²⁸

111. The OECD itself has commented:

High union density and bargaining coverage, and the centralisation/co-ordination of wage bargaining tend to go hand-in-hand with lower overall wage inequality. There is also some, albeit weaker, evidence that these facets of collective bargaining are positively associated with the relative wages of youths, older workers and women. On the other hand, the chapter does not find much evidence that employment of these groups is adversely affected.

No robust associations are evident between the indicators of wage bargaining developed in this chapter and either the growth rate of aggregate real wages or non-wage outcomes, including unemployment rates.²⁹

112. Another argument against rights for workers is the “conventional wisdom” that predicts that lower labour standards will be more attractive for foreign direct investment (FDI), which will increase domestic employment and output in the longer term. Some argue that, by increasing the cost of employing labour, workers’ rights make countries less competitive and therefore less attractive to foreign investors. This view has been criticised on the basis that employment rights may increase the productivity of workers through their impact on education, skills acquisition and firm loyalty, as well as being associated with higher economic growth. There is no credible empirical evidence to support the “conventional wisdom”. In fact, the empirical evidence “suggest[s] that FDI tends to be greater in countries with stronger worker rights”.³⁰

²⁷ op. cit., p. 22

²⁸ ibid.

²⁹ op. cit. p.130

³⁰ Kucera, D, “Core labour standards and foreign direct investment”, International Labour Review, vol. 141, nos 1–2, 2002, p. 34.

113. In short, workers' rights do not seem to have any significant negative impact on employment or efficiency, but they do have a significant impact on equality and the distribution of income.
114. As suggested above, the evidence overwhelmingly supports the view that greater flexibility in labour markets, especially that which occurs by reducing the power of trade unions, increases earnings inequality. Again the OECD itself has pointed this out:

[Our] analysis confirms one robust relationship between the organisation of collective bargaining and labour market outcomes, namely, that overall earnings dispersion tends to fall as union density and bargaining coverage and centralisation/co-ordination increase. It follows that equity effects need to be considered carefully when assessing policy guidelines related to wage-setting institutions.³¹

115. Income inequality and other undesirable social effects that may flow from increased flexibility may reduce productivity. This is particularly the case as empirical evidence suggests that workers care about social justice and that their incentive to work is influenced by their perception of how they are being treated. More generally, casualisation is likely to reduce the commitment of workers to firms and hence reduce productivity. This may have serious effects on international competitiveness, so "it is likely that [freedom of] association rights would increase output and competitiveness by raising productivity".³²
116. 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.
117. The provision of reasonable protections to workers, such as those contained in the Australian Charter of Employment Rights, is unlikely to impose costs on the economy in the form of reduced employment, output or efficiency. Neither the theoretical nor the empirical evidence supports the case for any loss in output, efficiency or employment resulting from these rights. In fact, there is significant evidence suggesting that the reverse may be true. It is reasonable to suppose, and the empirical evidence confirms, that workers "care" about just conditions and equity, and they react adversely to perceived unfairness and inequality. In addition, there is evidence of a link between better employment rights and improving economic performance through improvements in labour productivity associated with better education and skill acquisition— and in increased foreign direct investment, among other factors.

³¹ op. cit., p. 166.

³² Martin, W, and Maskus, K, "Core Labor Standards and Competitiveness: Implications for Global Trade Policy", Review of International Economics 9 (2), 2001, p. 317

118. The AIER recommends that the ACTU joins with organisations such as AIER in order to make a strong public case for labour market regulations based on a rights based approach as adopted in our Charter of Employment Rights. This includes actively educating about the benefits of a rights based approach and promoting a greater understanding of international rights based instruments and how they apply to the world of work.

Moving beyond the adversarial

118. AIER's vision for Australia's industrial relations future is one that is underpinned by fairness to all sides, balance and fostering greater respect, harmony and innovation. We raise this matter in the context of this Inquiry principally because we think a new approach to defining industrial relationships within Australia is required if the triggers for insecurity are to be removed or at least minimalised. One of the major obstacles to achieving this in our view is the loss of genuine, rather than functional tripartism in this arena within Australia. This loss of tripartism means there is limited opportunity to discuss new approaches to regulating work relationships in a non adversarial climate.
119. The AIER believes that greater effort needs to be put to rebuilding an environment of genuine tripartism. AIER has previously called for support for a Centre for Workplace Citizenship.³³ We renew our call for this initiative via this submission. Our detailed proposal for this Centre is attached as an Appendix to this submission.

³³ For a more detailed discussion of Industrial citizenship see: Ewing KD (1998) 'Australian and British Labour Law: Differences of Form or Substance', 11 Australian Journal of Labour Law 44; McCallum R (1996), 'The New Millennium and the Higgins Heritage: Industrial Relations in the 21st Century', 38 Journal of Industrial Relations 294; Fudge J (2005) 'After Industrial Citizenship: Market Citizenship or Citizenship at Work?', Industrial Relations, 60(4), pp. 631-653.

Annexure 1:

Australian Institute of Employment Rights Inc.

Patrons

The Honourable RJ Hawke
Professor Ron McCallum AO

Executive Members

President

Mr Michael Harmer Harmers Workplace Lawyers

Vice Presidents

Employer – Fiona Hardie – Hardie Grant Publishing
Employee – Paul Richardson – National Union of Workers
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Gary Rothville - Gary Rothville and Associates
Mark Irving - Victorian Bar
Anthony Lawrence - HWL Ebsworth
Joel Fetter – ACTU
Tim McCauley - AMWU
Lisa Heap – AIER Executive Director

Annexure 2

Charter - Panel of Experts & Charter Advisory Committee

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

Annexure 3

The Australian Charter of Employment Rights

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 4

The Australian Standard of Employment Rights

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

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

1. Good faith performance

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

2. Work with dignity

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

3. Freedom from discrimination and harassment

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

B. The employer makes non-discriminatory decisions about all work related matters by giving every worker and job applicant fair access to all workplace opportunities and benefits.

C. The employer has a clear set of policies and procedures for addressing and managing the risks arising from discrimination and harassment in the workplace. This includes:

- i preparing and distributing a written policy on discrimination and harassment
- ii ensuring that there is in place a protective investigation process which deals with complaints promptly and properly
- iii maintaining thorough records and (subject to legal requirements) guaranteeing confidentiality
- iv promoting the policy throughout the business
- v providing training on operation of the policy to all workers, including those in leadership positions
- vi if possible, appointing trained discrimination and harassment contact officers
- vii reviewing work practices and regularly monitoring and evaluating the workplace culture to ensure compatibility with appropriate standards
- viii guaranteeing that no worker will be victimised for making a complaint or for supporting someone who has done so
- ix ensuring that all parties to the complaints process are permitted to have a support person, advocate, union official or other similar representative accompany them to any interviews or meetings
- x providing a worker who has suffered discrimination or harassment in the workplace with access to counselling services or other employee assistance programs
- xi dealing with perpetrators in a manner proportionate to the severity of their behaviour

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

4. A safe and healthy workplace

A. The employer is committed to making safety part of the lifeblood of the business by minimising exposure to health hazards and taking all steps to minimise deaths and injuries in the workplace.

B. The employer has a systematic, proactive and comprehensive risk management process to ensure the achievement of a safe and healthy workplace.

C. There is consultation with workers about major changes to safety and health measures as well as changes to work that may have safety or health implications.

D. Workers are given the opportunity to be represented in dealings with their employer concerning health and safety issues.

E. There is adequate information, instruction, training and supervision given to workers to enable them to perform their work in a manner that is safe and without risks to health.

F. The workplace is free of bullying, stress, abuse and anxiety that is detrimental to the worker's mental health.

G. All workers are committed to achieving a safe and healthy workplace and to cooperating with management about workplace safety measures.

5. Workplace democracy

A. Both employers and workers reject adversarial workplace relations and commit to seeking mutually beneficial outcomes.

B. The employer does not have a blanket managerial prerogative but is committed to managing the business in a responsible manner.

C. Both employers and workers are committed to engaging in constructive dialogue. As part of this, workers are allowed to express their views in the workplace and have their views considered in good faith by their employer.

D. In the case of business decisions that have significant implications for workers such as workplace restructuring, workers have the opportunity to participate in the decision-making process by being provided with information and meaningful consultation.

E. Workers are committed to cooperating with and supporting the employer's right to responsibly manage their business.

6. Union membership and representation

A. Workers are not discriminated against or treated detrimentally for joining or being a member of a union or on account of their union activities.

B. No job or other employment benefit is offered on the condition that the worker is not a union member or relinquish the right to union representation.

C. The employer does not refuse to recognise a union or punish its members for participating in lawful industrial activity.

D. The employer recognises that the right to collectively bargain is an integral aspect of union membership.

E. The employer does not restrict the role of the union in representing workers within the workplace.

F. Workers and their unions exercise their right to collectivism, responsibly, in good faith and with regard to their ongoing employment relationship and the dignity of every person in their workplace.

7. Protection from unfair dismissal

A. The employer has a systematic and comprehensive risk management process to managing dismissals or terminations of employment in the workplace.

B. The employer has a legitimate reason for termination of employment when that termination relates to the worker's conduct.

C. Prior to termination and where possible, an employer should warn the worker about conduct or performance matters so that the worker has a reasonable opportunity to rectify the conduct or improve performance.

D. Workers who are being dismissed are entitled to procedural fairness in the dismissal process.

E. Where a worker is terminated because of the employer's operational requirements, the termination is to be treated as a redundancy, and procedures for determining and dealing with redundancies are followed.

F. The employer is committed to respecting the dignity of all those involved in the termination process.

8. Fair minimum standards

A. The employer is committed to complying with fair minimum standards imposed externally to the workplace.

B. The employer, in consultation with workers, is willing and committed to providing fair standards that build upon the legislative minimum and which are tailored to the needs of the workplace.

C. The employer respects the need of workers to live a fulfilling life and to attain a fair balance between work and the rest of their lives. In recognising this, the business is committed to developing policies on flexible work practices, parental leave, working hours and workloads, and other conditions within the workplace.

9. Fairness and balance in industrial bargaining

A. Workers have the right to bargain collectively.

B. All parties involved in bargaining for workplace agreements act in good faith and with due regard for the dignity and integrity of all persons in the workplace and relevant third parties.

C. Workers have a right to use representatives of their choosing in the bargaining process.

D. Workers have the right to use lawful industrial action as part of the bargaining process. Employers have a right to respond to this.

E. The use of statutory individual agreements does not undercut collective agreements and is not used as a mechanism to avoid or undermine collective bargaining with workers.

10. Effective dispute resolution

A. The process of dispute resolution is clearly documented and accessible to all workers, offering both formal and informal options.

B. The employer has a well-designed dispute resolution process that aims to:

i Guarantee timeliness, confidentiality and objectivity

ii Be administered by trained personnel

iii Provide clear guidance on the investigation process

iv Guarantee that no worker is victimised or disadvantaged for making a complaint

v Be regularly reviewed for effectiveness

vi Guarantee that the worker can participate in the dispute resolution process without any loss of remuneration

vii Graduate from informal to formal measures

C. The dispute resolution process is procedurally fair.

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

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

Annexure 5

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

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

By resource we mean an organisation/Centre dedicated to:

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

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

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

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

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

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

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

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

The Australian Institute of Employment Rights (AIER) has occupied a unique space being the only independent body in Australia with employer and employee/union representation in its composition and with the stated aims of promoting the recognition and implementation of

the rights of employees and employers in a cooperative industrial relations framework. The AIER has adopted the principles of the ILO and its commitment to tripartite processes.

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

The benefits of establishing this resource

Initiatives of this kind benefit employers, employees and unions. It is logical therefore that employers and the trade union movement will invest in an initiative of this type. There are also substantial public (or third party) benefits associated with the initiative that warrant the injection of public funds.

Without initiatives designed to drive fairness and an understanding of workplace citizenship organisations will continue with their current cost competitive approach and the adversarial industrial relations culture will permeate.

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

New workplace relationships can be fostered that:

- help to re-orient firms towards developments which improve quality, innovation and responsiveness to emerging market opportunities
- shift the industrial relations climate to one of engagement around issues of mutual interest
- ensure, via involvement and respect that maximum value of employees is reached
- provide a positive role for trade unions to play in the workplace. The public benefits associated with this proposal are:
 - Reduced transactional costs in forming and maintaining workplace relationships
 - Reduced level of industrial disruption and loss of productivity via hidden dissatisfaction and low morale
 - More adaptive production base Accelerated pace of organisational and cultural change
 - Improved social cohesion resulting from greater satisfaction with work and improved productivity and economic sustainability.

In addition the public benefit should also be measured in terms of the costs of not supporting such an initiative. These costs are largely associated with the lag or delay in achieving cultural change towards fairness where parties are skeptical or find it difficult to move away from past practice or where the improvements with these changes are incremental and difficult to measure. In this environment and without the support of

additional resources the positive more long-term initiatives may be crowded out by immediate short-term agendas.

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

The role and function of the resource

There is a very clear need for this new resource:

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

This resource should be guided by the following objectives:

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

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

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

Fostering front-end cultural change

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

- Provide information, resources and examples of fair work practices and processes

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

Promotion/demonstration of models of fair work practices

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

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

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

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

Educating workplaces, industrial parties and the broader community

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

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

- Provide a venue for the presentation of research and academic discussion about trends
- Engage and educate practitioners in the achievement of fair work standards.

Collecting and analysing data regarding practices within workplaces

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

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

Relationship to Fair Work Australia & the Fair Work Ombudsman

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