

A Fair Industrial Relations System

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From Master and Servant Act to freedom of work choices: full cycle?

[1] George Santayana warned that those who cannot learn from history are doomed to repeat it. Thus, in social engineering, the settings and other dynamics that govern outcomes need to be understood if proponents of change hope to avoid misfortune. Experience would seem to corroborate Santayana's aphorism but there are considerations that contradict it. Arguably, a substantial body of historical work demonstrates a kind of National Groundhog Day phenomenon. Sometimes we are doomed to repeat history, anyhow. "Things" in social orders are relatively intransigent; however much things may change, some societal ligaments, dynamics and principles are constantly or recurrently evidenced. Perhaps if we are unable to overcome them, we need to learn how to live with them.

[2] In social interaction and struggle it is not necessarily a lack of understanding of history that dooms participants to the repetition of it. Hierarchies of interests, patterns of conduct, governance and conflict resolution seem to be integral to societal function and are reasserted. An understanding of history may best serve to inform analysis of what outcomes are most readily achievable in labour market regulation.

[3] Paul Craven and Douglas Hay co-direct the *Master and Servant Project* at York University (Toronto). They and others have collaborated to share and explore a comprehensive database of some 2000 master and servant statutes from the 14th century to the mid-20th century. The database covers core British colonial and American legislation for more than 100 colonial and postcolonial jurisdictions. A collection of essays by the co-

¹ Paul Munro served from 1986 to 2004 as Justice Munro, Senior Deputy President of the Australian Industrial Relations Commission. This paper repeats some material first set forth in other papers, notably: Paul Munro: *From WorkChoices to Fair Work Australia and beyond: when the music stops around seats in Australian workplaces, for how long will it stop and who or what will be missing in action?* Paper for Industrial Relations Society of Queensland 2007 Convention [31 August 2007]; available at www.irsq.asn.au

directors and 13 other contributors was published in 2004 under the title "*Masters, Servants and Magistrates in Britain and the Empire, 1562-1955*"²

[4] The law of master and servant for more than 500 years fixed the boundaries of "free labour" throughout Britain and its empire. That body of law had three defining characteristics:

*"The first was the idea that the employment relation was a matter of private contract or agreement for work and wages between an employer who thereby acquired the rights to command and an employee who undertook to obey. The second was the provision for summary enforcement of these private agreements by lay justices of the peace or other magistrates, largely unsupervised by the senior courts. The third was punishment of the uncooperative worker: not damages to remedy the breach of contract, but whipping, imprisonment, forced labour, fines, the forfeit of all wages earned. This distinctive conjuncture of civil contract, informal justice and effective criminalisation of the workers's breach was enacted in thousands of statutes, enforced around the globe in closely related language, doctrine and social practice"*³

[5] Hay and Craven outline and explore several uses of the law of master and servant. Its primary function was to regulate the labour market. Their description of that function has a contemporary resonance:

*"Master and servant regimes combined a residual attachment to the subordination of bound labour with an emergent conception of the wage worker as a party to a personal, contractual relationship of limited duration. Freedom to choose one's employer did not imply the freedom to remain unemployed; if the master and servant acts did not themselves compel engagement and the whip of hunger did not suffice, then the head tax, land laws, or the law about vagrancy took up the burden."*⁴

[6] The concept of the labour market and its relative freedom are hardy perennials in our socio-economic debate. The constituents of the notions are poorly delimited. The widespread use of those expressions in public discussion proceeds from an assumption that they have a commonly understood meaning. Hay and Craven's analysis of the statutes brings an important constituent of the notion of a labour market into sharper relief:

*Social historians ... have emphasised the structures of power that determined conditions of work, directed workers toward the indentured sector, and held them there through very long-term contracts enforced by penal sanctions.... **In all these regimes, with or without "apprenticeship" and indentured migration, law and its enforcement, shaped both markets and social experience. Markets are always constituted by the law that enforces the bargains made in them.** Whether and how the state intervenes or abstains is expressed largely through legal rules and their enforcement (or deliberate non-enforcement) and so rests ultimately on its coercive power. Law is always coercive, even when it is also simultaneously facilitative and*

² 2004 University of North Carolina Press ISBN 978-0-8078-2877-9.

³ Ibid: Hay and Craven at 3

⁴ Ibid: Hay and Craven at 33

*enabling of social organisation. Nor is the law neutral: its rules, at any particular time tend to favour to a greater or lesser degree one or the other party in any given labour relation. Freedom of contract does not mean freedom to abandon the contract. The "security interest" in maintaining a contract disadvantageous to the other party is particularly striking when corporal punishment and imprisonment are part of the security apparatus. **The clear aim of much master and servant legislation was to make labour supply and performance more reliable and, especially in the case of migrant labour, cheaper than it could be obtained otherwise, if it could be obtained at all.***⁵ [My emphasis]

[7] Master and servant law, like contemporary industrial regulation, must be placed in its operational context. Other legislation and the detail of the administrative process are part of that context:

*The devil is in the details, of law and social practice, repression and bargaining. The balance of coercion and market bargaining advantage was always contested, and the law and especially its enforcement, not only in slavery and employment but also in vagrancy, public order, taxation, and access to land and other forms of property, were crucial in constructing masters' coercion or strengthening workers' resistance to it. Workers also had their own forms of coercion, in riot or sabotage, but these were exceptional punctuations of the constant pressure of legal coercion that shaped the terms of labour bargaining".*⁶

[8] From 1875 onwards, the function of master and servant law as the primary regulator of the labour market progressively declined. In the Australian States, some core statutes survived until the 1970s but had limited an application after the inception of industrial arbitration. However, the demise of master and servant law should not be overstated; concepts of employment, based on a master-servant relationship, are carried over as common-law principles and deployed in contemporary statutes. Concepts of the relationship continue to shape industrial outcomes in Australia in the 21st century. In early 2004, Michael Quinlan observed of the Australian experience from 1788 to 1902:

Master and servant laws were initially shaped by the interaction between local legislatures dominated by pastoral and commercial capital and British authorities, the convict experience, a fluid labour market, and the refusal of workers (many of them immigrant workers in search of a better life) to accept the dictates of their masters. The close association between the magistracy and employers, especially in rural districts, undermined the moral authority of the legislation in the eyes of workers..... The master and servant acts were always a site of struggle... Following a brief reversal in the 1890s, the long demise of the master and servant regime was accelerated by the introduction of compulsory arbitration at state and federal levels at the turn of the century. The acts remained on the statute books of a number of states until the 1970s. Ironically, recent legislative attempts to decollectivise employment

⁵ Ibid: Hay and Craven, Introduction at 26

⁶ Ibid: Hay and Craven, Introduction at 28

*regulation and promote individual employment contracts in Australia are reminiscent of earlier master and servant laws. The overt usage of subordination has been replaced by the new economic rationalist mantra of "freedom" and "choice". Like their counterparts of a century ago, workers today are finding that changes in terminology do not alter the realities of individualised bargaining"*⁷

De-collectivising the Australian IR system.

[9] That comment about legislative attempts to decollectivise employment regulation and promote individual employment contracts in Australia was made before the announcement or implementation of the WorkChoices regime. The introduction of that legislation was more than “reminiscent” of settings and ideology associated with 19th century master and servant laws; it actively resuscitated some of them. It switched the focus of Australian industrial relations systems away from compulsory arbitration around industrial disputes and other independent third party intervention in collective bargaining processes. The WorkChoices regime, like the Fair Work Australia regime that will replace it, is directed to intervention in and regulation of the employment relationships of "**federal employers.**" under the federal system. Employment at common law is almost precisely the relationship that was subject to master and servant regulation in the centuries preceding the "revolutionary" step in Australia to provide for compulsory arbitration of industrial disputes.

[10] WorkChoices accelerated and compounded existing trends away from secure employment and regulated collective agreement-making enforceable by independent third-party industrial dispute settlement procedures. The WorkChoices system was designed to lower minimum rates of pay and conditions of employment and to stifle collective bargaining, collective organisation and workplace representation through a collective voice. The legislation set aside or phased out the established institutional role of conciliation and arbitration for the prevention and settlement of industrial disputes at Commonwealth level. Counterpart State industrial jurisdictions applicable to relevant "corporate" employers were dispossessed. Barriers to industrial agreements between an employer and individual employees were removed. The statute prescribed a default minimum Standard. That Standard operated in place of the former safety net of minimum pay rates and conditions determined by arbitral tribunals by which collective bargaining was underpinned. The re-

⁷ Michael Quinlan: *Australia, 1788-1902 A Workingman's Paradise?* in Hay and Craven; at 249-250.

regulation of Australian working relations reduced collective agreement coverage and fostered increased resort to private contract and individualised agreements.

[11] Several other elements of the package of measures built around the policy reflected in WorkChoices had parallels in the master and servant act regimes. The recently created Federal Magistrates Court, expanded by at least one dubiously qualified appointment, was given jurisdiction over a dramatically increased array of statutory penalties and proceedings related to industrial matters. Administration and enforcement of the regime was allocated to newly formed Executive agencies. The agencies were not staffed, credentialed or funded with any or enough balance to justify confidence in their independence from partisan priorities of the Minister to whom they were responsible. Those Ministers generated at great public expense campaigns promoting the WorkChoices regime, often by denigrating or misrepresenting the roles of unions and collective agreements. "Welfare to work" conditions were tightened and enforced in a manner that coerced acceptance of the individual statutory contracts on offer.

The workers' rights and fair industrial system campaign.

[12] A formidable array of interests supported the new balance struck by the WorkChoices regime. The campaign led by the union movement against the regime contributed to the defeat of the Howard government in the election next following the unheralded introduction of WorkChoices. As we all know, that campaign, supported by other institutions, was built around the establishment of workers rights and the restoration of a fair industrial relations system.

[13] The focus on workers' rights was the product of a number of influences. Even before WorkChoices, the appropriateness of enacting a set of citizen rights related to work relationships was being canvassed in Australia, Europe, the United Kingdom and the United States.⁸ Proponents of that approach were influenced by the changing character of work in the global marketplace: the "new psychological employment contract", precarious employment, virtual workplaces, the need for individuals to have property in their accumulated human capital and work-life balance issues. Another influence was global shrinkage of collective rights and union rights in particular. From Thatcher onwards, an

8 New Matilda [magazine@newmatilda.com] *New Matilda's Statement of Employment Rights: the rights of workers within an efficient and fair industrial relations system*, policy@newmatilda.com; Mordy Bromberg SC at the launch of the Australian Institute of Employment Rights: (30 November 2005) available at: www.buseco.monash.edu.au/depts/mgt/sig/aier/speeches

Employment Rights Act was the operative centre of the UK legislative IR model. Under Blair, it proved to be resistant to sweeping reform. Generally, those who sought to restore social balance in their respective industrial systems were driven to a belief that the only practicable path to compromise would be to establish a set of enforceable rights accessible to individual workers.

[14] The demand for a fair industrial system was often the rhetorical obverse of denouncing the imbalance and unfairness of WorkChoices. There was much circumspection about stipulating fair industrial system to replace it. My view of what was necessary at the macro level was outlined some years ago.⁹ Looking back at what I said, I thought I gave insufficient emphasis and priority to the micro-level, to what happens at workplaces to make for a fair IR system. At that level, critical pointers to a fair system are: mutual respect between employer and employee, reciprocating “shared mission” communication lines, recognition of employee voice, availability of internal and external process, transparency of decision-making and accountability for delivering promised outcomes. Where there is such an approach to IR at workplace level, the formal IR system is almost irrelevant; it is needed only to establish guidelines and as a fallback when solutions cannot be arrived at in the workplace.

[15] To meet my criteria for fairness, a formal IR system would give recognition to, and allow as effective as practicable, a voice to all reasonably involved participants. Isaac and McIntyre described earlier forms of the conciliation and arbitration system in its operation as *quadripartite*.¹⁰ Changes since 1993 did not render that description entirely inapposite. Nonetheless, the so-called industrial partners were often the loudest voice; for balance, individual employees, workers, the interests of unemployed ought be given audience and where necessary, standing. A fair industrial system is one that, as far as practical, leaves much to an independent Authority operating openly and accountably, within the statutory powers entrusted to it. Generally, the administration and modification of the processes and principles of adjustment between participants should be the responsibility of that Authority. A fair industrial system is one in which independence of mind and the capacity individuals who perform those functions are fostered. That is best done by a sound and balanced pattern of appointments and secure tenure. That independence and capacity, or the appearance of it,

⁹Paul Munro: *What constitutes a fair industrial system?*; Paper for Community Industrial Relations Forum, Old Parliament House Canberra ACT [29 June 2005]

¹⁰ Joe Isaac and Stuart Macintyre, *The New Province for Law and Order. 100 years of Australian Industrial Conciliation and Arbitration* [Cambridge University Press 2004] at 48

is easily compromised. It is especially compromised when an appointee it is not manifestly well qualified, or not manifestly well suited to perform without fear or favour, the actual duties of the office which he or she accepts a commission to discharge.

[16] A fair industrial system is one in which reasoned positions are solicited from participants interested in the industrial matter or issue, and are supplied by them, to the Authority, which reciprocates by addressing them in detail. It is one in which reasoned determinations are made or the obstacle to providing a reasoned determination of particular outcome is explained. It is a system in which there is a socially fair safety net or floor below which market forces, when seeking advantage in the supply of labour, will not generally be allowed to prevail. It is a system in which processes are available to restrain or offset unreasonable imbalances of power or to remedy practices that emerge in the market setting including the damaging effects of collective bargaining. It is a system in which there is an effective connection between the administration of a safety net, and the application of it in agreements, and at workplace level.

Labour market and IR policy settings from 2007.

[17] So far as I am aware, no one who opposed WorkChoices, called for the restoration of the system built around compulsory arbitration of industrial matters. Legislative changes from 1993 onwards, brought a major shift from the model toward a collective bargaining system underpinned by independent arbitral oversight and last resort powers. By 2007, it was manifest that a number of the settings upon which WorkChoices was predicated would survive in any system that replaced it.

[18] Some of those settings are constitutionally or legislatively fixed, but others are institutional or circumstantial. As Justice Giudice, the President of the AIRC, observed earlier this year, the array of industrial institutions and principle around, Federal conciliation and arbitration powers will be of "mainly academic interest", for the foreseeable future.¹¹ The *Forward with Fairness* policy released by the Australian Labor Party in April 2007 is foundational to the policy commitments of the Rudd government.¹² Reviewing and analysing

¹¹ Justice Giudice: "*The Constitution and the National Industrial Relations System*"; Paper for the Australian Law Journal 20th Anniversary Conference, Sydney, 15 March 2007 at (59)

¹² ALP: "Forward with Fairness: Labor's plan for fairer and more productive Australian Workplaces" April 2007

the detailed aspects of the policy statement and subsequent developments, Anthony Forsyth concluded:

*The WorkChoices reforms have shifted the industrial relations terrain in Australia in favour of employers.... if the ALP is elected to office at the election later this year, what will emerge will be a blend of several overseas work representation models, resulting in some improvement to the current legal framework's subversion of collective bargaining to individualised agreement making.*¹³

[19] Transitional arrangements under WorkChoices will expire in 2009-2012. Thereafter, the federal regulatory system will be framed almost exclusively around the constitutional power over corporations. Parliament will by statute directly determine or enable determination of minimum conditions and regulatory machinery. Those provisions will be the nucleus around which enforcement or ancillary determinative process can be articulated. That change of setting is loaded with significant potential for political initiative. Thus, the ALP Policy Implementation Plan pointed out in August 2007 that it would exploit the expanded scope to enable employer specific "awards" about conditions of employment:

*The High Court has confirmed that the Federal Government has expanded powers to make laws about terms and conditions of employment. It is no longer necessary to use the practices of last century to make awards and Labor does not intend to do so.*¹⁴

[20] Federal legislation has now been elevated to become the primary instrument for regulating workplace conditions and rights. Dynamics that drive social demand for collective agreement making or particular labour-capital outcomes will focus more insistently on Parliament. Inevitably, politicians will be pressed to fill the void created by the displacement of industrial award and collective agreement making machinery. Perhaps because that prospect seems at this time politically unpalatable, but only as a matter of policy choice, the Rudd government has elected to maintain sets of simplified modernised, "Awards", as the repository of minimum terms and conditions. Those awards will cover 10 broadly specified subject matters.

[21] Another labour market setting affecting the Federal level is that it now seems common ground that, apart from the judicial element, the institutional structure will be unequivocally administrative in character. Strictly speaking industrial arbitration is the province of an administrative tribunal. Institutions of an administrative character have

¹³ Anthony Forsyth: "Work representation in Australia: Moving, Towards Overseas Models?" Monash University: Corporate Law and Accountability, Research Group Working paper. Number 8 July 2007

¹⁴ ALP: "Forward with Fairness: Policy Implementation Plan August 2007; Chapter 5. Award Modernisation and Simplification.

precarious independence from manipulation by Executive government. Those who wish to secure an independent industrial umpire will need to be vigilant and assertive against whatever form of manipulation confronts that independence.

[22] Associated with those developments has been a revival of belief that a truly national labour system for Australia should be achievable. The New South Wales government has commissioned a report from Professor Greg Williams on ways and means of achieving a single national industrial relations system. Models under consideration are derived from the arrangements devised for the Corporations Act schemes of reference.¹⁵ Under those models a Ministerial Council would govern a comprehensive law enacted by the Commonwealth with the support of the States. That Council could approve all substantive amendments to the law. Probably, there would need to be a tribunal and other statutory bodies with non-judicial powers monitored by a secretariat of the Ministerial Council. Unless there were to be a complete referral of relevant powers over industrial matters by a State, recent High Court decisions would mean that jurisdiction to decide disputes could be vested only in State courts. That limitation on concurrent jurisdiction would be at least an inconvenience and may well be a substantive barrier to achieving progress.

[23] Subject to whatever rationalisation or harmonisation may now be produced by a Federal-State accord, functions currently exercised under State industrial relations jurisdictions will continue to apply to a significant but still indeterminately defined workforces not caught within federal system employment. Estimates I have seen are imprecise; the proportion of employment still covered by State systems is estimated to be between 15% and 40% of the workforce, the higher figure being the assessment of the South Australian Industrial Commission for that State.¹⁶ Workloads for State Industrial Authority tribunals have declined in relation to industrial disputes, termination of employment and industrial agreements. Several robust jurisdictional fields survive; extensions of them may remain politically attractive to State government intervention. Jurisdictions relating to discriminatory conduct and occupational health and safety are well established. Child employment protection is an instance of an important innovation.¹⁷ The first exercises of that

¹⁵ WorkPlace Express: *Williams inquiry's issues paper canvasses six options for national system*; [Monday 17th September 2007]

¹⁶ South Australian Industrial Commission: *Interim Report of Inquiry into Work Choices and Independent Contractors Legislation*; 25 July 2007; [2007] SAIRComm 13 at Part 3

¹⁷ *Child Employment Principles Case* [2007] (NSW IR Commission 110). Three States, Queensland, NSW and South Australia have protective legislation. See discussion Justice

jurisdiction illustrate the grave weaknesses of perpetuating a non-interventionist model of regulation along the lines of the WorkChoices regime, or of unduly restricting the scope of tribunal discretion to make awards on particular subject matters. In hearings before the NSWIRC, it was established that work injury to junior workers has the highest statistical incidence. However, evidence of hospital emergency admissions attributable to teenage work injuries showed that the statistics understated the incidence of it. The hearing process often acts in that way to permit the marshalling of material persuasively relevant to understanding problems before testing solutions to them. Another instance of tension between pro-active State industrial authorities and seriously atrophied jurisdiction in the WorkChoices regime arose in relation to labour standard compliance, inspection and enforcement.¹⁸

[24] “Individualisation” of binding employment conditions in the Australian labour market and workforce is another continuing employment market setting. All employment depends upon the existence of a common law contract. Such contracts are often the primary or sole source of conditions of employment for about 30% of the workforce. Only about 5% of the workforce, 400,000 or so, are subscribed to AWAs.¹⁹ There is apparently bipartisan support for statutory segregation of “independent contractors” from industrial regulatory regimes, using the Corporations head of legislative power. About 1.9m people are said to be engaged under that form of relationship.²⁰ For the foreseeable future considerable scope will remain for the use of individual contracts to marginalise resort to collective bargaining in many workplaces.

[25] The ALP’s commitment to scrap AWAs reduces the scope for individual industrial agreements to have statutory force. Under the ALP Implementation Plan, employers will have the full term of existing AWAs to make suitable workplace arrangements for employees currently on AWAs. For new employees, until 2009 an employer may resort to Individual

Monika Schmidt: *New Role of Industrial Tribunals*: Workplace Research Centre 2007 Labour Law Conference 3 August 2007

¹⁸ QIRC: *Enquiry into the Impact of WorkChoices on Queensland Workplaces, Employees and Employers*. (29 January 2007) at 3.3; Workplace Express: *OWS yet to prosecute over any WorkChoices AWAs*; (2 November 2006); Office of Workplace Services: *Media Notification: OWS builds on recovery of under payments for individual workers*: 27 March 2007; Workplace Express: *Workplace Ombudsman rejects State/territory claims about complaint handling*; 21 August 2007

¹⁹ The ALP Policy Implementation Plan adopts the 5% estimate based on ABS statistics.

²⁰ Kevin Andrews; Media Release 3 May 2006: *New Protections in Independent Contractors Bill*

Transitional Employment Agreements that will be subject to a new no disadvantage test.²¹ That policy will limit further growth of statutory individual agreements. Much of their appeal lay in their use to defeat protected award conditions and to preclude or discourage collective bargaining.²²

[26] The need for the Australian labour market to be sensitive to the demands for a competitive economy is now sufficiently widely accepted for it to be taken as a “setting” for policy development. Effectively, this setting represented an almost insurmountable barrier to any policy that merely sought to restore an industrial relations system that tilts the balance toward more rigid or uniformly applicable labour market outcomes. The independent contributions of Professor Ron McCallum and Joe Isaac were compelling; each stressed that a socially fair industrial relations system needed also to be economically efficient.²³

The IR policy issues in the 2007 electoral contest.

[27] The settings summarised here informed the analysis of those who denounced features of work choices and sought to develop policy covering more the impact of its operative features than the legislative framework used to constitute it. The features of the WorkChoices scheme most criticized were:

- The removal or minimisation of balancing factors related to fairness and public interest considerations and the associated de-collectivist bias;
- The degree to which factors in various determinative processes were not, but should be transparent to public scrutiny;
- The degree to which processes were either dependent upon or not independent of executive government.

[28] The policy formulated by the ALP addressed the first two of those features by committing to legislate to:

- remove AWAs;

²¹ Joint Statement of Kevin Rudd MP and Julia Gillard MP *Forward with Fairness –Policy Implementation Plan* 28 August 2007

²² David Peetz: *Brave New Work Choices: What is the Story so Far?* Paper Presented to *Diverging Employment Relations in Australia and New Zealand?* 24th conference of the Association of Industrial Relations Academics of Australia and New Zealand, Auckland, NZ, 9 February 2007. Based on data current up to 8 February 2007.

²³ Joe Isaac; *Reforming Australian industrial relations?* Foenander Memorial Lecture: The Journal of Industrial Relations (JIR), 49, 3, June 2007; at 410. Professor Ron McCallum: “*Australian Labour Law after the Work Choices Avalanche: Developing an Employment Law for our Children*” JIR Vol 49 at 436

- provide for a no – disadvantage test and a form of remedy allowing employees “rights if dismissed unfairly”.
- a set of 10 National Employment Standards, (NES), covering: hours of work; parental leave; flexible work for parents; annual leave; Personal, Carers and compassionate leave; community service leave; public holidays; information in the workplace; notice of termination and redundancy; and long service leave. These Standards will be declared by statute. The detail is to be subject to a consultative process around an “exposure draft”, in the first half of 2008;²⁴
- renovate and simplify extant or new awards for particular sectors or enterprises covering 10 matters: minimum wages; type of work performed; arrangements for when work is performed; overtime rates; penalty rates; minimum annualised wage or salary arrangements; allowances; leave and the arrangements for taking leave; superannuation; and consultation representation and dispute settling procedures. This modernisation is to be undertaken by the AIRC over 2008-2010.
- Introduce a one-stop-shop authority, Fair Work Australia, to oversee all aspects of the administrative process.

[29] Intense campaigning followed the publication of those policies. The matters on which those seeking to retain WorkChoices most firmly joined issue were:

- expansion of the content and nature of the safety net and the association with it of arbitral powers over legislative standards, awards and bargaining;
- removing the voluntary character of collective bargaining by imposing obligations requiring employers to negotiate wages and conditions with unions or employees as a group;
- the abolition of AWAs and statutory individual bargaining;
- the extension of collective bargaining to matters currently prohibited;
- revival of an unfair dismissal remedy without exemption for small business;
- the establishment of powers in the proposed Fair Work Australia in place of existing regulatory machinery;

²⁴ “Comments on the exposure draft will be sought by April 2008, with a view to settling the content of the National Employment Standards by June 2008. This will provide sufficient time for the AIRC to take the National Employment Standards into account when undertaking the award modernisation process: Minister Julia Gillard: WorkPlace Express: *IR transition bill to include new no-disadvantage test, but 10 minimum conditions delayed*: 17th December 2007

- measures allowing for increased intervention by unions and government agencies in the development of workplace relationships, especially any addition to right of entry for union officials.

Building consensus around fundamentals of a fair IR system.

[30] The character of those issues demonstrates the division between participants in the struggle to maximise the benefits of labour or capital. The ideological foundations for that division cannot be lightly dismissed and should not be obscured. I do not to agree with the outgoing Prime Minister or with David Peetz that the recent election result is a barrier to any further attempt to radically change industrial relations settings.²⁵ As the history of the master and servant legislations shows, those who hold to “market society” ideology are of persevering character. Usually, they have greater power and resources. The settings for the present and future regulatory system in Australia identified in this paper are also likely to endure. Taken together, those circumstances suggest that the electoral outcome will not apply the quietus to ongoing ideological incompatibilities about our regulatory system. For those who are not warriors in the ideological fray, the probability of continuing polarisation should invigorate attempts to arrive at a greater consensus about what are the fundamental rights and duties in Australian workplaces and how they should be adjusted and enforced.

[31] Against the background of those settings and understandings, the Australian Institute of Employment Rights, (the AIER), over the past 18 months developed an outline of what it considered to be a fair industrial relations system. It proposes that there be an establishment of worker rights associated with guiding principles connected to an adequate process for encouraging their observance. That linkage and process ought be seen as a fundamental prerequisite for a stable *economically efficient and fair industrial relations system*.

[32] The principles and processes of such a system could probably be accommodated by amending processes inherent to the legislative framework of WorkChoices and the former conciliation and arbitration model. Construction of a process around a set of employee or worker rights declared by statute would be legislatively valid as a legacy of the WorkChoices' constitutional dispositions. In September 2007, the AIER published its developed proposal for a *Charter of Employment Rights* in a book augmented by analysis

²⁵ WorkPlace Express: *ALP's new IR framework will be long-lasting, says Peetz*; (Tuesday 11th December 2007).

from leading academic and other writers.²⁶ The Charter as proposed after extensive consultation is reproduced as **Attachment A** to this paper.²⁷

[33] The set of rights formulated by the AIER cover:

- good faith performance;
- work with dignity
- freedom from discrimination and harassment;
- safe and healthy workplaces;
- workplace democracy;
- union membership and representation;
- protection from unfair dismissal;
- fair minimum standards;
- fairness and balance in industrial bargaining; and effective dispute resolution.

[34] The rights as proposed in the Charter were derived from three key sources, namely:

- rights enshrined in international instruments adopted by Australia;
- values that have profoundly influenced Australian society and which are embedded in our constitutional and institutional history of industrial/employment law and practice; and
- rights recognised by the common law that are appropriate to a modern employment relationship.

The topics of the rights envisaged are not coextensive with the Rudd Government's proposed NES or the 10 award matters. Rather, there are significant deficits between the ALP's scheme and the standard sought in the AIER Charter in relation to substantive rights, employer-employee balance and process for encouraging observance of rights. It is to be hoped that points of view about those deficits will be injected into forthcoming consultations about NES, award modernisation and a single national IR system.

[35] The rights embodied in the Charter were initially identified by a steering committee formed by the AIER, comprising eminent workplace relations practitioners and leading academics. The AIER subsequently undertook widespread consultation to ensure that the final Charter was reflective of the values of key stakeholders and the wider community. The Charter is intended to be a blueprint for workplace fairness, such that employers and employees in Australia can work harmoniously together.

²⁶ *Australian Institute of Employment Rights: Australian Charter of Employment Rights*; Edited by Mordy Bromberg and Mark Irvine : Hardie Grant Books (August 2007)

²⁷ Available now at the AIER website: www.aierights.com.au

[36] The focus of the AIER's Charter is upon the most important rights of employer and employee at work place level. Rights identified may be examined as readily at workplace level as they might be at tribunal or legislative level. In other words, rights and duties of this kind are meant to be used from bottom up or from top down. Together they should guide users to the major settings around which the fundamental right that underpinned the arbitration system was articulated. That right, to have a matter in dispute in a workplace relationship determined by an independent umpire according to equity good conscience and the substantial merits of the case was the high water mark of Australian egalitarian policy. Under it, tribunals declared a raft of new rights shaped to perceptions of particular needs.

[37] The Charter proceeds from an acceptance of a central point made last year by the Canadian Supreme Court. A right to freedom of association is distinct and different from a right to collectively bargain. However, as the Court held, unanimously in this regard, "*the fundamental right to freedom of association includes a procedural right to collective bargaining, the most significant activity through which Freedom of Association is expressed in the Labour context*".²⁸ Individual negotiation for an agreement, even when assisted by a union supplied bargaining agent, does not amount to "collective bargaining". The AIER accepts that there may be individual agreements; but the Charter proposes: *employers and workers may make individual agreements that do not reduce minimum standards and that do not undermine the capacity of workers and employers to bargain collectively or the collective agreements made by them.* The AIER also accepts that collective bargaining may be undertaken otherwise than through a trade union. The Charter states: *workers have the right to bargain collectively through the representative of their choosing*

[38] The Charter expressly recognizes the reciprocity of employer and employee rights and duties in Australian work relationships. It attempts to balance the rights and duties of workers and employers. The resultant statement seeks to interpret and win acceptance for an agreed basis to *giving and getting a fair go all round* in Australian workplaces. A central purpose of the AIER is to generate an understanding about the content and origin of fundamental rights and duties in Australian workplaces. Such understanding might foster sufficient consensus about the steps necessary to restore confidence in the settings upon which we establish our industrial regulatory system.

²⁸ *Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27

[39] Few of the rights set out in the Charter should surprise or trouble most reasonable employers. According to the recent AHRI survey, a large majority of employers covered in the sample had found no need to take advantage of the increased powers made available to them by WorkChoices.²⁹ Common sense and decency, if not the need to retain staff in a tightening labour market, favoured delay in departing from familiar methods and conditions.

[40] The AIER and those associated with it, including the AEU, have sought to promote understanding and debate about employment rights. The AIER seeks to have that debate conducted at arm's length from political partisanship. The debate about employment rights in Australia is a contemporary version of an old conflict between free market and humanist ideologies. The path to a fair industrial system has always been elusive. The AIER Charter of Rights is a contemporary attempt to reset the compass toward that objective. The task of getting there is very much a matter for all of us. The shift toward a more dispersed administrative structure under Fair Work Australia should be seen as an opportunity. Larger unions may be well positioned to advance better understanding and use at community, regional and workplace levels of the overall IR system. There is scope for initiative, indeed I would think it a responsibility for teacher organisations to build better understanding and appreciation of those processes and the need for rights from the workplace level up. The NSW Teachers Federation publication, "You're gold if you're 15 years old" is an instance of the communicative reach that teacher organisations can bring to bear. That communicative reach and concern will be an important resource in the campaigns that lie ahead to build consensus around the establishment of an adequately fair and balanced IR system.³⁰ Those associated with developing the AIER's Charter of Employment Rights hope that it will become a template against which to measure the adequacy and fairness of the IR system as it applies at workplace or macro-level.

²⁹ Australian Human Resources Institute; *Work Choices; Its Impact within Australian Workplaces*. Survey Findings (23 August 2007) at p10 showing that of 676 human resource managers surveyed, 13.1% believed WorkChoices had resulted in increased employment in their workplaces; 81.9% believed there to have been no change

³⁰ NSW Teachers Federation: "You're gold if you're 15 years old The perceived impact of WorkChoices on Youth Employment and Education in NSW" [July 2007]

ATTACHMENT A

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:

- | | |
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| ■ race, colour, descent, national, social or ethnic origin | in union activities or other collective industrial activity |
| ■ sex, gender identity or sexual orientation | ■ membership of an employer organisation or participation in the activities of such a body |
| ■ age | ■ personal association with someone possessing one or more of these attributes. |
| ■ 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 | |

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 Organisation 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.