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What about the worker?! The move toward establishing a system of rights for employees

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Abstract

This paper will consider whether a system based on private contracting by individuals has the capacity to develop a right to fair treatment at work; the extent to which common law principles are able to contribute to that development; some of the inadequacies of enforcement under the common law; and the need for additional support from other non-legal forms of 'soft' regulation. In particular, the paper will conclude with some observations on a current project of the Australian Institute of Employment Rights to develop a system of accreditation for employers who comply with a proposed Charter of Employment Rights. My subject is the establishment of a new system of rights for employees, or more accurately still, the establishment of a new approach to framing and recognising workers' rights.

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What about the worker?!

The move toward establishing a system of rights for employees.

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A new approach to workers' rights

When I first accepted the invitation to address this Colloquium on the topic, '*What about the worker? The move toward establishing a system of rights for employees*', I should probably have proposed a modification to my headline. After all, it would not be true to say that workers have enjoyed no rights in Australia to date. Many on the far right would probably complain that at times workers have enjoyed too many rights, to the detriment of Australia's fulfilment of optimum economic advancement. My subject is the establishment of a *new* system of rights for employees, or more accurately still, the establishment of a new *approach* to framing and recognising workers' rights.

Traditionally, the Australian industrial relations system has focussed on the establishment of workers' rights through collective means – generally by tribunals making industry-wide awards to settle claims brought by trade unions. Today, however, union membership is in decline, and a new approach to industrial relations is in the ascendancy. In the universities, 'industrial relations' departments are being re-badged as 'organisational management' schools. The new social science of Human Resources Management (HRM) is displacing 'IR'. HRM de-emphasises industrial relations as the terrain for the negotiation of the inherently conflicting interests of capital and labour, and asserts instead a 'unitarist' conception of the management of

work relations as a cooperative endeavour.[1] And HRM's preferred regulatory tool is private ordering, through contract.

This paper will consider whether a system based on private contracting by individuals has the capacity to develop a right to fair treatment at work; the extent to which common law principles are able to contribute to that development; some of the inadequacies of enforcement under the common law; and the need for additional support from other non-legal forms of 'soft' regulation. In particular, the paper will conclude with some observations on a current project of the Australian Institute of Employment Rights to develop a system of accreditation for employers who comply with a proposed Charter of Employment Rights.[2]

Political background

At around this time last year,[3] we were in the last weeks of a federal election campaign in which the Australian Council of Trade Unions (ACTU) ran series of media advertisements under the slogan, 'Your Rights as Work'. The ACTU campaign attacked the Howard government's WorkChoices laws,[4] and it certainly appears that attack was effective. According to Roy Morgan polls conducted ahead of the election, the WorkChoices laws were the most significant factor in voters' support of a change of government.[5]

WorkChoices brought radical change to Australia's industrial relations system in a number of respects, many of which are outside my particular brief here.[6] The aspect of interest to me is the ideological agenda clearly driving many of the WorkChoices reforms. WorkChoices demonstrated a commitment to an individualistic, contract-based model for establishing employees' rights. In this

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[1] S Deery et al *Industrial Relations: A Contemporary Analysis*, 2nd ed, 2001, Irwin/McGrawHill, Sydney, at p 37. HRM comes in 'soft' but also 'hard' versions. The more benign 'soft' version was not adopted in any of the Howard Government's industrial relations reforms, according to S Deery and J Walsh 'The character of Individualised Employment Arrangements in Australia: A model of "Hard" HRM' in S Deery and R Mitchell (eds) *Employment Relations: Individualisation and Union Exclusion, An International Study*, 1999, Federation Press, Sydney.

[2] See M Bromberg and M Irving (eds) *Australian Charter of Employment Rights* (2007) Australian Institute of Employment Rights, Hardie Grant Books, Melbourne.

[3] Australians voted in a new ALP Federal Government on 24 November 2008.

[4] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*WorkChoices*)

[5] See 'IR Reforms Still Driving Labour Support: Liberal Voters Afraid of Union Dominance', June 18, 2007, at http://www.roymorgan.com/news/polls/2007/4179 last checked 14 May 2008.

[6] See for example the challenge to federalism raised by the use of the corporations power in the Constitution s 51(xx) to override State industrial regulation: G Craven, 'Industrial Relations, the Constitution and Federalism: Facing the Avalanche' (2006) 29(1) *UNSW Law Journal* 203.

respect, WorkChoices' rhetoric adopted the ascendant HRM approach to workplace relations, and the legislation followed a globally-recognised trend, called (in many respects inappropriately[7]) 'deregulation'.

Deregulation is the label given to the 'widespread displacement of collectively-based regulatory strategies in favour of individual mechanisms of worker and employer redress'.[8] It is tempting to view this agenda cynically, as driven entirely by the power of 'Global Capital' seeking to improve the share of productivity gains going to profits at the expense of the share for Labour's wages. And indeed, National Accounts data released on 3 September 2008, showed the 'profits share' of the Australian economy reached 'a record high of 27.8 per cent in trend terms, the greatest share going to profits since the ABS began collecting the data in the September quarter of 1959' while at the same time the wages share 'fell to 52.7 per cent', the lowest level since 1965.[9] Nevertheless, there is also a view that some of the pressure comes from an emergent individualism among the citizens of western democracies. Hepple and Morris have identified a rising 'rights-based' individualism as the cause of considerable pressure on western industrial relations systems, as workers demand enforcement of these rights.[10] So it is perhaps not surprising that the 'Your Rights at Work' campaign resonated with the electorate – even those who were not affiliated with trade unions.

A year on, those of us with a particular interest in industrial relations law and policy are eagerly awaiting the tabling of new laws which promise more changes to Australia's industrial relations system.[11] Indications from the new government's press statements suggest that the new laws will not simply reinstate the old industrial relations model. It is already clear that some of the new 'Forward with Fairness' measures will accommodate options for individual bargaining of working conditions, notwithstanding the abolition of Australian Workplace Agreements (AWAs) by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008

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[7] See H Collins 'Regulating the Employment Relation for Competitiveness' (2001) 30 Industrial Law Journal 17 for the view that resort to contract is a different form of regulation, not an absence of regulation. See too A Stewart 'Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation' (1992) 5 *Australian Journal of Labour Law* 101 at 101.

[8] J Conaghan, 'Labour Law and "New Economy" Discourse' (2003) 16 *Australian Journal of Labour Law* 9 at 19.

[9] 'Profit share of economy hits 50 year high', *Workplace Express*, 3 September 2008, http://www.workplaceexpress.com.su/nav?id=37569&no=703592232, last checked 5 September 2008.

[10] B Hepple and G Morris (2002) 'The Employment Act 2002 and the Crisis of Individual Employment Rights' (2002) 31 *Industrial Law Journal* 245 at 247.

[11] No Bill was available at the time of writing (10 September 2008).

(Cth).[12] For example, the *Award Modernisation Decision*[13] sets out a 'model award flexibility clause' which contemplates individual agreements. An individual employee may agree with an employer to vary the application of an otherwise binding modern federal award, so long as certain protections of both a procedural and substantive nature are observed. Procedurally, the agreement must be in writing, and must be 'genuinely made', without coercion or duress. Substantively, the agreement may not 'disadvantage the individual employee in relation to the individual employee's term and conditions of employment'.[14]

There is also a suggestion in the *Forward with Fairness Policy Implementation Plan*[15] that the new rules will allow an exemption from award coverage for employees on incomes over $100,000, on the assumption that these 'high income earners' should be liberated to make their own deals about working hours and other employment conditions. Clearly, the proposed new laws anticipate a role for private contracting in the regulation of working conditions, and many applaud this approach, as a means of ensuring that individuals' special needs can be met in their working arrangements.

Private ordering and public regulation

This brings us to an essential question: can a system of workplace regulation based on private contracting deliver effective recognition and enforcement of the kinds of rights that workers are now asserting? Labour law orthodoxy would probably answer a resounding 'no'. Shae McCrystal has undertaken some informal surveying of young Australian law students about what rights they believe they enjoy under the common law (absent any special statutory rules) when they accept employment:

> 'Students are generally surprised to find that none of the controls that they assumed they would find around hours, wage rates, location of work, workloads . . . exist at common law. Instead, the principle of managerial prerogative and the right to terminate upon giving notice accords to employers an extremely high degree of control over their employees, with few if any restrictions around how they exercise that control.'[16]

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[12] This legislation took effect from 28 March 2008.
[13] AIRC, PR062008, 20 June 2008; [2008] AIRCFB 550, at par [187].
[14] Ibid.
[15] K Rudd and J Gillard, *Forward with Fairness: Policy Implementation Plan*, Australian Labor Party, Canberra, August 2007
[16] S McCrystal 'Re-imagining the Role of Trade Unions After WorkChoices' (2008) 18(2) *Economic and Labour Relations Review* 63 at 64.

This is all entirely true. Minimum rates of pay, controls on working hours, protection of job security – all these and many more benefits[17] that employees customarily enjoy in Australia flow from their entitlement to the benefits of legislated standards and arbitrated industrial awards. There will always be a need for public regulation to maintain a safety net of basic working conditions, because there will always be a large class of workers who do not enjoy sufficient bargaining power to secure decent conditions for themselves in a completely unregulated labour market. [18]

Likewise, there is ample evidence that collective bargaining generally produces better outcomes for workers than individual bargaining.[19] So statutory support for the enforcement of trade union-negotiated collective bargains[20] has been, and will continue to be, vital to the protection of those workplace rights taken for granted by many in the community. Indeed, the rights to freedom of association and collective bargaining which are recognised under International Labour Organisation Conventions C87 Freedom of Association and Protection of the Right to Organise 1948 and C154 Collective Bargaining Convention 1981, are fundamentally important in the maintenance of labour standards. Any system of workplace rights must necessarily recognise those collective rights, if it is to claim that it produces just outcomes.[21]

This is all by way of an important disclaimer from the discussion that now follows about the potential for the development of principles that recognise rights at

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[17] For example, freedom from discrimination on the grounds of sex, race, disability, etc.

[18] See K W Wedderburn The *Worker and the Law* (1986) Penguin, England, at p.5: '. . . the individual worker brings no equality of bargaining power to the labour market and to this transaction central to his life whereby the employer buys his labour power'. See also R Johnstone and R Mitchell, 'Regulating Work' in C Parker et al *Regulating Law*, (2004) OUP, Oxford, at p 119.

[19] For example, figures released by the Office of the Employment Advocate (OEA)(which is now renamed the Workplace Authority) in May 2006 showed that from a sample of 250 AWAs, every one removed at least one 'protected award condition' and 16 per cent removed all such conditions: P McIlwain *Evidence to Estimates Hearing, Senate Committee on Employment, Workplace Relations and Education*, Parliament of Australia, Canberra, 29 May 2006. Data allegedly leaked from the OEA also revealed that 44 per cent of a sample of 998 AWAs removed all protected award conditions; 76 per cent removed shift loadings, 70 per cent removed incentive payments and bonuses and 59 per cent removed annual leave loading: see M Davis 'Revealed: How AWAs Strip Work Rights', *Sydney Morning Herald*, 17 April 2007; M Davis, and M Schubert, 'Workers' Rights Lost with AWAs', *The Age*, 17 April 2007, noted in C Sutherland and J Riley 'Industrial Legislation in 2007' (2008) 50(3) *Journal of Industrial Relations* 417 at 419.

[20] For an analysis of the weaknesses of the common law in enabling collective bargaining see A Stewart and J Riley 'Working Around Work Choices: Collective Bargaining and the Common Law' (2007) 31(3) *Melbourne University Law Review* 903 at 920-927.

[21] See M Irving 'Union Membership and Representation' in M Bromberg and M Irving (eds) *Australian Charter of Employment Rights* (2007) Australian Institute of Employment Rights, Hardie Grant Books, Melbourne.

work under the common law. My work in *Employee Protection at Common Law*[22] has often been criticised for failing to make this disclaimer sufficiently robustly. So I repeat it again here: there will always be a need for statutory intervention in workplace regulation.[23] Nevertheless, it seems equally clear that statutory protections will be limited to a very basic safety net of wages and conditions. Any claim to benefits above that safety net must now generally be pursued by negotiation and enforcement of workplace bargains. Increasingly, those bargains are individual contracts.

If individual agreement-making is to be encouraged as a principal tool for establishing workplace rights, those individual agreements will sometimes require enforcement. We have generally looked to the principles of the common law of contract when it comes to upholding private bargains, although in some areas, those rules and principles have been modified or complemented by statute. To what extent does the common law presently recognise any 'rights at work'? And, just as important, how effective is common law enforcement of any such rights?

'Fair dealing' and employment contracts

Some of the television advertisements in the ACTU's pre-election campaign focused on WorkChoices' withdrawal of statutory unfair dismissal protection for many workers.[24] These advertisements appealed to a community expectation that people should enjoy a right to a certain level of job security: people ought not be subjected to capricious and arbitrary treatment at work, and ought not to be sacked unceremoniously without a valid reason. This 'right' has certainly been claimed in a number of termination of employment cases brought under the common law in recent times. These cases allow us some insight into whether the common law is evolving principles which regard a right to fair dealing at work.

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[22] J Riley *Employee Protection at Common Law* (2005) Federation Press, Sydney.

[23] Ibid at p.2. See particularly fn 1 which reads: 'This work is by no means a manifesto supporting the destruction of all forms of collective regulation. This work should *never* be cited as an apology for the neo-liberal agenda.'

[24] In particular, the so-called 'small business' exemption for employers with fewer than 101 employees by s 643(10) removed protection for many workers. According the AIRC's Annual Report for the Year ended 30 June 2007, unfair dismissal hearings fell from 6707 in the year ended June 2005 (the last full year before the introduction of WorkChoices on 27 March 2006) to 5758 in the year ended June 2007. Given that WorkChoices also abolished access to State unfair dismissal schemes for employees of private sector employees, it is surprising that the numbers of cases before the AIRC did not *rise* over this period.

A claim to fair dealing is generally framed in terms of the employer's obligation not to act in a way calculated to destroy the relationship of mutual trust and confidence between the employer and employee, although in the United Kingdom it has been expressed as a duty of 'fair dealing' for some time now.[25] In the United Kingdom, the 'rapid evolution' of this principle has been the subject of 'very extensive and significant case law development'. [26] Even there, however, '[t]he nature, content and scope of this principle are not fully defined; indeed, in some respects they are keenly controversial.'[27]

This is a huge topic, and could well be the subject of a complete book. For the purposes of this paper, I would make just a few brief observations on Australian developments.

1 There is a duty of mutual trust and confidence, or good faith and fair dealing in employment relationships.

Firstly, notwithstanding frequent assertions that this duty is not established under Australian law and has yet to be affirmed by an appellate court,[28] it is clear that the courts in many jurisdictions are assuming the existence of duty. Most recently it has been applied in the Supreme Court of South Australia in *McDonald v State of South Australia*,[29] and by the Supreme Court of New South Wales in *Downe v Sydney West Area Health Service (No 2)*.[30] The New South Wales Supreme Court was prepared to concede its existence in *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*.[31] The duty was clearly assumed by the High Court of Australia in *Koehler v Cerebos (Australia) Ltd*,[32] in the statement (at paragraph [24] of the judgment:

> 'it is only when the contractual position between the parties (*including the implied duty of trust and confidence between them*) "is explored fully along with the relevant statutory framework" that it would be possible to give appropriate content to the duty of reasonable care . . .' [my emphasis].

[25] See D Brodie 'A Fair Deal At Work' (1999) 19 *Oxford Journal of Legal Studies* 83.
[26] M Freedland *The Personal Employment Contract* (2003) Oxford University Press, Oxford, at p.154.
[27] Ibid.
[28] See for example *Heptonstall v Gaskin (No 2)* [2005] NSWSC 30 per Hoeben J at [23].
[29] [2008] SASC 134.
[30] [2008] NSW 159.
[31] [2008] NSWCA 217 per Basten JA at [33] and Campbell JA at [73].
[32] (2005) 222 CLR 44.

In my view, it is no longer useful to debate the existence of a duty not to destroy mutual trust and confidence. What requires attention now is its scope. What kind of conduct does observance of the duty require on the part of the employer? In what circumstances will the duty be breached? Case law is now beginning to develop particular examples and instances of the duty and its breach, however in Australia – as in the United Kingdom – this is still contested terrain.

2. *This duty alone does not restrict the freedom of an employer to terminate the employment contract with proper notice.*

The second observation flows from the question concerning the scope of the duty. Clearly, the duty of mutual trust and confidence or fair dealing does not require that an employer engage the worker perpetually. Under the common law, an employer is still entitled to terminate an employment contract by giving the required period of notice under the employment contract, and is not obliged to offer any particular kind of reason for the decision to terminate. Those cases which have found that the employer is only entitled to terminate the contract for cause are cases where the employment contract included an obligation not to dismiss without reasons. In *Balsdon v Murray Irrigation Ltd*,[33] for example, Ashford J in the District Court of New South Wales held that Mr Balsdon's dismissal was in breach of the employer's obligation not to dismiss on 'harsh, unjust and unreasonable' grounds. This obligation had been incorporated as a term of the employment contract from an enterprise bargain. This finding was confirmed on appeal by Bryson JA (with whom Handley and Ipp JA agreed).[34] Sometimes, an obligation not to dismiss without conducting a proper enquiry and establishing a good reason will be incorporated into the employment contract from a human resources policy.[35] It is still the case, however, that absent such a contractual term, employers enjoy a common law right to terminate employment contracts for any reason or no reason at all, so long as they observe the terms of those contracts.

[33] Unreported, DC159/2004, 19 September 2005.
[34] *Murray Irrigation Ltd v Balsdon* [2006] NSWCA 253 at [25].
[35] See for example *Rispoli v Merke Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160.

3. The good faith obligation assists in the construction of the terms of an employment contract.

A third point flows from this, and that is that in many cases the most important questions to be resolved in a case relate to construction of the contract. If the employer is obliged to give proper notice in order to terminate, then a fundamental issue to be resolved will be the period of notice required. This, I believe, is where the mutual trust or fair dealing obligation is doing some important work, albeit invisibly.

The full federal court decision in *Walker v Citigroup Global Markets Australia Pty Limited*[36] is a good illustration of this point. In that case, the court was faced with some conflicting evidence as to the terms of the employment contract. On the one hand there was correspondence which indicated that the parties expected the engagement to last for at least a year: there was a guaranteed bonus for the first year, and a commitment to promote the employee, or at least confer a more illustrious title on him, after the end of the first year of engagement. On the other hand, there was a set of standard term 'conditions of employment' attached to his ultimate letter of offer which stipulated that the engagement could be terminated with one month's notice.

At first instance, it was held that the standard term conditions prevailed. The other promises about longer term employment were held to be representations only. As misleading and deceptive representations, they were held to sound in a claim for compensation for breach of section 52 of the *Trade Practices Act* 1974 (Cth). On appeal, however, the full court held that the commitments evidenced in the correspondence between the parties during negotiations were contractual. The court was guided by the general principle of contract construction that '[w]here there are clauses in a contract specially framed with the individual circumstances in mind, together with standard form clauses, it will normally be appropriate to give greater weight to the specially negotiated clauses'.[37] The circumstances of the recruitment assisted the court to this conclusion. It was held that 'the purpose and object of the transaction, namely the recruiting of a high level and high profile employee then in other employment' made it a 'practical absurdity' that the parties would have agreed

[36] [2006] FCAFC 101 (23 june 2006).
[37] At [77].

to a clause allowing termination on only one month's notice, and a consequent avoidance of any obligation to pay the promised guaranteed bonus.[38]

In my humble view, this is evidence of an approach to contract construction that assumes good faith and fair dealing between the parties. The court looked to the 'purpose and object' of the contract, and the expectations of 'business people active in the financial world', and assumed that they were committed to cooperating in allowing the other the benefit of the deal they had made. They were not permitted to rely opportunistically on the written terms of a form attached to their contract.

Of course, the court did not expressly describe this as a 'good faith' obligation. In fact, Kenny J at first instance held that the court should *not* imply a duty of good faith in employment contracts, and the full bench said that it was not necessary to determine whether there was such an obligation to resolve the appeal. I would argue however, that the process of construing a contract on the basis that the parties must be assumed to be committed to performing the contract according to the reasonable expectations of prudent business people negotiating such transactions is to apply a good faith standard. This is all that good faith implies. Good faith does not oblige a contracting party to volunteer new benefits to a counterparty. It requires only faithful observance of the agreement made. It requires respect for the spirit of the agreement, and disallows opportunistic manipulation of some technical flaw in its form. [39]

4. Damages are assessed according to the loss flowing from early termination of the contract.

The third point above shows that the good faith obligation is a principle of construction of employment contracts. The obligation not to destroy mutual trust and confidence is not a 'stand alone' term of the contract, so breach does not give rise to damages independent of any entitlement to be compensated for losses caused by early termination. Generally, breach of mutual trust and confidence by the employer allows the employee to treat him or herself as constructively dismissed, and then to claim

[38] At [76].

[39] See J W Carter, E Peden and G J Tolhurst *Contract Law in Australia*, 5th ed, (2007) Lexis Nexis Butterworths, Sydney at pp 26-27 for an authoritative view that good faith means 'not acting arbitrarily or capriciously; not acting with an intention to cause harm; and acting with due respect for the intent of the bargain as a matter of substance, not form'.

expectation-based damages on the assumption that they would have remained employed until the employer could legitimately have terminated the employment. The quantum of damages will therefore be largely determined by what the employee would have earned during a reasonable period of notice. In some cases, employees may also be able to substantiate a claim for 'loss of chance' damages, based on the fact that premature dismissal has caused them to lose other opportunities, for example, promotion.[40]

There is one contested exception to the principle that damages are based only on what would have been earned during the proper period of notice, and that is the increasingly common claim for some kind of general damages based on mental suffering.

The treatment of claims for psychiatric harm tends to divide the English and the Australian decisions. English cases have been prepared to allow recovery of damages under contract for breach of the mutual trust and confidence obligation when the damage sounds in some kind of medically treated mental illness,[41] but only so long as the mental suffering was due to conduct occurring during employment, and did not arise only as a consequence of the fact of early termination.[42] Australian cases have tended to treat these kinds of claims as damages flowing not from a breach of mutual trust and confidence, but from breach of a duty to provide a safe workplace (a duty which arises concurrently in tort and contract).[43] However the duty is described, Australian cases have awarded damages to compensate for serious mental illness, so long as the employee has been able to establish that the harm was the foreseeable consequence of a breach of the employer's duty of care.[44]

The problem of enforcement

The principles outlined above suggest that in recent times the common law of employment contracts has evolved to develop some principles of fair dealing.

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[40] See *Walker v Citigroup*, above n.36 and *McDonald v South Australia*, above n.29.
[41] See *Gogay v Hertfordshire County Council* [2000] IRLR 703.
[42] This awkward distinction was confirmed by the House of Lords in *Eastwood v Magnox Electrix plc* [2004] 3 WLR 322.
[43] See for example *Naidu v Group 4 Securitas Pty Ltd* [2006] NSWSC 144, and *Goldman Sachs J B Were Services Pty Ltd v Nikolich* [2007] FCAFC 120.
[44] See for example *Patrick Stevedores (No 1) Pty Ltd v Vaughan* [2002] NSWCA 422, and *State of NSW v Seedsman* (2000) 217 ALR 583.

Australian development may not have kept pace with developments in the United Kingdom,[45] however there have been advances in recent years. Some badly treated employees have been able to secure substantial damages awards based on the courts' willingness to find that the employer's breach of a duty of mutual trust and confidence or a duty of care has caused a premature termination of the employment relationship, causing compensable harm. The damages awards in some of these cases have been considerably more generous than awards in statutory unfair dismissal cases, where there is a cap on compensation. And if anecdotal reports from law firms practising in this field are reliable, the litigated cases are the tip of an iceberg of cases being negotiated and settled in the shadow of these important court decisions. It is tempting to conclude, therefore, that a system of private contracting can support recognition of a worker's right to fair dealing at work, at least in so far as that claim protects the worker from a capricious and arbitrary summary dismissal.

The problem, however, is that many aggrieved employees cannot afford even preliminary legal advice about their claims, let alone legal representation in court.[46] Court processes are notoriously expensive, time-consuming, and one wonders if the court process itself is not a significant contributor to the mental distress suffered by employees who find themselves in the odious position of having to litigate to vindicate their claims to recognition of their rights.

In other fields we have established specialist tribunals to deal quickly, inexpensively and informally with disputes involving small claims brought by certain classes of vulnerable persons, for example, the Residential Tenancies Tribunals in each State. For some reason, the former government in its Work Choices laws chose to limit the jurisdiction of State and federal industrial relations tribunals to deal with individual grievances according to their customarily more informal processes. Instead, employees claiming recognition of a workplace right under the *Workplace Relations Act* are presently faced with a choice: litigate before the Federal Magistrates Court, or opt to follow the model dispute resolution procedure set out in the *Workplace Relations Act* Part 13. This model procedure leads the complainant to an 'alternative dispute resolution' (ADR) process.

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[45] See for example *BG plc v O'Brien* [2001] IRLR 496, where it was held that the duty obliged the employer to be even-handed between employees in conferring redundancy entitlements.

[46] Mr McDonald was ultimately self-represented in his action before the Supreme Court of South Australia.

The first step in the Model procedure set out in the *Workplace Relations Act* is that the parties must attempt to resolve the matter at the workplace level.[47] If that proves futile the parties can refer the matter to a private ADR provider, or may resort to private ADR services provided by the Australian Industrial Relations Commission (AIRC), however the AIRC will not have the power to compel any person to do anything, and will only have the power to arbitrate the dispute if the parties agree to arbitration.[48] Essentially, this leaves the resolution of the dispute in the hands of the parties themselves.

Here we see the HRM agenda at work: the model dispute resolution process assumes that the parties themselves, as robust individuals capable of negotiating their own mutually satisfactory terms, should be free to determine their own rights. This assumption ignores the conventional complaint about the inherent inequality of bargaining power between the individual worker and the employer.[49]

The model process applies even in a dispute over the application of a legislated minimum working condition in the Australian Fair Pay and Conditions Standard.[50] The model process tolerates the idea that even those standards fixed by apparently mandatory public regulation should be able to be negotiated away by private contract at the point of resolution of a dispute. Certainly, parties maintain their right to litigate, but for many impecunious workers without recourse to legal assistance, this is an illusory benefit.

An alternative, non-legal model?

The picture painted above is the usual bleak picture of inadequate access to justice for the weaker members of our community. We could seek to improve access to informal tribunals for the vindication of workplace rights (and it remains to be seen whether the new ALP government chooses to confer such a jurisdiction on a new judicial arm of the promised Fair Work Australia body). Or we could try an entirely different approach. The Australian Institute of Employment Rights (AIER) is presently working on a project which seeks to do just that.

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[47] See *Workplace Relations Act* 1996 (Cth) s 695.
[48] Ibid, s 701.
[49] See Wedderburn, above n.18.
[50] Ibid, ss 699(1)(a); 694(2) note (a) and 175.

The AIER is an independent body funded and governed entirely under the terms set out in its rules of association. Its current patron is former Australian Prime Minister, the Hon Robert J L Hawke, and it is inspired by the same tripartite philosophy that underpinned the Accord promoted by his government in its day.[51]

One of the AIER's major projects has been the formulation and dissemination of a proposed Charter of Employment Rights.[52] This Charter identified ten workplace rights, many of which are expressed as reciprocal rights (i.e. rights to be enjoyed by both workers and employers). The ten rights or principles are:

- Good faith performance of work contracts
- Work with dignity
- Freedom from discrimination and harassment
- A safe and healthy workplace
- Workplace democracy
- Union membership and representation
- Protection from unfair dismissal
- Fair minimum standards
- Fairness and balance in industrial bargaining
- Effective dispute resolution.

A second phase in the AIER's mission is to promote voluntary adoption of these principles in Australian workplaces. It is presently working on an accreditation scheme, whereby employers would apply for accreditation as a Charter-compliant employer. The benefit to the employer would be an ability to claim itself a 'best practice' 'employer of choice', and so compete favourably in the market for skills and talent. The process of accreditation would involve an assessment of the employer's practices, through means including surveys of staff. The process of conducting the surveys would itself be a means of disseminating the aspirations of the Charter throughout workplaces.

The AIER's Charter of Employment Rights and proposed accreditation scheme appeals to the 'rights-discourse' of our present times, and also to the noblest versions of the HRM literature, which argue that there is a business case for respecting workers' rights and thereby earning their cooperation and support for business goals. As a form of regulation (in the broadest sense of the word) this is

[51] See R J L Hawke's Foreword in Bromberg and Irving, above n.2, at xi.
[52] See Bromberg and Irving above n.2.

'soft law'. Parties are persuaded to sign up to voluntary codes of conduct, and to commit to compliance. Sanctions are persuasive rather than coercive: the shame of withdrawal of accredited status is likely to be the most serious 'penalty' the AIER would be able to impose. Nevertheless, good publicity is generally seen as a great benefit in fostering business success. Consumers of a firm's goods and services are also audiences to news of a firm's conduct in respect of its staff.

Perhaps if this accreditation scheme were to be widely adopted we might one day see arguments in court cases that the Charter has been incorporated by reference or implied by custom and practice or a course of dealing into an employment contract. That, however, is not the goal of the project. If successful, the great value of this kind of scheme is that it intends to be preventative. Reading the facts of cases such as *Naidu*,[53] *Nikolich*[54] and *McDonald*,[55] is deeply frustrating. Great harm can follow from capricious disregard and abusive treatment of workers. It is not only their working lives that suffer. These workers also suffered serious dislocation to their family lives and their personal health. No amount of monetary compensation mends that harm. Prevention of this kind of harm, through the education of employers and their managerial and supervisory staff is certainly a worthy goal of workplace regulation. If that can be achieved by voluntary 'soft' forms of regulation, all to the better.

If the accreditation scheme is successful in persuading firms to observe the kinds of principles set out in the Charter of Employment Rights, the kind of employer conduct causing the grievances in the 'mutual trust and confidence' case law may be prevented. Charter compliant employers would, for instance, ensure that supervisors did not abuse their staff (*Naidu*). They would institute fair and reasonable performance review systems (*McDonald*); they would prudently investigate any allegations of impropriety against employees before acting precipitately (*Gogay*, *Russell*), and they would respectfully follow up repeated complaints from employees (*Nikolich, McDonald*). They would certainly not trump up malicious complaints against their staff (*Eastwood v Magnox*). And so a great deal of personal grief, and an enormous amount of business time, finances and resources, would be saved.

[53] *Naidu v Group 4 Securitas Pty Ltd* [2006] NSWSC 144.
[54] *Goldman Sachs J B Were Services Pty Ltd v Nikolich* [2007] FCAFC 120.
[55] [2008] SASC 134.

Conclusion

In remaking Australian workplace relations laws to regulate for 'fair work', the new the federal government faces particular challenges. Allowing individual arrangements for the kinds of flexibility claimed by employers and many employees is likely to require some kind of individual contracting over working conditions. How much supervision of private bargaining is to be provided, and whether new avenues for recognition and enforcement of rights are to be created, remain to be seen.

Although the common law in Australia has begun to recognise rights to fair dealing at work through the gradual evolution of a reciprocal duty of mutual trust and confidence in employment relationships, reliance on the common law as the sole means for enforcement of workers' rights is unsatisfactory. The very fact that an employer's counsel can sometimes vigorously argue the absence of any duty to an employee, even in the face of the most compelling evidence of appalling behaviour and serious harm, is testimony itself to the unsatisfactory service provided by the common law in this field.

Perhaps we should now be grasping the present opportunity to re-regulate Australian workplace relations, to engage in some serious rethinking about how workplace rights should be developed and recognised. I for one will be watching the development of the AIER Charter of Employment Rights and accompanying accreditation project with great interest. It may provide the opportunity for some close study of whether the HRM theories of organisational behaviour upon which much of the recent rhetoric about workplace law reform has been built can indeed be harnessed to develop fairer and safer working environments, and to establish clearly articulated and reliably recognised rights for Australian workers.