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The Australian Charter of Employment Rights: The Missing Dimension¹

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Largely written by a distinguished group of labour lawyers, the Australian Charter of Employment Rights (AIER, 2007) comprising ten ‘rights’ and a justificatory text was intended to be an alternative to the Coalition Government’s *Workchoices* laws. The political context, coming weeks before the election, was evident in the measured intention to be ‘employer friendly’. The question is whether the Charter maps out a desirable, feasible framework in the globalisation era, in which labour market flexibility, outsourcing, casualisation and privatisation of social policy are the pervasive trends.

This article accepts that the Charter is an articulate defence of the social democratic system, which should be widely debated. However, although its values are progressive, it is paternalistic and tinged with nostalgia for a world dominated by manufacturing and stable full-time jobs, when the extension of *social rights* comprised progressive politics. The article is a plea to those seeking an alternative to *Workchoices* to be less defensive. While it is easy to criticise the ‘Howard’ laws, it is neither realistic nor desirable to return to the *labourist* model.

The Worker

At the heart of the matter is ‘the worker’, defined laboriously in a sentence of no fewer than 236 words as ‘the employee’ (AIER, 2007: 125-126). This definitional conundrum reflects a contemporary dilemma.

In the context of globalisation, the *standard employment relationship* (SER) is crumbling amidst a widening diversity of work statuses. From a policy viewpoint, one could extend the notion of employee, as this Charter does, to try to encompass ambivalent statuses. Or one could recognise the diversity of work-life trajectories and address specific issues confronting the various groups in their dealings and contractual relationships.

Labour parties have a predicament. They came into existence not to overthrow capitalism but to *regulate* it so as to make the SER not only the norm but a sphere of ‘decent’ and ‘fair’ practice. Throughout the 20th century, the social democratic model linked social entitlements – so-called ‘rights’ – to the performance of labour and the willingness to perform it.

Part of the deal – the *social compact* – was that social rights for employees would be extended in return for the state and worker representatives supporting the managerial

¹ This draws on an invited speech at the Charter’s launch in Melbourne in September, 2007. A longer version is available under ‘speeches’ at www.guystanding.com. Professor of Labour Economics, Monash University, GuyStanding@standingnet.com.

right to manage and *right to retain profits*. Unions had a compromised role, being institutionalised as protectors of the compact and as voice of employees wishing to obtain more labour-based entitlements. Social rights outside the workplace were exchanged for curtailment of work rights within it (Standing, 2002).

For many years, this was progressive. There was redistribution from capital to labour in gaining social rights, such as contingency-based social security, and enterprise-based benefits, such as defined-benefit pensions and healthcare insurance. But the model had flaws that this Charter and its UK predecessor (Ewing and Hendy, 2002) fail to overcome. It treats the labour market as a matter of vulnerable employees facing powerful employers, the former deemed to need protection, the latter the ‘right’ to expect employees to show loyalty and a duty to obey.

This Charter seeks to revive the resultant labourist model. Accordingly, there is no consideration of alternatives to industrial unionism. The model also discounts work done by more people for more time than any other, namely *care work*. This writer does not believe it is desirable to ignore some forms of work in a strategy of work rights. Nevertheless, let us consider the Charter on its own terms.

Workers are defined as (i) employees, (ii) dependent contractors, and (iii) others whose contracts seek to conceal real employment (p.118). The authors accept that the criterion of ‘control’ used to determine employment has given way to a ‘multi-factor test’ (p.119) relevant to triangular relationships, dependent contractors and ‘atypical’ employment. But then they run into difficulties.

Their solution is to define the worker as someone satisfying one necessary condition and at least two from a menu of six others. The necessary condition is that the person must not be engaged in ‘entrepreneurial activity’. So, someone providing a service to ‘a range of customers’ is not a worker. It is unclear where the Charter would place single-person producers supplying services to a few clients. If covered by common law and competition policy, they would have little chance of being allowed to bargain collectively. Yet many would have a vulnerable position vis-à-vis client producers. And many outworkers, including home-based workers, would not satisfy the necessary condition, since they work for several employers and take risks that make them candidates for ‘entrepreneurial’ status.

If the objective is to identify the vulnerable, then let us recognise that many excluded from worker status on the grounds that they are ‘independent contractors’ are among the most vulnerable of all.

The Employer

The Charter gives less attention to defining ‘the employer’, who emerges as a benevolent power with strong rights and vague ‘obligations’. The Charter recognises two awkward phenomena – *independent contractors* and *triangular employment*. But the independent provider of services would sit uneasily between having the rights and duties of an employer and the rights and duties of a worker, thus having no rights at all. As for the

triangular relationship, lawyers struggle to identify the *true employer* when brokers or employment agencies are involved. For those in such situations, the crucial concerns would be transparency, accountability and security.

The Charter should be challenged on its paternalistic bias. IR sages, such as Sumner Slichter (1929), understood the dangers. Why, for example, should employers have an obligation to provide training for those who work for them, or provide opportunity for career progression? An alternative view is that employers should draw up transparent employment contracts and then adhere to the law. The rights of independent contractors should be the same as for those designated as workers, including the right to free association and to free collective bargaining.

Are there Employment Rights?

The Charter claims employment rights stem from three sources – international instruments, primarily ILO Conventions and human rights declarations, ‘values’ that have influenced Australia’s constitutional and institutional history, and common law. This provides a large menu from which to choose. How to prioritise is not explained, although there are tantalising references to the ‘egalitarian principle’, ‘classical contract theory’ and ‘the right to work’.

The book exhorts us to go ‘back to basics’. Well, it is usually accepted that human rights are *universal, equal and indivisible*. Rights are ethical demands for certain *freedoms*, and are about forging full freedom, in which Isaiah Berlin’s negative liberty (freedom from) and positive liberty (freedom to) are given equal weight (Berlin, 1958). An essential freedom is the ability to say “No!” It is important to differentiate between legal and *claim rights*. The latter are rights which policy and institutional change should move steadily towards; as such, they provide criteria by which to evaluate reforms. Economic and social rights (‘second generation’ rights) are *claim rights*.

In this context, it is hard to know what *employment* rights could mean. Should someone in employment have rights that others should not have? Does everybody who is working have the same rights?

The Charter refers to ILO Conventions as setting obligations on Australian governments. As of 2007, the ILO had adopted 188 Conventions and 199 Recommendations. The former establish obligations on governments if the country has ratified them. Unfortunately, no country has ratified anything like all the Conventions or subscribed to all the Recommendations (which do not involve binding obligations). And efforts to reach ‘tripartite’ agreement on Conventions attempting to deal with more flexible labour markets have been unsuccessful.

In particular, the *Homework Convention* of 1996 has been ratified by just four countries, Australia not being one of them. And the tortuous attempt to establish a *Convention on Contract Labour* in the mid-1990s failed dismally. In other words, there are no established international ‘rights’ covering two growing forms of employment in the Global Transformation.

Given the dubious notion of employment rights, one might think in terms of *worker rights*. This would run into similar difficulties, since it would still involve an arbitrary distinction between workers and non-workers. A better alternative is to consider *work rights*. This would not exclude anybody, since everybody physically and mentally capable of a normal life performs activities that could be regarded as work. What would one wish to include in a Charter of Work Rights?

Work as Freedom and Security

Work rights should be about advancing freedom in the sphere of work. This must include the *right to the commons*, and the right to control one's *time* and *space* in which to work. Work freedom encompasses access to and control of seven aspects of work – own labour power, labour (time), skill development, means of production, raw materials, output, and the proceeds of the output. A rights agenda should consider how to ensure a maximum feasible combination of these freedoms, subject to the constraints of equity, dynamic efficiency and the Kantian principle of doing-no-harm-to-others.

This leads to the complex idea of *security*. There are substantive and instrumental reasons for a claim right to basic economic security (Standing, 2002). The challenge lies in determining what types of security are paramount, what level of security is optimum and what forms of security might be regarded as *tradable rights* (those one might do without if some other right was strengthened).

The Charter refers to several forms of security, but not all. It states that workers should have voice in connection with 'job security' (AIER, 2007: 50) and a chapter is devoted to unfair dismissal. But it mixes up *employment security* and *job security*, ignoring the latter altogether. Having a secure job within an enterprise, or a secure occupation, is not the same as having a long-term employment contract or tolerable dismissal procedures.

Both employment and job security are tradable rights. If one wishes to have control over one's work, and develop a lifetime of satisfying work, the crucial needs are basic income security and representation security. Only with the assurance of a means of survival, without fear and without having to undertake demeaning tasks to obtain it, could someone make rational choices. That would give meaning to the *right to work*. However, only with individual and collective Voice security could income security be maintained. One without the other would be inadequate.

The 'Right to Work'

The authors note without explanation that the 'right to work', while covered in Chapter 13, is not included in the Charter because it is a 'societal right' (AIER, 2007: 8). Chapter 13 begins by recalling Article 23 of the Universal Declaration of Human Rights stating that everybody has a right '*to free choice of employment*'. It gives a Keynesian interpretation of the trade-off between inflation and unemployment, and claims there is '*widespread consensus among economists about policies*' to deal with unemployment, adding that the '*only serious disagreements are value laden ones about how much should be spent*' (AIER, 2007: 142, emphasis added).

The Chicago school of law-and-economics has long argued that the model favoured in this Charter generates market *distortions* that raise unemployment. Its response has been to dismantle protective regulations and curb unions, so as to produce 'market clearing wages'. To say there is consensus must mean that no 'serious' economists adhere to that position or that all do so. This writer does not subscribe to the Chicago school. However, to imagine that the world is not being driven by economists, financial agencies and policymakers who do, is to indulge in wishful thinking.

Chapter 13 also fails to rescue the Charter from an omission, by not dealing with Australia's rush to *workfare*, as a policy for dealing with unemployment and the moral and immoral hazards associated with means-testing, poverty traps and unemployment traps in flexible labour markets. The trend is towards coercing the unemployed and others to take low-level jobs, on pain of having benefits cut. The right to 'freely chosen employment' is dishonoured in this paternalistic strategy. Moreover, the effects on working conditions of those in low-level jobs of having pressure from a cowed group can hardly be beneficial.

In sum, the rights of those in employment depend as much on the state's attitude to the unemployed as on the state's policy on, say, dismissal procedures. The Charter's omission is inadmissible and, one suspects, expedient.

Confronting Inequality?

Although the Charter mentions inequality, it is coy about what to do. Thus it asserts, reasonably, 'Inequality and subordination are dysfunctional characteristics of human relationships that breed discontent in the workplace' (AIER, 2007: 7). It then states that 'equality of treatment' does not mean 'parity between worker and employer' but 'a fair exchange'. This is confusing.

The authors seem to have in mind a model of *employment equity*, not equality. They believe in subordination. Having referred to a 'fair go all round' as part of Australian 'egalitarian democracy' (p.13), they sign up to 'the doctrine of managerial prerogative (managers' inherent and unquestioned right to manage)' (AIER, 2007: 22), adding, in bold, 'Every employer has the right to expect that workers will cooperate' (AIER, 2007: 42). There is no caveat.

Inequality in Australia has been growing. The functional distribution of income is widening, with more income going to capital (Peetz, 2007). If the boss paid himself a million dollars a year and shopfloor workers \$20,000, would the latter be 'unfair' if they did not cooperate? Is there no worker's right to a 'fair' share? Or is such a delicate subject outside the Charter's remit? Wage differentials are widening. The shrinking gender-based wage inequality has been reversed. The distributions of enterprise benefits and state benefits are becoming more regressive.

These are contributing to a global *class fragmentation*. This reflects differentiation in forms of income and forms of social rights and security. In brief, at the top is a

grotesquely affluent tiny *elite*, below whom is a *salariat*, privileged through employment security, income security and benefits covering most forms of risk. Below them are *proficians*, usually earning high incomes but with self-chosen employment insecurity.

The Charter would be of little interest to those top strata. Below them come *core workers*, the old working class. The Charter is for them. They are mostly in the SER, have access to unions, some employment security and some income security. But they are dwindling as a social force. Below them is what should be called *the precariat*. This is the group to which a Charter of work rights should be primarily addressed. They have little income security, with no assured entitlement to state or enterprise benefits, and little employment security, or other forms of security (labour market, work, skill, occupational or representation). Below the *precariat* come the unemployed and a *lumpenised* detached group who wander the streets. They all count.

Only if we have some image of the class character of society can we have a vision of work rights and devise a strategy for responding to today's socio-economic ruptures. Doing so, we may find that emerging generations of workers are aspiring to a different package of rights than could be conveyed by the old industrial model.

The Dignity of Work

Chapter 2 is an interesting call for 'work with dignity'. But it is unclear how one can have a *right to dignity*. Surely, one obtains dignity not from being in employment, but from the work one does and the community in which one does it.

The chapter cites the ILO Philadelphia Declaration's reference to 'freedom' and 'economic security', but does not deal with them. Instead, after mentioning the slogan of 'decent work', it claims that 'dignity at work' is about 'the employment relationship' (AIER, 2007: 21), while 'dignity of work' seems to be about job design. The incredibly brief section on the latter does not consider how workers themselves could develop dignified work. It is paternalistic. All we have is an assertion, 'The right to dignity of work demands that jobs be designed with proper regard to [social and humanitarian] considerations' (p.25). One is not told how this could be ensured, let alone how it sits with the right of employers to manage as they see fit.

The section adds that there should be a right for 'equal opportunity for everyone to be promoted', citing the UN's 1966 Covenant on Economic, Social and Cultural Rights, which here is actually referring to discrimination. One cannot see employers providing promotion opportunities for everybody. And it is wishful thinking to imagine it is in every employer's interests to 'maximise the opportunities for training, development and promotion' (AIER, 2007: 25). Most could neither afford nor benefit from providing everybody who works for them with such opportunities. However, it is not clear that employers should be social policy agents. This smacks of old-style corporate paternalism. To be treated paternalistically, however nicely, is not a route to dignity.

Occupational rights?

Most worrying of all is the absence of discussion of work as *occupation*. What we do is more important than for whom we do it. Most people in reasonable health want to spend their lives working to better themselves and their families. This is what occupations are about. There is nothing on occupations in the book, beyond a remark that unions should be free to pursue workers' 'occupational interests' (AIER, 2007: 59). There is no discussion of occupational associations or regulation.

If there is any work right, it must be the right to do the work we wish, subject to our abilities and to ensuring that it does not harm others. This should be at the heart of a Charter.

We should develop an agenda for *occupational rights* and a system of *occupational regulation*, the term for the legal and institutional mechanisms used to guide combinations of tasks that have come to be called occupations. What system of occupational regulation would promote work *rights*? Adam Smith (1776: 225) believed there should be no restrictions on workers practising whatever they chose. Modern and ancient legislators around the world have not agreed. The *right to practise* is curtailed in Australia in many ways.

First, legislators have wished to ensure that *freedom of association* should not be interpreted too literally. If a group doing a similar type of work form an association to set their own standards, qualification requirements and remuneration scales, that can be seen as in contravention of *competition policy*. So, with some exceptions (e.g., lawyers), the state has tended to regulate, and even block the formation of, professional bodies.

Second, again in the ostensible interest of 'consumers' and 'competition', governments have resorted to *occupational licensing*, standard setting, *accreditation* tests, rules of disbarment and mandatory codes of practice. In Australia, many groups have requested state governments for a licence to operate as a group. Besides well-known professions, they have included travel agents, opticians, martial arts promoters, electrical contractors, mechanics, beauticians and insurance agents (Moore and Tarr, 1989).

The Charter is silent on all this. Its authors could not claim it is a marginal issue. In Australia, as in the USA, more workers are encompassed by occupational regulation than by collective agreements. And that will continue.

Is *occupational licensing* justifiable in terms of rights? The claim is that it helps protect the consumer, who can anticipate a reliable service. In the case of medical treatment, that can be reassuring. Yet critics have swarmed over that claim (e.g., Summers, 2007; Kleiner, 2000). Do not look to this Charter for a resolution of the argument, or even awareness of it.

Occupational licensing is growing fast. By the 1980s, over 800 occupations in the USA required a licence; that may be over 1,000 now (Kleiner, 2006). And more associations are emerging to protect occupations. They may favour licensing because it can keep up

their prices and, in pursuit of that, impose artificially high entry standards. And they can persuade governments to pass laws requiring workers wishing to join the occupation to achieve qualifications only through specified avenues. Whose rights count?

Alongside licensing is *negative occupational licensing*, common in Australia as elsewhere, by which a person can be disqualified by contravening some rule or standard of competence. From a rights perspective, we should ask what behaviour could justify someone being locked out of his chosen work and what authority should have the right to make that decision.

Occupational licensing and negative licensing by the state are just two means by which the right to work is controlled. Throughout history, groups have used *self-regulation* to achieve the same purpose. A Charter of work rights should take a position on what is appropriate.

For instance, a typical rule is that someone can only practise if he or she has done so within a specified period – a *recency of practice* test.² How would a person recover the right to practise? At the very least, work rights should balance the need to ensure respect for standards with the right to work, for example, by requiring those wishing to renew work to undergo refresher courses. A rights-based charter should propose ways of resolving conflicting objectives – reassurance for consumers and the right to practise.

Another issue is what should be called *occupational oppression*. Two occupations that have suffered from oppression are *midwives* and *alternative medicine practitioners*, particularly in the USA. In both cases, regulations at the behest of one powerful group (doctors) have blocked other groups from practising.

There are many aspects of occupations that should be in a Charter of Work Rights, and it is to be hoped that the Australian IR community will help forge it. It should cover the right to enter an occupation, the right to practise and the right to mobility, across geographical boundaries and within the occupation itself.

‘Workplace Democracy’

The tantalisingly short chapter on workplace democracy (eight pages) begins by stating that ‘*workers have the right to play a part in decisions that fundamentally affect them in the workplace*’ (AIER, 2007: 44). What does ‘play a part’ mean?

If one lauds the duty to obey an employer and his ‘unquestioned’ right to manage, then playing a part must be limited. It is not much use having a say if the employer can retort, ‘Tough, mate.’ A right must be meaningful, and there must be protection against retribution, with consequences if the right is abused. Apparently, workers would have ‘the right to express their views’ and play an ‘advisory role’ (AIER, 2007: 51). This is hardly a rights strategy. Moreover, apparently democracy ‘involves a rejection of adversarial workplace relations’ (AIER, 2007: 44). This is an employer’s nirvana.

² Thus, Australian states operate Physiotherapy Acts that have diverse ‘recency of practise’ requirements.

To place faith in ‘a partnership-oriented approach (rather than a merely adversarial approach)’ (AIER, 2007: 49) is platitudinous unless one states what form of partnership is being advocated. It is unclear whether the authors believe workers and employers should have equal voting rights. Given their commitment to the right of employers to manage and the worker’s duty to obey and show loyalty, the partnership sounds like an old-fashioned marriage. Unless the workers’ Voice could be raised, adversarially if necessary, gestures about partnership are not worth much.

Workplace democracy should surely be about the distribution of power, income and assets, and such matters as technological change and job design. While workers need information, democracy is having the capacity to do something with it. Does the Charter team believe there should be a democratic right to shape wage differentials, or the distribution of profits? If one omits such issues in a plea for workplace democracy one is omitting primary features of the Global Transformation.

This leads to the Charter’s position on ‘the right of free association’ (AIER, 2007: 54), which is couched in terms that conjure up an earlier age. It is all about ‘union membership’ and bargaining between unions and employers. Two statements worried this reader. One is that ‘no job or employment benefit should be offered on the condition that the worker not be a union member’ (AIER, 2007: 56). The Charter implies that a benefit conditional on being a union member would be acceptable. This has helped keep up unionisation in Scandinavia. Where does the Charter team stand?

The second statement is that unions should be allowed to campaign on all sorts of issues ‘on behalf of members’ (AIER, 2007: 60), including ‘the election of a political party’. Think of the counter-factual. Suppose one joins a union to be represented in bargaining with employers, and then the union leadership decides to support a right-wing political party.

The claims recall a statement made by G.D.H. Cole (1920: 95) that we need as many interest associations as we have interests to represent. There is no good reason for a blanket right for unions. Ironically, the proposed right for unions to do all the activities listed would be counter to their long-term appeal, since potential members could be put off by their positions on external matters.

Since unions are shrinking, calling for a union-based model risks irrelevance. Meanwhile, a growing number of people belong to (sometimes obligatory) occupational bodies. A framework for *occupational democracy* has yet to be laid out, although US libertarian institutes call for complete *self-regulation*, which will not happen.

Occupational associations vary from informational exchange societies to powerful bodies determining everything from right of entry to pay scales and disbarment. Given that lawyers operate a comprehensive one, it is strange that the Charter did not engage with the issues. Often, such bodies do not bargain directly with employers. Often, they advance some ‘rights’ of members, but curb others. Often, they determine gainers and

losers within an occupational community, determine ‘the right to practise’ and determine with whom members can work.

If the sphere of democracy is unclear, so too is the workplace. The term ‘workplace democracy’ needs unpacking since a growing number of people work in multiple workplaces. At the heart of labour law is the physical workplace, the factory, mine or office. These days, for many people this workplace may be the least fixed. A second workplace is the *home*, to where an increasing number take work, even if they have a physical workplace as well.

A third workplace, which may be the most fixed, psychologically or aspirationally, is our craft or profession, which may have several layers, from a local community, responsible for overseeing local performance, to an international association with powerful regulatory functions. This *occupational workplace* is a mini-society, since it may embrace functions that are often considered the sphere of the state, from the establishment and monitoring of qualifications to determination of entitlement to social protection. As with states, occupations vary in the comprehensiveness of their policies. But one cannot deny they have a growing role in shaping work in modern societies.

Thus what happens in the physical workplace may be the least important part of a person’s work, scarcely worth making the cornerstone of a Charter. For a growing number of people, the occupational workplace is more important than the office or shopfloor where one happens to be working at the moment. There is a need for *occupational democracy* as part of *occupational rights*.³

Concluding Reflections

We need a charter of work rights, in which the imagination focuses on the content of work. That must be linked to a strategy for *economic rights*. Work comprises all the activities we do to be creative, productive and reproductive, not just employment.⁴

Progressives favouring a society in which work can flourish in freedom should make a leap. Contrary to what has been said *ad nauseam*, *labour is a commodity*. The ultimate work right is that the worker should not be. It is sensible for individuals to enter relationships in which they supply a commodity (labour) for a price (wage) and in which they accept direction from the purchaser (employer). But in a good society, everybody should have economic rights that would prevent them from becoming commodified.

A Charter for Work Rights for the 21st century could build on the Charter of Economic Security presented in an ILO report (2004). It should set an agenda for *occupational rights* and occupational citizenship. Everybody is a worker and should be enabled to

³ This should lead us to reconsider *guilds*, *cooperatives* and *community unionism*. These may provide a route to *dignified work*, but if left as vehicles of self-regulation, they would be subject to *regulatory capture* and *distributional failure*. Regulatory capture was the first issue in a paper by the Treasury as part of the National Competition Policy Reform (Parker et al, 1997).

⁴ Pigou’s well-known quip reminds us of the limits of labourism (Pigou, 1920: 32). He noted that if he hired a housekeeper, national income would rise, whereas if he married her, national income would fall. Unpaid care and community work should be treated as work just as much as the paid equivalent.

combine paid and unpaid forms of work in ways they want. By disregarding work that is not employment and by disregarding occupations, this Charter has missed an opportunity to change the terms of debate about the future of work.

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