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**Note:** The views of the contributors are not necessarily those of the IR Society of SA.

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## PRESIDENT'S MESSAGE

Welcome to the new look IRS Newsletter. This represents a further stage in the "rebadging" of the Society following a number of decisions taken late last year to update the image and services of the organisation.

The next stage will be the launch of an upgraded website involving a new image and more functions that should make the information on the site more accessible and enable more of our services to be managed on-line. More details will follow. In the interim we will continue to maintain the existing website, albeit with some difficulty given the (almost) redundant technology required to update its content.

As expected, 2008 is turning out to be a period of great interest and some change for the profession. Legislative change to the Federal system has already been made and preparations for the new system, expected to be fully operational from January 2010, are being made through a variety of consultative forums.

The Society has already held a number of seminars on topics related to the new system and more can be expected in the months to come. Indeed, the Society will be conducting a major seminar in late October on the issue and more details are set out later in this newsletter.

On a personal basis, I would inform the Society that our hard working Secretariat, Ian Fiddian, has been unwell of late. We wish Ian all the best in his recovery and acknowledge the assistance of his colleague Anne from Mitcham Smart Biz who has ensured a continuity of services during Ian's absence.

Peter Hampton  
**President**  
**IRS SA**

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## A Single National IR System for the Private Sector?

In our first newsletter of the year, the Society advised of developments to that point regarding the potential to establish a single industrial relations system in Australia.

The Rudd Government's industrial relations policy, *Forward with Fairness* contemplates establishing a single national system in Australia for the private sector.

As noted in our earlier report, in South Australia coverage of the federal system extends to something in excess of 60 percent of the total workforce, and in the order of 70 percent of the private sector. However, the continuing use of the "corporations" power, as undertaken by the previous Government with Work Choices, is of itself unlikely to achieve a single system in the foreseeable future. It is conceivable, albeit difficult, for the Commonwealth to achieve a very extensive national system using the corporations power and other heads of power provided by the Constitution. Rather, the *Forward with Fairness* policy contemplates this being achieved with the cooperation of the States and Territories.

The 1 February 2008 meeting of the Workplace Relations Minister's Council (WRMC) represented a significant development towards a national system. The Ministers agreed a number of matters including:

- Endorsement of *Forward with Fairness* as providing the basis for a modern, fair and flexible workplace relations system and in that context noted the report by Professor George Williams;
- The need for all Government to engage actively in developing its substantive workplace relations legislation; and
- The establishment of a high level officials group to collaborate on the development of the new national system and its interface with State systems.

In the meantime, the Deputy Prime Minister, Hon Julia Gillard MP has steered the *Workplace Relations (Transition to Forward with Fairness) Act 2008* through the Commonwealth Parliament.

The Transition Act, among other things:

- prevents the making of new Australian Workplace Agreements (AWAs);
- creates a new form of individual workplace agreement – the Interim Transitional Employment Agreement (ITEA) – to be available only for limited use during the transitional period;
- enables the life of preserved State Agreements to be extended and varied in limited circumstances;
- removes the requirement for employers to provide the Workplace Relations Fact Sheet;
- replaces the Fairness Test with a new no disadvantage test for new agreements to provide better protection for employees; and
- enables the AIRC to undertake the process of modernising industrial awards.

These changes took effect from 28 March 2008.

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The Commonwealth Government has also released a draft of the National Employment Standards, which along with the modern Awards, will provide the safety net in the new system. Public comment on the draft standards has closed and we would expect that the final proposals will be announced later in the year as part of the substantive reforms.

The extent and nature of participation of the various State and Territory Governments is yet to be confirmed however more could be revealed following the next WRMC meeting scheduled for Brisbane on 23 May 2008.

The Deputy Prime Minister has also announced that the substantial reform Bill, that will establish the new system, will be tabled later this year with a view to full implementation by 1 January 2010.

The Society will continue to provide information on the issue as developments take place. For members seeking further information in the interim, the following websites contain documents relevant to this issue:

Forward with Fairness (April 2007):

<http://www.alp.org.au/download/forwardwithfairness.pdf>

Policy Implementation Plan (August 2007):

[http://www.alp.org.au/download/070828\\_dp\\_forward\\_with\\_fairness\\_policy\\_implementation\\_plan.pdf](http://www.alp.org.au/download/070828_dp_forward_with_fairness_policy_implementation_plan.pdf)

Williams Inquiry Issues Paper (September 2007):

<http://www.industrialrelations.nsw.gov.au/action/inquiry.html>

Transitional Act details:

<http://www.workplaceauthority.gov.au/graphics.asp?showdoc=/ForwardwithFairness/legislation.asp>

Award modernisation process:

<http://www.airc.gov.au/awardmod/about.htm>

National Employment Standards:

<http://www.workplace.gov.au/workplace/Publications/WorkplaceRelations/DiscussionpaperonNationalEmploymentStandards.htm>

## **IRSSA Convention on the proposed new National IR System**

The Society will be conducting a major seminar dealing with the proposed new national IR system on **Friday 24 October 2008 at the Stanford Grand at Glenelg**. This day-long event will seek to explore the details of the substantive reforms proposed as part of the national system and we hope to present national and local perspectives from political, industrial, tribunal and legal representatives and commentators. A **convention dinner** will also be conducted on Friday evening.

Further details and registration forms will be available in the coming weeks. However, we suggest that you place this event in your diary now.

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## CURRENT CONTROVERSIES

### Australian Charter of Employment Rights – Various Contributors Reviewed by Keith Hancock

*Australian Charter of Employment Rights* is the title of a short book that sets out, explains and promotes the Australian Charter of Employment Rights (hereafter the Charter). The Charter was a project of the Australian Institute of Employment Rights.

According to Mordy Bromberg, in his introduction to the book, the Charter is ‘a back-to-basics attempt to define the rights of workers and employers’; a template ‘which all workplaces are encouraged to adopt and observe’; and ‘an instrument for advocating the reform of labour law in Australia’ which can be used ‘to critique the current law and any proposals for change’. Bromberg writes:

Labour law has been a political football kicked back and forth by the ideological warriors of class politics for far too long and at far too great a cost. Class-based politics have engendered an adversarial and conflict ridden approach to workplace relations that has not served Australia well. This trend continues. The Charter is an attempt to encourage a new direction. (p. 6)

Inasmuch as this implies that the Charter is ideology-free, it must be rejected. The ideology is unmistakably social democratic – ‘centre-left’, in current parlance.

Neither the Charter nor the book is explicit as to the quality of ‘rights’. Presumably a ‘right’ connotes something more fundamental than merely ‘expedient’ or ‘appropriate to the times’. A properly-set minimum wage, for example, might be characterised as a right, but not a sum of \$x per week. I shall assume that the authors intend a distinction of this kind.

The Charter draws upon ‘Australian industrial practice, the common law and international treaty obligations’ in framing ‘a statement of the reciprocal rights of workers and employers in Australian workplaces’. These rights fall under ten headings: good faith performance; 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; and effective dispute resolution.

The book has 13 chapters. The first ten, written by various authors, correspond to the above headings of the Charter. An eleventh is ‘The Scope of the Charter’, by Bromberg and Mark Irving. This is about the kinds of ‘workers’ who would enjoy the benefits and protections of the Charter (an issue about which the Charter itself is silent). ‘Workers’ would, for example, include dependent contractors. A twelfth chapter, ‘Economic Perspectives on Workers’ Rights’, seeks to counter an anticipated objection: that observance of the Charter would impose economic costs. The final chapter, ‘The Right to Work’ (by the same authors), is about the importance of full employment and the possibility of modifying economic policy to achieve it. The right to a job is not enshrined in the Charter because it ‘is not a right that any individual employer can fulfil ...’. This and the previous chapter may be intended to pre-empt the likely criticism that the Charter prefers rights to jobs. Part of the answer is that government and the Reserve Bank can, if they choose, increase jobs by according a lesser priority to the avoidance of inflation.

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In the main, the various chapters of the book explain, elaborate and assert, rather than argue. The authors repeatedly invoke the authority of international ‘treaties’ – ILO Conventions and the like – to which Australia is a party. Many people (though not, apparently, the Howard government) would agree that Australia should honour its commitments; but some may question the wisdom of entering into them, and thus be reluctant to applaud a Charter that celebrates them. The existence or absence of treaty commitments cannot be allowed to silence debate on the merits of postulated rights. There is no compelling case in the book as to why anyone should ‘sign up’ to the Charter. It is a matter of personal opinion – as are my comments.

My values are, in the main, similar to those that underlie the Charter and the book. I would, however, differ from the authors of both in drawing a distinction between ends and means. The pertinence of the distinction, for me, lies in the Charter’s espousal of ‘fair’ and ‘balanced’ bargaining. This entails, among other things, workers’ having ‘the right to bargain collectively through the representative of their choosing’ and, subject to the obligation to bargain in good faith, ‘the right to take industrial action’ (with employers having ‘the right to respond’). The end in view is presumably the creation of proper employment standards. The presumption that ‘fair and balanced bargaining’ is a preferred means to its achievement, sufficiently fundamental to entail ‘rights’, is a subject on which I want to comment at somewhat greater length. It is the one aspect of the Charter about which I have a serious reservation.

‘Fair and balanced industrial bargaining’, say Ron McCallum, David Chin and Anne Gooley,

is the foundation of any good system for regulating rights and obligations in the workplace. Genuine industrial bargaining requires both sides to have equivalent bargaining power and capacity. Thus, the right to bargain collectively and the right to take industrial action are enshrined as part of the pantheon of fundamental and universal human rights to which all civilized societies subscribe. (p. 92)

Likewise:

Without at least the credible threat of industrial action, workers do not sit as equals with employers at the bargaining table. The realistic prospect of workers taking industrial action is the difference between collective bargaining and collective beseeching. That is why the right to strike is recognised as a fundamental human right to be respected in all decent and civilised societies ... Denying the right to strike effectively nullifies freedom of association... (p. 97)

I may be foolhardy to raise issues about ‘universal human rights to which all civilized societies subscribe’. But what *are* ‘fairness’ and ‘balance’ in bargaining; and how do we know when bargaining power is ‘equivalent’? It is not self-evident to me that allowing and even assisting unions with muscle to impose their will constitutes fairness, balance or equivalence.

I do not think that Higgins was wrong when he described strikes and lockouts as ‘crude and barbarous’, though he was unrealistic to hope that the warring parties of industrial relations would submit to the alternatives offered them. Would a denial of the right to strike nullify freedom of association? Higgins certainly did not think so: associations of employers and employees were fundamental to the new province for law and order. That people should be free to associate for lawful purposes is uncontroversial. That actions which might be socially harmful (bearing arms comes to mind) should be *made* lawful so as to validate associations dedicated to them (such as gun clubs) is a different kettle of fish. There are unions which do not strike and apparently do not see their existence as pointless. Irving thinks (and I agree) that armed services personnel should have ‘the fundamental right to join and form a union’ (p. 57). Would this be an empty right if they could not strike?

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Whether collective bargaining, supplemented by the threat or the actuality of industrial action, is the best available way to settle the terms of employment is a question to be settled pragmatically on a weighing of the benefits and costs and with regard to the practicalities of the times. The decision need not be absolute. The authors quoted above accept the need to maintain essential services; and the Labor Government has retained its predecessors' prohibition of pattern bargaining, which threatens commonly accepted macroeconomic goals. The following are reasons, additional to the confusion of ends and means, why I would not enshrine in my charter unionised bargaining fortified by a right to strike:

- The fall in union membership (below 19 per cent on the latest count) calls into question the continued relevance of union-led bargaining. Whether or not one agrees with this assessment, there must surely be *some* level of union density where legal preference toward unionised bargaining becomes anomalous.
- The minority of the workforce able to benefit from it are in a privileged position. I find no ethical appeal in the notion that the benefits enjoyed by groups of workers should be correlated with the strength and propensities to strike of their unions. I would like to see child-care and aged-care workers, shop assistants and hospitality workers paid more, relative to the wages of miners, building workers and air pilots, than the traditional and existing distribution of bargaining power has yielded.
- Strikes and lockouts inconvenience third parties – the public at large – who are not represented in the bargaining process and may have little or no influence over the course of events.
- Limitation of collective action in furtherance of economic self-interest offends no generally accepted principle of public policy. Price-fixing agreements between businesses (including small traders), which are a form of collective action to improve their economic position, are prohibited and attract severe penalties.

The force of these reasons is enhanced if there other protections for workers. I concur strongly with the Charter in its prescription of a right to '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.

Paul Munro, David Peetz and Barbara Pocock, authors of the associated chapter in the book, distinguish between irreducible minimum standards, compensable minimum standards and facilitative minimum standards. Irreducible minimum standards, as the term implies, would permit of no deviation; compensable minima could be the subject of trading; and facilitative standards would allow for negotiation between employee and employer, requiring the employer to deal in good faith with worker requests. This is a useful categorisation. Like Munro et al., I regard the specification of minimum standards as an ongoing task, suited to an independent tribunal. Reliance on a tribunal, guided by broad statutory criteria, is preferable to governmental prescription of National Employment Standards.

At the risk of stating the obvious, I would add that to dispute the existence of an alleged *right* is not to say that the practice in question should be banned. In the case of strikes, for example, we may think that they can sometimes serve a useful purpose as a safety-valve for defusing discontent. Again, we may prefer to avoid the costs and conflicts associated with their proscription. Our preparedness to tolerate them may be enhanced by their infrequency. Judgments of expediency must be made. These may well lead to middle courses, such as permitting strikes under defined circumstances but not in others. None of these judgments is the stuff of a charter of rights.

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At various points in the book, the Charter is depicted as a high road to productive performance. In Bromberg's words,

A successful workplace relations system will be built on the premise that high productivity and high worker satisfaction are both enhanced by investment: workers investing in their workplace and employers investing in their workers. This workplace investment compact will be founded on an appreciation that the legitimate expectations of workers and those of employers are not mutually exclusive but are largely complementary.

Although I broadly agree, it is fair to say that the book offers nothing to convince a person of a different mind. Kriesler and Nevile, in the former of their chapters, refer to research that tends to counter claims that certain benefits, including job protection, would have adverse economic effects; but these are issues that need to be explored in much greater depth. In their other chapter, Kriesler and Nevile advance a Phillips-curve (or 'trade-off') view of the economy. That is, they argue that lower unemployment is possible if we are willing to endure a bit more inflation. In reality, this is a highly complex issue that has generated a huge literature. Those who have challenged the relevance of the Phillips curve (including Nobel laureates) have drawn upon sophisticated theory and econometrics. With respect to Kriesler and Nevile, I think that they should recognise this and not create the impression that policy-makers have simply chosen a particular combination of unemployment and inflation from a range that is available to them.

I do not know what effect, if any, promulgation of the Charter will have. But I commend its authors for putting forward a positive program, rather than merely reciting familiar complaints about existing evils.

Keith Hancock  
29 April 2007

## **NEWSLETTER CONTRIBUTIONS WELCOME**

The editors invite contributions to the newsletter from members of the Society. These contributions might include opinion pieces, reviews of books or articles relevant to the Industrial Relations profession, or updates on significant tribunal or legislative developments.

Contributions should be supplied to the editors in electronic (Word) format via the Society's Secretariat.

As you would expect, the editors reserve the right to determine the ultimate content of the newsletter.

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## Message from Sandra Dann – Director of the Working Women’s Centre of SA

Dear Friends

I am delighted to let you know that the Commonwealth Government has made the decision to fund the SA Working Women’s Centre for a further 12 months. This reverses an earlier decision not to fund any Working Women’s Centres post-June 2008 (there are also Centres in NT and QLD).

The NT Working Women’s Centre has also been advised that it will receive ongoing funding but unfortunately the Queensland Working Women’s Centre will not. We hope for an ongoing commitment to Working Women’s Centres nationally from the Commonwealth Government after the 2008-2009 financial year.

The change in the decision to fund the SA and NT Working Women’s Centre is largely due to the overwhelming support of Working Women’s Centres from the community. Thousands of letters, emails and faxes were sent to the Commonwealth Government from all over the country in support of the continuation of Working Women’s Centres. **We sincerely thank you for your tremendous support.**

There are too many people to thank individually but in particular the NT Working Women’s Centre wishes to acknowledge the tireless work of Senator Trish Crossin and Member of Parliament Damien Hale in having our issue raised at the federal level. Senator Crossin and Damien Hale demonstrated a real commitment to ensuring that the work of the NT Working Women’s Centre continues. In South Australia we particularly thank Senator Anne McEwen and her staff, our Union, the Australian Services Union and the broader union movement.

I also acknowledge that the South Australian Government continues to provide significant ongoing financial and other assistance to underpin the work of the Centre and this support is appreciated.

For now at least, it is business as usual. The SA Working Women’s Centre is very pleased to be able to continue to provide free and confidential support, advice and information to women about a range of work-related issues. We will continue to provide community education and individual support to women across the State on issues such as; termination of employment, employment contracts, workplace bullying, sexual harassment, discrimination, occupational health and safety, workers compensation, superannuation and pay and conditions. Women in South Australia should not hesitate to contact us on 1800 652 697 or (08) 8410 6499 or by email on [wwc@wwc.org.au](mailto:wwc@wwc.org.au)

Thanks again.

Sandra Dann  
*Director*  
*Working Women's Centre SA*