“The Australian Charter of Employment Rights”: Missing Dimensions

by Guy Standing

1. Introduction

In September 2007, the Australian Institute of Employment Rights launched the Australian Charter of Employment Rights (AIER, 2007). Although careful not to endorse it, the Deputy Leader of the Labour Party, Julia Gillard, launched the Charter at one public event, and the former Labour Prime Minister, Bob Hawke, wrote its foreword, in which he announced the end of the class war, declaring it “a senseless tug-of-war between labour and capital”.

Clearly, the Charter of ten “rights” and the 144 pages of justificatory text were intended to be an alternative to the Coalition Government’s Workchoices laws and the ethos that had guided them. The book was written by a distinguished group of labour lawyers, with contributions from several economists.

The political context, coming weeks before a general election, was evident in the measured text and obvious intention to be “employer friendly”. The question is whether the Charter maps out a coherent, desirable and feasible framework for Australia in the globalisation era, or what is better described as the Global Transformation, in which labour market flexibility, outsourcing, casualisation and privatisation of social policy are the pervasive trends.

This paper accepts that the Charter is an articulate defence of the social democratic system, which deserves to be widely debated. Its values are broadly progressive, although it is paternalistic. It is tinged with nostalgia for a world in which manufacturing was the main sector, stable full-time jobs the main form of employment, and the extension of social rights the main agenda of progressive politics.

The paper is nevertheless a plea to those wishing to promote an alternative to the Workchoices framework to move out of a defensive way of thinking. While it is easy to criticise the “Howard” laws, it is neither realistic nor desirable to return to the labourist model, whichever variant one chooses.

A danger in having a group of like-minded people write a book is that the collective will be swept along by its convictions and will miss the need to pre-empt criticisms. This group would have benefited from a devil’s advocate in their midst. Lawyers ply their trade by verbal precision, and yet this Charter is full of loose statements. Moreover, it reminds us that labour law tends to address yesterday’s problems more than today’s.

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1 This draws on an invited speech at the launch of the Charter in Melbourne in September 2007. Views expressed are those of the author only.
2. **The Worker**

At the heart of the matter is “the worker”. The Charter spends much space in defining this strange creature, and in doing so demonstrates the intellectual mess labour law has created (or been plunged into). The lawyers who edited the book produced a definition in one sentence of no less than 236 words, trying to define the worker as “the employee” (AIER, 2007, pp.125-26). This reflects a contemporary dilemma, a source of confusion around the world, epitomised by the International Labour Organisation’s unprecedented failure to reach a Convention on contract labour when it tried to do so in the mid-1990s.

In the context of globalisation, flexibility and labour *externalisation*, the norm of the *standard employment relationship* (SER) is crumbling amidst a widening diversity of work statuses. From a legal or policy viewpoint, there are two possible courses. 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 everywhere have a predicament. They came into existence not to overthrow capitalism but to regulate it so as to make the standard employment relationship 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 so-called social *compact* – was that social rights for employees would be extended in return for the state and worker representatives supporting the managerial *right to manage* and *right to make and retain profits*. Unions in that framework had a compromised role, since they were institutionalised as protectors of the social compact and as Voice of employees wishing to obtain more labour-based entitlements. In a sense, social rights outside the workplace were exchanged for a curtailment of work rights within it (Standing, 2002).

This was progressive for most of the 20th century. There was redistribution from capital to labour in gaining social rights, such as contingency-based social security schemes, 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, fidelity and a duty to obey.

The worker in this scenario is a limited fellow. Reading the description reminded this writer of an incident that followed the election of the first 30 Labour members of the British Parliament in 1906. They were asked by a journalist which book had most influenced them. The one cited most was John Ruskin’s *Unto This Last*. Ruskin spent a great deal of space defining the worker in a way that had little resemblance to how labour
lawyers have since defined him. Ruskin saw the worker as struggling to stay in control of his \textit{work}, retaining a sense of craftsmanship and control over \textit{time}, over the development of skills and how to use them. Disciplinary pressures were there, so memorably analysed by E. P. Thompson. But Taylorism and Fordism were beckoning.

This Charter seeks to revive the resultant labourist model. Accordingly, there is no consideration of alternatives to the old model of industrial unionism. The Charter neglects not only new forms of unionism, such as community unions, but omits relations \underline{between workers, between occupations, and between professional associations and the state}. What happened to the famed (if abused) $\underline{\text{Australian notion of mateship}}$?

Furthermore, the labourist model underlying the Charter discounts work done by more people for more time than any other, namely \textit{care work}, including \textit{voluntary community work}. It was only in the 20$^{\text{th}}$ century that this was treated as non-work. A perspective that starts from labour law inevitably continues that tradition. 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 approach taken in the Charter’s book on its own terms.

Workers are defined as (i) employees, (ii) dependent contractors, and (iii) others who \textit{\textquotedblleft perform work under a contract that seeks to conceal, distort or disguise the true nature of the underlying employment relationship\textquotedblright} (p.118). The authors accept that the criterion of \textquotedblleft control\textquotedblright\ used to determine employment has given way to a \textquotedblleft multi-factor test\textquotedblright\ (p.119). They recognise the existence of triangular relationships and the tendency of workers to become \textit{\textquotedblleft one-person companies\textquotedblright} or slip into \textit{\textquotedblleft atypical\textquotedblright} employment. But then they run into difficulties. They mention the ILO Recommendation Concerning the Employment Relationship, as if it established ground rules, neglecting to mention that the binding Convention meant to flow from it failed to secure consensus – the first time in the ILO’s history this had happened.

The authors’ 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 \textit{entrepreneurial activity}. So, someone providing a service to \textit{\textquotedblleft a range of customers\textquotedblright} is not a worker. It is unclear where the Charter would place single-person producers supplying services to a small number of clients. If they were 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 fail to satisfy the necessary condition, since they may work for several employers and take risks that could make them candidates for \textit{entrepreneurial} status.

The stretching exercise is strange. Why should someone who is working for several employers, who is doing something specific and not working regularly for any one employer, or who does not use someone else’s equipment, be treated as a non-worker?

The Charter defines dependent contractors as employees, if they work wholly or mainly for a \textit{\textquotedblleft principal contractor\textquotedblright} (employer). Then it turns to unmasking the \textit{\textquotedblleft true\textquotedblright}
employer (p.124). It tries to resolve the problem of “illegitimate third party arrangements”. Here we enter murky territory since illegitimate means the arrangement is “designed to avoid employment obligations”. The draft ILO Convention failed partly because determining intention is notoriously difficult.

This highlights how nebulous many labour relationships can be, which should lead us to wonder whether the effort to create a definition is worthwhile. If the objective is to identify those who are vulnerable, then let us recognise that many who would be excluded on the grounds that they are “independent contractors” of a service are among the most vulnerable of all.

3. The Employer

Given the space spent on the worker, one should also reflect on the implied notion of “the employer”. The employer here emerges as a benevolent power with strong rights and vague “obligations”. The Charter should be challenged on its paternalistic bias. Readers should be reminded of sages of IR, such as Sumner Slichter, who warned that paternalism was one of the dangers facing well-meaning reformers (Slichter, 1929).

Why, for example, should employers have an obligation to provide training for those who work for them, or provide opportunity for career progression? I have chosen those words with care. It is about time a clearer distinction was made between the individual who employs others to provide effort, time and skill and the firm that uses labour and workers to generate profits.

The Charter recognises two phenomena that relate to the notion of employer – the independent contractor and the triangular employment relationship. The poor 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 employment relationship, the issue for lawyers has been to identify the true employer when labour brokers or employment agencies are involved. For those working in such situations, one would expect that the crucial concerns would be transparency, accountability and security. And, as mentioned later, a worker may actually have a contractual relationship with more than two entities.

The Charter fails to argue the case for paternalistic employers. An alternative view would be that employers should adhere to the law and should draw up and operate transparent employment contracts with all those who work for them. The rights of independent contractors should be the same as for those designated as workers, including the right to free association and the right to free collective bargaining.

4. Are there Employment Rights?

The Charter (p.2) defines employment rights in terms of “three sources” – those enshrined in international instruments, primarily ILO Conventions and human rights
declarations, “values” that have influenced Australia’s constitutional and institutional history, and what is recognised by 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” - so one should do so. It is usually accepted that human rights are universal, equal and indivisible. Rights are usually regarded as ethical demands for certain specified freedoms, and as such they are about forging full freedom, in which Isaiah Berlin’s negative liberty (freedom from) and positive liberty (freedom to) are given equal weight, i.e., freedom from unchosen controls and opportunity freedom. An essential freedom is the ability to say “No!” It is important to differentiate between legal rights, as enshrined by laws, and claim rights. The latter are rights which policy and institutional change should move steadily towards realising; as such, they provide criteria by which to evaluate any reform. Economic and social rights (called “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 someone else should not have? Does everybody who is working have the same rights?

The Charter makes extensive reference to ILO Conventions as imposing obligations on Australian governments. As of 2007, the ILO has adopted 188 Conventions and 199 Recommendations. The former establish obligations on governments if the country has ratified the Convention. 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 consensual “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, and Australia is not one of them. And the tortuous attempt to establish a Convention on Contract Labour failed dismally, the first time in the ILO’s history when the representatives of the industrial model failed to reach agreement on a proposed Convention. It was a symbolic moment. For this Charter, in which so much emphasis is placed on the need to adhere to international standards, it is critical. 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 be tempted to think in terms of worker rights. This would run into similar difficulties, in that it would still involve making an arbitrary distinction between someone who is a worker and someone who is not. The alternative is to consider work rights. This would not exclude anybody, since everybody physically and mentally capable of living a normal life performs activities that could be regarded as work. What would one wish to include in a Charter of Work Rights that is not in the “Charter of Employment Rights”?

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2 This would also make it easier to embrace a rights-based approach to “impairment”, one aspect where the USA has been a pioneer.
5. **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 own *time* and access to *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 of the work, and the proceeds of the output. A rights agenda should consider how to ensure a maximum feasible combination of freedoms in these respects, subject to the constraints of equity, dynamic efficiency and the Kantian principle of doing-no-harm-to-others.

The vital spark is equality. Thus, every person should have the same right to have control over their labour power, making slavery intolerable. Similarly, everyone should have an equal right to have control over how much work they undertake, and everyone should have an equal right to an opportunity to develop skills. And the *indivisibility* of rights that has been enshrined in all human rights declarations since 1948 means that equality and freedom in all respects are equally important.3

This leads to the complex idea of *security*. There are substantive and instrumental reasons for a claim right to basic socio-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*.4

The Charter refers to several forms of security, but not all. For instance, it states that workers should have voice in connection with important aspects such as “job security” (p.50) and a chapter is devoted to the contentious issue of unfair dismissal. But the book 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 instrumental needs, tradable not meta-rights. If one wishes to have control over one’s work, and develop a lifetime of satisfying work, the crucial needs are income security and Voice representation security. Only with basic income security – the assurance of a means of survival, without fear and without having to undertake demeaning or onerous tasks to obtain it – could someone make choices in a rational, long-term way. 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.

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3 Thus it would scarcely be consistent with a rights-based approach if policymakers allowed everybody to have the right to obtain skills in a certain type of work and denied them the right to obtain the tools and equipment needed to pursue that work.

4 A tradable right is one that one might be prepared to do without if some other right were strengthened.
6. The “Right to Work”

The “right to work” deserves more intellectual respect than has been shown by its advocates. The Charter is in good company in failing to say what it means. A right, besides being universal and equal, should involve obligations on somebody (or agency) to ensure it is respected, with sanctions on those who fail to meet these obligations. The Charter omits these issues in its discussion of the right to work.

The writers 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” (p.8). This reads like legalistic expediency. One is left wondering what a right that is not societal can mean.

Chapter 13 appears to have been tagged on as an afterthought, and is excessively brief. It 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 makes a grand claim that 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” (p.142, emphasis added).

Recall just two areas where there is no agreement. The Chicago school of law-and-economics has long argued that the sort of regulations and mechanisms favoured in this Charter generate market distortions that raise the unemployment rate (the NAIRU). Their response has been to dismantle protective regulations and curb union strength, so as to produce “market clearing wages”. To say there is consensus on policies 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.

Regrettably, Chapter 13 fails to rescue the Charter from an awkward omission, by not dealing with Australia’s rush to workfare, or “labourfare”, 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 authors appear to believe there is a consensus. This writer can only hope this is not the case.

The Charter team could not fairly retort this is outside the realm of employment rights. The trend is towards coercing the unemployed and many outside the labour force to take or prepare for low-level jobs, on pain of having benefits cut. A fancy language is being fashioned – with words like “mutual obligations”, “breach”, and “quarantine” liberally used. The so-called right to “freely chosen employment” is dishonoured in this paternalistic strategy. Moreover, the effects on the 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.

7. Confronting Inequality?

Although the Charter mentions inequality, it is coy about what to do about it. Thus
it asserts, reasonably, “Inequality and subordination are dysfunctional characteristics of
human relationships that breed discontent in the workplace” (p.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)” (p.22), and give this
unequivocal meaning when stating in bold, “Every employer has the right to expect that
workers will cooperate” (p.42). There is no caveat.

In today’s world, without being anarchistic, most of us would subscribe to a mild
version of retributive justice rather than to such a code of deference. If an employer was
pouring chemical waste into a river, would we cooperate, even if there were no law
banning such behaviour? If the boss was paying himself a million dollars a year and
paying shopfloor workers $20,000, would the latter be “unfair” if they did not cooperate
with diligence? Again, the Charter shirks issues that are central to globalisation.

Inequality in Australia has been growing in four main forms. First, the functional
distribution of income is widening, with more of national income going to capital (Peetz,
2007, pp.51-52). Is there no worker’s right to a “fair” share? Or is such a delicate subject
outside the remit of the Charter? Second, wage differentials are widening. Third, the
trend to decreasing gender-based wage inequality has been reversed. Fourth, the
distributions of enterprise benefits and state benefits are becoming more regressive.

All of these are contributing to a new form of class fragmentation. As in other parts
of the world, this is part of the Global Transformation. Here is not the place to go into
this in detail. However, unlike the classic images of class, class fragmentation reflects
differentiation in forms of income and forms of social and economic rights and security.
In brief, one can identify an élite, whose income grows almost exponentially, below
whom are those in the salariat, who are privileged through employment security, income
security and assured benefits covering most forms of risk. Below them are the proficians,
usually earning high incomes but with self-chosen employment insecurity.

The Charter would be of little interest to those top three strata. Below them come
core workers, who used to be called the working class. The Charter is for them. They are
mostly in the standard employment relationship, have access to unions, some
employment security and some income security. They are dwindling in numbers and effectiveness as a social force.

Below them in the pecking order 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 scarcely any assured entitlement to state or enterprise benefits, and have 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 an 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. In doing so – and there is certainly scope for refining this model of class fragmentation – 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.

8. The Dignity of Work

The Charter devotes much attention to the notion of dignity, with Chapter 2 being a statement of what is entailed by “work with dignity”. But it is unclear how one can have a right to dignity. Surely, one obtains dignity from work, 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 references to “freedom” and “economic security”, but does not deal with them. Instead, after mentioning the hijacked slogan of “decent work”, it claims that “dignity at work” is about “the employment relationship”, including “fair wages” (p.21), while “dignity of work” seems to be about job design. The incredibly brief section on dignity of work touches on the nature of work, but there is no consideration of how workers themselves could develop dignified work. It is paternalistic. All we have is a claim that jobs should be designed to accord with “social and humanitarian considerations”, with an assertion, “The right to dignity of work demands that jobs be designed with proper regard to these considerations” (p.25). One is not told how this could be ensured, let alone how it sits with the apparent 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 in their employment”, citing the UN’s 1966 Covenant on Economic, Social and Cultural Rights, which here is referring to discrimination. One surely cannot see employers providing promotion opportunities for all workers. And it is wishful thinking to imagine it is in every employer’s long-term interests to “maximise the opportunities for training, development and promotion” among employees (p.25). Most employers could neither afford nor benefit from providing those who work for them with such opportunities.

However, it is far from clear that employers should be social policy agents. This smacks of a corporate paternalism that characterised the era of industrial citizenship.
Today, young and old understand that one obtains dignity by not depending on the discretionary benevolence of some privileged group. To be treated paternalistically, however nicely, is not a route to dignity.

9. 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, if fortunate enough to have reasonable health and education, want to spend the bulk of their lives working to better themselves and their families. This is what occupations are all about. There is nothing on occupations in the book, beyond a remark that unions should be free to pursue “the occupational interests of workers” (p.59). There is no discussion of occupational associations or regulation, the fastest-growing issues in labour markets.

Consider what might be covered by a perspective that stems from thinking of the worker not as an employee but as someone with a sense of occupation or vocation. If there is any work right, it must be the right to do the work we wish, subject to our ability to do so and subject to ensuring that it does not harm others. This opens up a host of issues that should be at the heart of a Charter of work rights for the 21st century.

In reality, the right to practise is curtailed in Australia and elsewhere. To give just one illustrative example: As of 2007, if you were an osteopath in New South Wales, you could not practise as a chiropractor in Victoria. But if you were an osteopath in Queensland, you could practise as a chiropractor in Victoria. So, a non-qualified person living in NSW would be well-advised to move to Queensland before applying to practise as a chiropractor in Victoria. The reason for this bizarre situation is the nature of the mutual recognition agreements between the states, and the fact that in Queensland the two occupations are treated as one, while in the other states they are treated as separate (Council of Australian Governments, 2005).

The right to work in a self-chosen occupation is something that has to be forged. For an increasing number of occupations there are statutory and institutional barriers to work, notably restrictive licensing, and there are good reasons for some of them. What rules and principles should prevail?

The Charter is based on an industrial model of subordinated labour. However, that is surely fading. Increasingly, people do not define their identity by whom they work for but by what they do and by what they see themselves as working towards. The dour labourists wish to reconstruct a neo-corporatist framework. But if we listen to the youth and the elderly, we will hear a new exciting idea of work taking shape. What makes youth angry? It is not the absence of stable, steady jobs. It is the productivist disregard for the ecology and the maldistribution of the key assets of the era, including quality time. People want to have control over their time, throughout their life. The model of “school – full-time job – retirement” is crumbling.
In short, identity will come from being in control of our work and from developing a lifestyle built on combining forms of work linked to our abiding interests. Either the job we do will link to those interests or it will be purely instrumental, to allow pursuit of those interests. To the extent that it is the latter, the matters that preoccupied the Charter’s team may be relegated to footnote status.

Many people are resigned to take an instrumental approach to their jobs. But a great society would be one that celebrated and nurtured its occupational communities, creating a framework in which creative competence could develop and be protected, and in which the state played an enabling role, not a restrictive or paternalistic one. It would start from the premise that people want to work and not from one that focuses on a tiny minority in order to justify policies and regulations that set out to guide behaviour, however benevolently, and that rewards preconceived norms while penalising those who do not adhere to them. The labourist model of industrial citizenship was the most paternalistic in human history. Its children were Third Wayism, Clinton’s “End welfare as we know it” doctrine and Australian welfare-to-work measures.

We should reflect on what would constitute an agenda for occupational rights and an appropriate system of occupational regulation, the term for the legal and institutional mechanisms used to limit (or curtail) and guide combinations of tasks that have come to be called occupations. Note that there is no reason to suppose that any division of work in existing occupations is natural or permanent.

What system of occupational regulation would promote work rights? Adam Smith (1776) believed there should be no restrictions on workers practising whatever work they chose. Modern and ancient legislators around the world have not agreed.

First, legislators have wished to ensure that freedom of association should not be interpreted too literally. If a group doing what they see as a similar type of work form an association (let us call them lawyers) to set their own standards, qualification requirements and remuneration scales, that can be seen as in contravention of competition policy. So, with some glaring exceptions (not far from the legal profession), 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 increasingly resorted to occupational licensing and standard setting, including the imposition of accreditation tests, rules of disbarment and mandatory codes of practice. In Australia, many groups have approached state governments with requests 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 now, 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 work rights? The key claim in its favour is that by requiring a person who is providing a service to be “licensed”, the consumer is protected, and 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 an awareness of it.

Occupational licensing is growing. By the 1980s, over 800 occupations in the USA required a “licence to practise”; that may be over 1,000 now (Rottenburg, 1980; Kleiner, 2006). And more associations are emerging to protect groups who choose to enter a designated occupation. They may favour licensing because it can help keep up the price for their services and, in pursuit of that, can impose artificially high standards of entry. And they can persuade governments to pass laws requiring workers wishing to belong to the occupation to achieve certain qualifications through specified avenues and not others. Whose rights count?

Alongside licensing is negative occupational licensing, which is common in Australia, as elsewhere. Whereas with licensing someone has to qualify to earn a right to practise, here one can be disqualified by contravening some rule or standard of competence. Considered from a rights perspective, we should ask what behaviour could justify someone being locked out of his or her chosen work activity. We need to consider whether or not there should be rules for suspension of the right to practise, or if there should be penalties that fall short of excommunication. And then there is the awkward issue of determining who should have the right to throw someone out of his occupation.

Occupational licensing and negative licensing are just two of the means by which the right to work is controlled. Throughout history, groups have used self-regulation to limit workers’ right to work in areas where they might wish to do so. One cannot have a Charter of work rights without taking a position on what is appropriate in this regard.

Consider some rules that occupations have used. One is that someone can only practise if he or she has done so within a specified period – a recency of practice test. Suppose one was disbarred from practising the work of one’s choice because one had not done so for five years. How would one 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. That might require those wishing to renew work to undergo refresher courses. A rights-based charter should propose ways of resolving such conflicting objectives – reassurance for consumers of a service and the right to practise for those wishing to work.

Another issue is what should be called occupational oppression. This might seem esoteric. It takes an occupational perspective to see why it is not. Two of the many occupations that have suffered from occupational 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.

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5 Thus, Australian states operate Physiotherapy Acts that have diverse ‘recency of practice’ requirements.
There are other 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.

10. Voice, Representation and “Workplace Democracy”

In this context, the chapter on workplace democracy is tantalisingly short (eight pages). It begins by stating that “workers have the right to play a part in decisions that fundamentally affect them in the workplace” (p.44). This prompts several questions.

What does “play a part” mean? If one lauds the duty to obey an employer and the latter’s “unquestioned” right to manage, then playing a part must be rather limited. It is not much use having a say if the employer can simply retort, “Tough, mate. Take it or pick up your cards on the way out.” A right must be meaningful, and there must be protection against retribution, with consequences if the exercise of a right is abused or ineffectual. Apparently, workers would have “the right to express their views” and could play an “advisory role” (pp.50-51). This is hardly a rights strategy. Imagine what this would mean in a General Election. Moreover, we are told that workplace democracy “involves a rejection of adversarial workplace relations” (p.44). This is an employer’s nirvana, with unquestioned rights and no argument.

What form should workplace democracy take? The chapter refers to Germany’s works councils, describing that system as “regarded internationally as the optimal model of workplace democracy (viewed from the workers’ perspective)” (p.48). It omits to mention that it is showing signs of morbidity. The reasons should inform any Charter. Those include labour externalisation, informalisation and workplace fragmentation. In this “democracy”, should a part-time employee have the same vote as a full-timer, or a probationary employee the same vote as someone who has been with a firm for 30 years?

To place one’s faith in “a partnership-oriented approach (rather than a merely adversarial approach) to industrial relations” (p.49) is platitudinous unless one states what form of partnership is being advocated. It is unclear whether the Charter’s authors believe workers and employers should have equal voting rights. Given the commitment to the unquestioned 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.

Third, what should workplace democracy be about? A “fair say” about what? 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

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6 As when claiming that “labour is not a mere commodity” (p.2), one is unsure what “merely” means here.
distribution of profits? If one leaves out 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” (p.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” (p.56). By not making that symmetrical, the Charter implies that a benefit conditional on being a union member would be acceptable. This has been a factor keeping up the unionisation rate 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” (p.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 bring to mind a statement made by the guild socialist, G. D. H. Cole (1920), that we need as many interest associations as we have interests to represent. There is no good reason for calling for a blanket right for unions. Perhaps the writer could have provided a democratic caveat. But he did not. Ironically, the proposal of a right for unions to do all the activities listed would be counter to their long-term attractiveness, since potential members could be put off by their positions on external matters.

Unions are shrinking everywhere. Unless one understands why, calling for a model based on them is equivalent to spitting in the wind. Perhaps they do not appeal because they are perceived as part of the old industrial model. Meanwhile, a growing number of people belong to occupational bodies. A statutory framework for occupational association and democracy has yet to be laid out, although US-based libertarian institutes (Summers, 2007) have pushed for complete self-regulation, which will not happen.

Occupational associations vary from little more than informational exchange societies to powerful bodies determining everything from right of entry to pay scales and disbarment. Given that lawyers operate one of the latter type, it is strange that the Charter did not engage with these issues, which lie at the heart of the global transformation of work. Often, such bodies do not bargain directly with employers. Often, they advance some “rights” of their members, but curb others. Often, they determine gainers and losers within an occupational community. Often, they determine “the right to practise” and may determine with whom someone in the occupation can work.

Next, in this era of labour externalisation and telecommuting, what is the workplace? In considering workplace democracy, one should unpackage the term since a growing number of people work in multiple workplaces. The one that has been at the heart of labour law is the physical workplace, the factory, farm, mine or office. These days, for many people, this workplace may be the least fixed, contrary to the image
conveyed by orthodox IR theory. A second workplace is the *home*, to where an increasing number of workers take their 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, perhaps responsible for overseeing local performance, to an international association that may have powerful regulatory functions.

One can see this *occupational workplace* as a mini-society, since it may embrace functions that have been 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 employment in modern societies.

In short, the notion of physical workplace is too restrictive in the globalisation era. If a worker has a say in his physical workplace about the toilet lights, one would not be impressed by claims about workplace democracy if at the same time he had to work for a given fee for a given number of hours, and then only if he had a given level of qualifications and experience, and if he did not have a right to determine any of those. Clearly, there would be a *representation gap*.

What happens in the physical workplace may be the least important part of the person’s work, one 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 on which one happens to be working at the moment. There is a need for *occupational democracy* as part of *occupational rights*.

11. Concluding Reflections

We need a charter of work rights, in which the imagination is focused 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.

Progressives favouring an egalitarian society in which work can flourish in freedom should make a leap. Contrary to what has been said *ad nauseam* for generations, *labour is a commodity*. The ultimate work right is that the worker should not be. It is sensible for

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7 This should lead us to reconsider such honoured concepts as *guilds* and *cooperatives*, as well as modern *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*. The first arises when an occupation becomes close to a monopsony, acquiring rental income for its members; the second arises when an elite in an occupation takes a disproportionate share of its income. Regulatory capture was the first issue raised in a paper prepared by the Treasury as part of the National Competition Policy Reform (Parker et al., 1997).

8 Pigou’s well-known quip is a reminder of the limits of labourism (Pigou, 1920). He noted that if he hired a housekeeper, national income would rise, whereas if he married her and she continued to do the same work, national income would fall. We must move our minds, as feminists and ecologists have tried to do. Unpaid care and community work should be treated as work just as much as the paid equivalent. A Charter of Work Rights should promote the capacity to combine various forms of work.
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). This is the definition of a commodity. But in a good society, everybody should have economic rights that would prevent them from becoming commodified.⁹

A Charter for Work Rights for the 21st century could build on the Charter of Economic Security presented in an ILO report (2004). In doing so, it could set out an agenda for occupational rights and occupational citizenship. Everybody is a worker and should be enabled to 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 the opportunity to change the terms of debate about the future of work.

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⁹ Put differently, the labourist model states that the worker is vulnerable and needs protection, whereas a better approach would tackle the vulnerability to lessen the need for protection.
References


