What work rights are still worth fighting for?

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Australia (and hence Queensland) is respondent to all the fundamental international human rights instruments covering labour. Trade unions stopped being illegal in the fourth quarter of the nineteenth century and throughout the twentieth century, federal and state arbitration systems regulated terms and conditions of employment and provided a comprehensive schema of dispute resolution. The *Fair Work Act* (2009) (FWA) which replaced *Work Choices* (2005) sets national employment standards including a minimum wage, provides recourse for unfair dismissals and sets out 'general protections' for discrimination and adverse actions because of union membership. Modern awards provide industry and occupational safety nets that serve to underpin enterprise - based collective bargaining.

Despite 100 years of arbitration, the definition and protection of employment rights seem confused and inchoate. There is an admix of common law and statutes, individual and collective rights, specialist tribunals and the general courts and negotiated, arbitrated and legislated standards. The question of defining 'who is employed' is a further and massive complication as are the issues of how to deal with employment rights for the expanding number of people who are in the contingent, that is non-permanent, work-force.

The complicated body of industrial relations and law does not appear to be making people secure at work. Instead, change and redundancy are very common and often seem grossly unfair and beyond the influence of those directly affected. Here is an example, from May 2014

> *It was a bloody shock,'' said Mr B..., who worked at the firm for 17 years. ''They called us to a meeting two weeks before and said [they] were looking at outsourcing staff, and putting casuals in our place.'' When the casuals were hired, Mr B... said, the company ''had the audacity to ask us to train them''.*[1]

Priority rights

This is a working document not an academic tome and is meant as an *aide memoir* for those trying to improve industrial and employment policy. Of necessity, the discussion is political both in taking a wide social and political economy view and in formulating clear options and priorities. After reviewing some issues about 'rights' I will tabulate what seem to be the most critical issues and possible responses to them. Two factors have guided my list of priorities; the first is deficiencies in the current arrangements; the second is which parts of the current arrangements are the most fundamental to defend from neo-liberals and the current Federal and State Coalition Governments.

Three organising questions cover the scope of the changes needed. They are

- What employment rights and other arrangements are needed to improve the security and certainty of all those who provide labour?
- How to best assist workers to get meaningful flexibility in work and non-work arrangements?
- How to protect workers' representatives and increase their capacity to effect industrial and social change?

[1] Clay Lucas, 'Older workers dismissed as a casual expedient', *The Age*, May 19 2014, http://www.theage.com.au/victoria/older-workers-dismissed-as-a-casual-expedient-20140518-38hyn.html#ixzz328AfUJgo

This approach limits the very wide range of matters that could be considered under the rubric of 'employment rights' and recognising that some parts of the existing legislative and institutional arrangements are generally acceptable. The focus here is to amend and improve existing arrangements; it is not to redesign employment and industrial relations from scratch.

Nonetheless, I do recommend that a new *Employment Rights Act* could be an effective focus for advancing a progressive agenda of employment rights and job security. Progressive policy needs an underlying narrative and justification that helps to achieve the widest possible public legitimacy, in this case for employment rights. Even so, statements of intent need to be converted into effective policies and institutions and unions and labour advocates are remiss, and poor historians, if they think the detail of this is can be safely left to law makers, however well intentioned.

The suggested improvements fall into three sets. One is to restrict the use of workers on casual and fixed-term appointments and to give better protections to those employed as contractors and through labour hire. Casual and fixed-term workers also need better access to various forms of leave. These can be done within the current framework of the Fair Work Act and its Queensland equivalent[2]. Measures are also needed that give all workers more control over their working lives and give them flexibility to deal with study, family and community responsibilities. Such flexibility is needed to handle day-to-day matters and to allow easier movement into and out of paid employment over a life-time. Such arrangements are also needed to counter the surprisingly common argument that workers 'want' casual employment because it gives them flexibility.

The second set of changes is about redressing the prevailing high levels of job insecurity. These include requiring employers to negotiate about restructuring and about requiring dialogue with unions and communities about the employment impacts of major closures and new projects.

Some of the most substantial deficiencies are in the rights of workers when they join a union and act as union representatives. The third set of proposed changes go to such matters including the protection of union representatives against adverse action from employers, the rights of workers and unions to demand and have safe and discrimination-free workplaces that advance the position of women, Indigenous people and those from other vulnerable groups. This, as will be seen, requires that unions have unfettered ability to act as civil society organisations as well as participants in the industrial relations system.

I also sound a cautionary note about the terminology of *'employment rights'.* The term became a very persuasive one in the ACTU *'Yours Rights at Work'* campaign of the mid-2000s. However, outside that campaign it can induce a false sense of security since it obscures both the collective and the political basis of worker's rights.

Rough justice

Even where the law 'works' for workers, the results hardly seem to address the injustice. Thus, for example, the Federal Circuit Court in May 2014 accepted that the Queensland manager of Tuscan Landscape Company told an employee who was claiming an award allowance for using their own

[2] The discussion here is based on the Federal Fair Work Act and related arrangements to the almost complete exclusion of the Queensland Industrial Relations Act which covers non-incorporated employers and the some though not all of the public sector. This is done so that the argument can concentrate on 'rights' rather than the merits of federal and state jurisdictions. The same rights are needed whether or not there are one or two systems operating within Queensland. My view, and it is stated in a footnote for completeness, is that serious consideration should be given to following Victoria and transferring all industrial relations powers to the federal jurisdiction.

vehicle at work, that he "*may be fired for causing trouble*" and "*should not expect a good outcome*" if he pursued the matter. The casual employee went to the Fair Work Ombudsman and the company stopped offering him work.

The outcome of the Court case taken by the Fair Work Ombudsman was compensation of $3,381 paid to the employee for economic loss, stress, anxiety, hurt, humiliation and inconvenience. It is hardly a princely or princessly sum. In addition the two responsible managers were fined $540 and $550 respectively and the company fined $9,000.[3]

Another example reinforces that even though the legal system is convicting employers who breach awards and agreements, employees are still victims. In December 2012, a deputy director of nursing was summarily dismissed, without a reference, from an aged care centre for demanding consultation and representation over a proposed restructure. In April 2014, the aged care centre was fined $10,200 for breaching the enterprise agreement. This was paid to the nurse who was not assisted by the Fair Work Ombudsman or a union. In addition she was awarded $10,000 in damages. She did not receive legal costs and had argued that her losses including lost earnings were $196,000.[4]

As if to add insult to the injury, the nurse had to concede that her employer was actually the local priest and not the Catholic Church hierarchy. This reduced the possible penalty (and hence payment to the nurse) by a factor of five. As the judgement states

> *The Court is sensible of the fact that a lay person reading the preceding paragraphs and the original judgment might query why, although the signatory to the Workplace Agreement was the Archdiocese, the respondent to the matter is Father Michael Court, the local Parish Priest.............*
>
> *.....Ms S.... accepted that her employer was Father Michael Court albeit some unnamed organisation would stand behind him and indemnify him against any awards of damages and penalties arising out of actions for which he accepted vicarious liability. These concessions have a serious effect. Penalties under the Fair Work Act 2009 (Cth) are imposed at different levels for individuals and corporations. The level for a corporation is five times that of the level for an individual. Father Michael Court is an individual. The Archdiocese of Sydney, if that is who is standing behind him, might well be considered a corporation. But this is the situation that pertains and it is the situation that the Court is obliged to work with.*[5]

The lesson is that even where cases go in favour of the worker, the results seem to be, to say the least, underwhelming.

There are many cases where a 'surprise', unexpected and/or unknown to the worker, determines the outcome. Very often this can be that while there is no argument that work was performed, it is held that there was no *employment relationship*. Many employment lawyers and consultants are, for the appropriate fee, ready and willingly to help big and small employers structure their operations so that such 'surprises' **do** restrict workers' rights.

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[3] Kristian Silva, 'Landscapers fined over allowance sack threats', *Brisbane Times*, May 18 2014, http://www.brisbanetimes.com.au/queensland/landscapers-fined-over-allowance-sack-threats-20140518-zrgad.html#ixzz327q8VPyz

[4] Stanley v Father Michael Court (No.2) [2014] FCCA 736 (14 April 2014), http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCCA/2014/736.html?stem=0&synonyms=0&query=Fair%20Work%20Ombudsman

[5] ibid para 12

The question of balance

Some employer organisations, right-wing think-tanks and academics continue the refrain that the Fair Work Act shifted the balance towards unions. They have variously labelled it as "*inflexible*", "*a drag on productivity*", leading to a "*boom in industrial action*" and, an "*explosion in trade union power*".[6] In its policy document for the 2013 Federal Election, the Australian Chamber of Commerce and Industry (ACCI) called for individual agreements, reduced trade union rights and a dilution of the unfair dismal and general protections in the Fair Work Act.[7] As the ACCI objectives say, "*Promote freedom of choice for employers and employees in their workplace arrangements*". [8]

The Federal Government's Commission of Audit wants to reduce the minimum wage as a proportion of average earnings and to have a different rate between states[9]. This is not sufficient for the Institute of Public Affairs (IPA) with Julie Novak advocating to *"end the anti-jobs, anti-social justice minimum wage for a fair go and a stronger economy"*.[10] John Lloyd of the IPA and former Australian Building and Construction Commissioner, opined that the "*Fair Work Act has unleashed mob rule and it's spreading". [11]*

These aggressive demands and opinions are accompanied, in some quarters, by pushing the law and the legal process to its extremes in attacking unions and workers. The Australian Building and Construction Commission and Patricks might be the most prominent examples but they are far from alone.

Even more disturbingly to me, the 'law' as a system does not seem to need much pushing to act against workers. There appears to be an imbalance within the law that favours capital over labour and employers over workers. This is deeply embedded in common law systems like Australia where the core is individual contract as modified by what lawyers term 'equitable principles'. These individualised modes of redress frequently win out over equality of outcome and collective rights. It is also obvious in the contrived ways in which unions are not given explicit rights but are 'exempted' or granted immunity for action that would otherwise be classed as illegal. This even occurs in the legislation implementing national competition policy.

This makes protecting workplace union representatives against employers very fraught. Almost all unions have experience of delegates whose lives have been made difficult whether through being allocated the worst duties and working hours, refused time-off, had overtime and casual hours reduced, or who just happen to be in a work area where redundancies occur.

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[6] Rae Cooper quotes, but does not approve of these, in, 'Fair Work Act review: weighing up the evidence, the spin and the wedge', *The Conversation*, 2 August 2012, http://theconversation.com/fair-work-act-review-weighing-up-the-evidence-the-spin-and-the-wedge-8611

[7] ACCI Policy Blueprint, Getting on With Business: Reform Priorities for the Next Australian Government, 2013, http://www.acci.asn.au/Research-and-Publications/Publications/ACCI-Policy-Blueprint-2013

[8] ACCI, Workplace Relations, Our Agenda, http://www.acci.asn.au/Our-Agenda/Workplace/Workplace-Relations

[9] *Having a single national minimum wage disadvantages workers attempting to gain a job in states like Tasmania and South Australia where wages and the costs of living are generally lower than in other States*. (sec 7.11) Australian Government, National Commission of Audit, *Towards Responsible Government; The Report of the National Commission of Audit,* Canberra, 2014, http://www.ncoa.gov.au/report/phase-one/part-b/7-11-unemployment-benefits-and-the-minimum-wage.html

See also David Peetz, Commission of Audit's poverty traps for low wage earners, The Conversation, 6 May 2014, http://theconversation.com/commission-of-audits-poverty-traps-for-low-wage-earners-26214

[10] Julie Novak, 'Minimum wage is anti-jobs and should be abolished', *Canberra Tim*es 17 May, 2014, http://ipa.org.au/news/3105/minimum-wage-is-anti-jobs-and-should-be-abolished

[11] John Lloyd, 'Fair Work Act has unleashed mob rule and it's spreading', *The Australian* 7 September, 2012, http://www.ipa.org.au/sectors/work-reform-and-productivity-unit/news/2744/fair-work-act-has-unleashed-mob-rule-and-it%27s-spreading--

In 2012, the High Court of Australia drastically reduced the effective protection of union delegates and representatives by upholding the right of an employer to discipline a union delegate who sent a message to union members that the employer did not like.[12] The employer accepted the message was sent in the person's union role but still took exception to the message and disciplined them under the code of conduct covering employees. The decision exposes union representatives in almost all workplaces and is discussed in more detail later. At this stage, note that one of the grounds of the High Court decision was the need to *'maintain balance'*!

Insecurity is 'normal'

Three decades of neo-liberal policies in Australia have substantially reversed the post-World War II social contract and made insecurity in work and employment 'normal'. Glib slogans about the *'end of the age of entitlement*' and the report of the 2014 Commission of Audit indicate even further intensification of the rule of the market.

As John Buchanan argues *"employment is now the bearer of inequality and unfairness*' and *'the risks of production and work have been shifted from large businesses to workers and smaller players in production networks*".[13] This has occurred over the same period as quite massive change in the patterns of working life including the expansion of women's employment and of non-permanent employment.

Australian industrial relations arrangements developed on the basis of the stereotype of *'Harvester man*' - an adult, full-time, male worker with permanent employment for an indefinite period with one employer often to retirement. While this was always an unrealistic model, it is now very atypical with the increase in women's work-force participation, the expansion of casual, fixed term and other contingent employment arrangements and a labour market where few people have or even expect long-term security with one employer. The *'standard employment relationship'* (SER) of a "*stable, socially protected, dependent, full-time job"* has been severely eroded.[14] The SER, most notably in Western Europe, was part of the de-commodification of labour which included entitlements to training, skill development and income and social security.

The work-force is now extremely diverse in age, gender and ethnicity and without a standard retirement age. Working hours are segmented into what can be termed a '*three-thirds'* work-force. Around one third work less than 'ordinary time' (not always by choice); a third work the standard week (35-38 hours) and a third work long hours (including paid and unpaid overtime). The growth of complex supply-chains adds to this already complex web with production processes divided between different employers, contractors and sub-contractors. Often these can be in the same work-place - for example business services, equipment maintenance, building maintenance, cleaning and transport being provided by different firms.[15]

These supply chains are the cause and effect of out-sourcing facilitated especially in the provision of business and administrative services by on-line work that can be located almost anywhere in Australia or across the globe. The latter is *'off-shoring'*, that is the increasing trend for companies to

[12] Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32 (7 September 2012) http://www.austlii.edu.au/au/cases/cth/HCA/2012/32.html

[13] John Buchanan, 'A new model for fairness in employment', *Australian Options* 76, May 2014

[14] The definition is from Gerhard Bosch, Towards a New Standard Employment Relationship in Western Europe, *British Journal of Industrial Relations*, 42, December 2004, 617–636

[15] Apocryphally, a very large construction site in Brisbane in 2012-13 had only one direct employee of the construction company - everyone else was employed either by a contracting company or as an independent contractor. Even the site industrial relations services were provided by a contracted legal firm.

relocate parts of their operations to locations outside the country where the service is being delivered. Usually the driver is cost reduction because the places where the jobs are going have low labour costs and often very limited union representation.[16]

Some complexities of employment regulation

The sheer complexity of employment regulation makes the protection of employment rights more difficult than it could or should be. Workers and employers enter a contract of employment to which both common law and statute law apply. Terms and conditions of employment are set variously by the minimum standards in the Fair Work Act, Modern Industry Awards and specific enterprise agreements all of which are legally enforceable through the Fair Work Act. There may be other matters agreed between the employer and worker and, especially in larger work places, matters set out in an employer's policy handbook, howsoever called. These are not enforceable through the Fair Work Act. In addition, another set of rights about treatment in employment are drawn from anti-discrimination and human rights legislation[17]. Finally, there are statutory provisions about workers compensation and occupational health and safety.

In consequence, as McCallum and colleagues say, "*the source of rights determines available avenues for redress when rights are infringed*."[18] These include the Fair Work Commission (FWC), the Federal Court and Federal Magistrates Court and the Human Rights Commission. Also the Queensland Industrial Commission is now the venue for appeals about workers' compensation payments and related matters. Moreover, the various statutory provisions have not shut off access to the 'ordinary courts' about common law aspects of a particular employment contract. The common law, in Queensland at any rate, is most commonly used in claims for compensation for injury at work but is also used for some dismissals often involving highly paid celebrities or executives. Issues specified in awards and collective agreements are often resolved outside the legal process by negotiations between unions and employers and through the internal steps of dispute and grievance procedures set out in those awards and agreements.

Workers and their representatives should be extremely wary about how common and contract law have been used to limit industrial action by workers and to impose penalty damages on workers and unions. At this stage it is sufficient to note that the right to strike is considerably restricted in Australia. I also note an apparent paradox that unions demand a common law right for workers to sue for compensation for occupational injury but want to remove common law actions for breach of contract and about industrial action. My view is the common law has many vestiges of the law of master and servant and that workers and unions would be better placed if all common law aspects of employment were consigned to the dust-bin of history.

A cautionary note about 'rights'

The term 'employment rights' has dangers for the unwary. Notably rights are depicted in everyday usage as an entitlement of individuals. This is unexceptional for civil and political rights like the right

[16] Note that bilateral and multilateral trade agreements in goods and services are a crucial 'enabler' of off-shoring. The most recent examples are the negotiations for the Trans Pacific Partnership (TPP) and the Financial Services Annex of the global Trade in Services Agreement.

[17] Although some aspects of discrimination are also covered under the general protection provisions of the Fair Work Act and this has been extended to bullying at work. There are differences between jurisdictions - for example the Fair Work Commission has the power to order reinstatement for unfair dismissal but the Human Rights Commission is limited to awarding compensation where dismissal is held to be discriminatory.

[18] Ron McCallum, Joellen Riley, & Andrew Stewart Resolving Disputes Over Employment Rights In Australia, *Comparative Labor Law & Policy Journal* 34, 2013, 843-75, Available at SSRN: http://ssrn.com/abstract=2307734

to vote, freedom of speech, protection against arbitrary arrest and so forth. These are '*the rights of man*' (sic) for which in the eighteenth century the middle class (*bourgeoisies*) fought against the aristocracy in the French Revolution and the white colonials against the British crown in the American Revolution. The civil and political rights agenda in Australia, as most other places, remains incomplete. Even so, and respecting both the historical and the current importance of the particular rights, they are compatible with a liberal market economy. Indeed, some of the rights, especially those about ownership of private property, are foundations of neo-liberalism.

The rights of workers to fair treatment, decent work and to act in and through unions are collective not individual. These are economic and social rights whose origin lies in political compromises made between liberal regimes and organised labour beginning in final quarter of the nineteenth century. They are now most concisely stated in articles seven and eight of *The International Convention on Economic and Social rights.*[19] The International Labour Organisation has been central and fundamental to the promulgation of workers' rights and it was established by the Treaty of Versailles in 1919 under the '*premise that universal, lasting peace can be established only if it is based on social justice'*[20]*;* this was expressly about relations between labour and capital. Recognition of the collective ethos of the ILO is reinforced by the extension of its concerns to Indigenous peoples and the ILO was the co-convenor with the United Nations of the first International Year of Indigenous Peoples in 1993.[21]

The exercise of worker's rights limits the power of employers to unilaterally determine what occurs in employment and changes what the employer can do in hiring and firing and in setting terms and conditions. One consequence is that employers contest both the substance of rights (for example what is a fair wage) and the procedures by which rights are specified (for example the rights of unions). The contests occur both within industrial relations and about how industrial relations should be conducted such that the industrial and political are inextricably linked.

Aspects of this were covered earlier under the heading of "*a question of balance*". The adoption of neo-liberal policies provided opportunities for the political agents of employers to roll back workers' rights with *Work Choices* being a prime example. Similar actions continue with the Queensland and New South Wales Governments legislating to significantly constrain the bargaining ability of public sector unions which is not dissimilar to the actions of State legislatures in the United States including Wisconsin to remove collective bargaining rights of public employees. On a wider canvass, the employers' group at the ILO has been actively campaigning at the last three ILO Conferences against the existence of any right to strike.[22]

The politics of rights

Individual and collective rights can conflict. In the past, unions have used collective agreements and action to exclude people because of their gender, race or ethnicity. These are explicable but not

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[19] United Nations Human Rights, The International Covenant on Economic, Social and Cultural Rights, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[20] ILO History and Origins, http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm

[21] ILO Conventions Nos. 107 and 169 on Indigenous and tribal peoples were the first international legal instruments adopted specifically on the subject by the international community. Though note that Convention 107 adopted in 1957 was assimilationist. See John Ahni Schertow, *The History of ILO Conventions on Indigenous Peoples,* IC Magazine March 17, 2012 at http://intercontinentalcry.org/the-history-of-ilo-conventions-on-indigenous-peoples/

[22] For a short discussion see New Unionism Blog, ILO workers' representatives call employers' bluff on right to strike", 17 March 2014 at https://newunionism.wordpress.com . For an authoritative account as to why there is a right to strike see International Trade Union Confederation, The Right to Strike and The ILO: The Legal Foundations, March 2014 at http://www.ituc-csi.org/IMG/pdf/ituc_final_brief_on_the_right_to_strike.pdf

excusable and current unions need to accept responsibility. However and even though most unions are now much more progressive, there is still considerable potential for conflict between individual and collective approaches and logics.

The potential clash between the individual rights approach of the human rights advocates and jurisdictions and the collective rights approach taken by unions is of serious concern. This is a practical as well as a theoretical matter and has been well discussed by labour advocates in the United States. Guy Mundlakt warns of the danger that unions are confined to *'freedom of association'* while civil society human rights advocacy bodies take up 'i*ndividual*' cases of discrimination, privacy, dismissal and the like.[23] This not only reduces the role of unions in handling such issues but almost entirely removes any collective element from them. Civil rights advocates will stress 'power' but not necessarily politics and solidarity.

A comprehensive restatement of employment regulation as a collective right ought to be a centre piece of a renewed progressive politics. 'Rights' are neither divine nor natural but the product of politics. As McIntyre says, rights are produced they are not discovered.[24] In turn, rights are contested - for example the neo-liberals of the HR Nicholls Society never gave up on 'freedom of contract' and the common law and what they regard as the primacy of individual over collective arrangements. Indeed, the Coalition's *Work Choices* in its final form of 2005 was a complete re-write of employment regulation to favour individual contracts that mimicked nineteenth century common law. So was the Employment Contracts Act of the New Zealand National Party Government in 1991.

The left has two tasks; one to get support for establishing a regime of employment rights that reduces the new insecurity. The second is to continue to agitate so that the regime gains widespread legitimacy and, in a way, comes to be seen as 'natural'. We must always remember that what is introduced by legislation can be undone by legislation.[25]

The central issue of insecure 'employment'

The Australian Bureau of Statistics (ABS) classifies 'employed persons' (that is the work-force) into employees, independent contractors and business operators. *Employees* are engaged under a contract of service (an employment contract) and take directions from their employer/ supervisor/ manager on how the work is performed.[26] Employees are grouped into those with paid leave entitlements and those without. The latter is the nearest the ABS gets to measuring the incidence of casual work.

Independent contractors are defined as people who operate their own business and who are contracted to provide labour type services direct to a client. Independent contractors are engaged under a contract for services (a commercial contract).

Business operators are people who operate their own business, with or without employees, but distinguished from independent contractors in that they tend to generate their income from

[23] See Guy Mundlakt, Human Rights and a Labor Rights: a Why Don't The Two Tracks Meet?, *Comparative Labor Law & Policy Journal 34,* 2012-2013, 217 for an extremely useful review of the issues.
[24] Richard McIntyre, *Are Worker Rights Human Rights?*, Wisconsin, University of Michigan Press, 2008
[25] This presumes that embedding employment rights, or any other body of rights, in the Australian Constitution is very unlikely. Ironically, this is unlike Germany where the post-world war II constitution (basic law) guarantees equality, freedom of association and of assembly, free choice of occupation and prohibition of forced labour. This constitution and the initial labour laws were written by the US and the UK. A similar set of rights are guaranteed in the Papua New Guinea constitution which was written by Australia.
[26] Australian Bureau of Statistics, *Forms of Employment, Australia*, November 2013, Cat No 6359.0

managing their staff or from selling goods or services to the public, rather than providing a labour service directly to a client. More simply, they are not selling their labour through either a contract of service or a contract for services.

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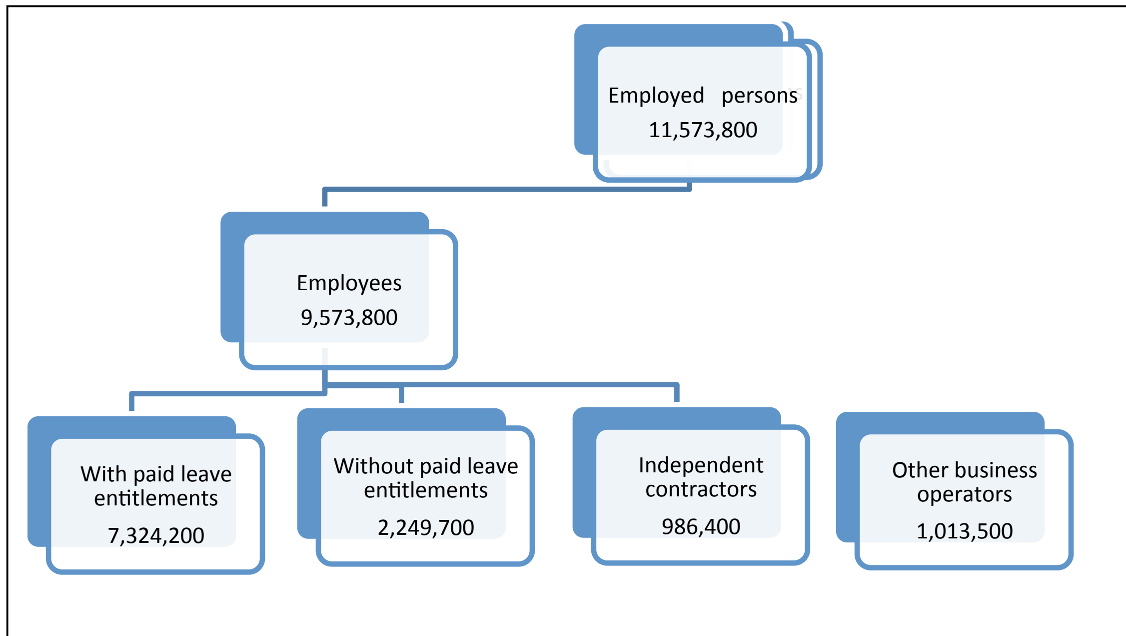
The number of people in each of the categories at November 2013 is shown in the box below.[27] 9.6 million of the work-force (82.7 per cent)were employees; just under 1.0 million (8.5 per cent) were classed as independent contractors and just over 1.0 million (8.8 per cent) were other business operators (9 per cent).



Almost 2.25 million of those in the work force were employees without paid leave entitlements, that is were employed as casuals and they constituted 23.5 per cent of employees. The proportion has been around this level in the five years to 2013. Women are more likely than men to be employed as casuals. In November 2013, 26.5 per cent of women employees were casual and 20.7 per cent of men. However, the level of casualisation has been increasing fastest among men.

Within the major industry groups, the highest incidence of casual employment is in the accommodation and food industry which includes fast food and tourism. The proportion of employees who are casual in November 2013 was 64.6 per cent. The incidence is also high in retail trade at 40.2 per cent and in arts and recreation at 41.6 per cent. Note though that there are pockets of high casualisation in parts of other major industry groups; for example in higher and tertiary education and property cleaning and maintenance.

The ABS survey also shows levels of fixed-term employment defined as where the contract of employment specifies that the employment will be terminated on a particular date/event. In 2013, 3.8 per cent of all employees were on fixed-term contracts with a greater incidence among women (4.4 per cent) than men (3.3 per cent). The proportion of fixed term employment was highest at 14.6

[27] ibid. This is an annual survey by the ABS.

per cent of all employees in education and training followed by arts and recreation at 6.3 per cent and health at 4.2 per cent.[28]

Independent contractors have no job security under employment legislation, awards and collective agreements. That of casuals is much diminished while fixed-term employees have, by definition, no permanency. Overall, 3.61 million or 34 per cent of people providing labour in Australia in 2013 had no or limited job security. As the independent study of insecure work commissioned by the ACTU summarised the situation,

> *Over the past few decades, a new divide has opened in the Australian workforce. No longer between the blue-collar and white-collar worker, it is between those in the "core" of the workforce and those on the "periphery".*[29]

A table of needed rights

Three sets of improvements in employment rights were listed above; they are about giving rights to contingent workers, improving job security and making employers negotiate about job restructuring and seeking more protection for union representatives. The full list of issues and suggested responses is in tables at the completion of this brief. The issue of restructuring is covered below as it is the most novel of the proposals made here.

The limits of consultation

Despite the frequency of restructuring and redundancies, the Fair Work system is confined to requiring 'consultation'. Both modern awards and enterprise agreements must contain clauses requiring employers to consult with employees about 'major workplace change'.[30] Where the decision is to dismiss 15 or more employees and irrespective of whether there is an enterprise agreement, employers are required to notify Centrelink and to consult with relevant unions about minimising the number and mitigating the effects of dismissals.[31]

While consultation might be good human relations practice, these provisions leave effective control over restructuring and dismissals with the employer. The provisions do not require the employer to negotiate about the changes and access to the Commission can only be about whether there was consultation; the Commission cannot arbitrate over the scale and scope of the proposed dismissals.

In Queensland in 2013, the Liberal National Party Government introduced legislation through Parliament to override extant provisions on termination, change and redundancy in collective agreements and awards for the public sector. The legislation also made any existing restrictions on the use of contractors unenforceable.

Just as importantly, industrial action by workers and unions is only protected industrial action, during the making of an enterprise agreement except where there is reasonable concern of the employee about an imminent risk to his or her health or safety.[32] If restructuring occurs during the

[28] ibid. One-third of all fixed term employee were in education and training.
[29] Independent Inquiry into Insecure Work in Australia, *Lives on Hold, 2012,* ACTU available at http://www.actu.org.au/Images/Dynamic/attachments/8032/lives_on_hold.pdf
[30] Section 205 and see FWC Determination PR546288, *Consultation clause in modern awards* 24 December 2013
[31] Sections 530 & 531
[32] Section 19 and Section 408.

term of an agreement, any industrial action to try to alter the outcome will be unprotected and open to sanctions. There are plenty of consultants and lawyers ready to help with "*Managing activities to prevent, stop or minimise industrial action*".[33]

Tackling managerial prerogatives

The current legislative regime protects managerial prerogatives over restructuring and redundancy. Furthermore, the bargaining regime with its distinct periods of agreement making and agreement implementation is structurally weighted against workers. Workers and unions are required to advance all their claims during the bargaining period and unmet claims are dormant for the life of the agreement. Moreover, workers and unions assess whether or not to settle an agreement by weighing up the various elements of pay, conditions and job security. Indeed, in all most all the enterprise bargaining negotiations in which I have participated, the employer has explicitly linked wage increases and the level of employment.

Bargaining operates in a different way for employers even though, formally, they also cannot take protected action outside a bargaining period. However employers are free, among other things, to restructure, contract-out, out-source, declare redundancies and reduce the hours of casuals at any time during the life of an enterprise agreement. This is subject only to consultation with those affected. Put plainly, this allows employers to alter the impact of an agreement at any time without making a 'claim' in bargaining. Two such examples were given at the opening of this brief. There is a strong practical and conceptual argument that this is unbalanced and a direct cause of the job insecurity felt and suffered by workers.

Negotiating change

The best way to restore balance is for the legislation to require that significant restructuring is undertaken according to a negotiated agreement. The negotiation should cover the scale and scope of changes and job losses and the implementation of change including the criteria to apply in the event of any redundancies. To remove any doubt, the Fair Work Act should require that significant restructuring cannot occur other than under a scheme of arrangement that has been certified by the Fair Work Commission. In turn, the Act should require that restructuring is implemented with maximum retention of workers, no increase in casualisation, out-sourcing or contracting-out and a demonstrated preference for retraining over redundancy.

The necessary balance between employer and workers in restructuring and redundancies will also require one or both of two other changes. The first is that the parties in negotiations over major restructuring would be able to apply for bargaining orders and take protected action on exactly the same basis as for the making of a new agreement. The second is that the Fair Work Commission would be able to arbitrate on the substantive matters including but not limited to the scale and scope of job losses, criteria for redundancy and retraining arrangements.

Employment Impact statements

Job security is also about the state of the labour market. In downturns workers hang on to their jobs and capacity to demand rights is reduced. As noted earlier, the 'new normal' is that market relationships rule. This is just as prevalent in labour markets with short-term hiring and much less emphasis on long-term relationships, training and development. The latter have become personal responsibilities of workers. Large scale restructuring either at a single firm such as Alcoa or the University of Queensland or the Queensland Public Service or in an entire sector such as vehicle

[33] Quote, almost at random, is from FCB Group, 'Managing union relations and industrial action'. They advertise themselves as Australia's leading workplace relations specialist firm. http://www.fcbgroup.com.au/about-us/

manufacturing is much more severe on the workers directly involved and on regional communities and economies.

Unregulated markets cycle through excess demand and over-supply. This is evident in the labour market with, on one hand, the skills shortages that accompanied the resources boom of the last few years and, on another, the over-supply of pastry cooks and hairdressers as visa and profit-making training places were filled by fee-paying overseas students. The overall effect is that high wages for short periods in some industries co-exist with job insecurity and low wages in other sectors and with strong ebbs and flows in demand for education and training and hence places in VOCED and universities. These are accentuated by the use of permanent migration of the 'skills in demand' programme and the temporary migration of 457 visas and, to a lesser extent, student and backpacker visas.

The capacity to respond to major restructurings can be enhanced by better coordination between employers and with public and non-government agencies. Such coordination is also needed where large new projects create additional demand for particular occupations and skills. Workers and communities would benefit from the dampening of such labour market fluctuations. A starting point is the idea of requiring *employment impact statements* for major new projects and for major restructures. There is an analogy between these and the environmental impact statements that are already required for large developments.

Employment impact statements would be required for major projects and where a significant closure was mooted to all or part of an undertaking[34]. For new projects the employment impact statement could be combined with the environmental impact statement and would emphasise sources of workers and how to maximise local skills development. These are especially important given that the input-output models used to assess the economic contribution of new projects assume that all labour is mobile and that demand will ensure supply. Notably, this did not convince the NSW Land and Environment Court who were quite caustic about the unreality of economists' submissions in the case brought by the Bulga community against Warkworth mining.[35]

Employment impact statements for major closures would document and propose remedies for the impacts on workers and communities. This would include discussion of the economic and social effects of lost jobs and incomes and how to best plan and deliver training and education and new job opportunities for current workers and new entrants to the workforce. A critical part would be to coordinate transitional assistance including alternative uses of the business plant and facilities for other productive or community use. As an example, the '*Pathways*' scheme for the closure of BHP Steel at Newcastle involved opportunities to undertake education and training over the last two years of the plant.[36]

The requirement for employment impact statements does not necessarily involve changes to the Fair Work Act and could be done by state governments. The developer or the employer proposing the closure would be responsible for preparing the employment impact statement. The format of

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[34] The threshold needs to be discussed but it could be where 50 workers were to be affected - this would apply in the private and public sectors and across all industries and sectors. On recent experience, it would pick up manufacturing and public service departments but also railways, universities, insurance and banking.

[35] Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48 (15 April 2013). See especially paras 464-96 http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2013/48.html

[36] Alicia Payne, *Jobs lost, but skills gained: lessons for Ford from Steel City,* Crikey*,* Thursday, 30 May 2013, http://www.crikey.com.au/2013/05/30/jobs-lost-but-skills-gained-lessons-for-ford-from-steel-city/?wpmp_switcher=mobile

the statement would be set by the responsible state or federal department in the same way as is done with environmental impact statements. The statement would need to specifically cover the employment impact on more vulnerable groups including younger and older people, women, Indigenous people, the disabled and those already marginal to the labour market.

There would have to be dialogue with unions and communities and the statement would be publicly available and audited. This would have at least three effects - one is that there would be a structured opportunity for public debate about whether and how the changes should be made. Another is that changes should be made with less cost being forced on the losers and more opportunities to compensate them. The third is that unions would have the opportunity to engage with community issues and operate on a wider canvass.

This is a suitable point to conclude. Unions were exceptionally effective in the mid-2000s in defeating Work Choices and the extreme deregulation of the labour market. A decade later, employers are well on the way to creating an almost disposable work-force where all jobs are insecure and all employment temporary. This is economically and socially unacceptable and new policy and legislative settings are justified to withstand it. Unions have a vital part if they can mobilise adequate resources and imagination.

Three tables of needed rights

Contingent workers	
Issues	**Responses**
Insecure and uncertain employment • The expansion of *contingent employment* has *de facto* limited the employment rights of around 40 per cent of the work-force. • In 2013, the OECD ranked Australia fifth lowest of member countries in the level of regulation of fixed-term appointments and temporary employment agency work. On a scale of 0-6 Australia was scored at 1.05 with an OECD average of 2.08. Norway was scored at 3.42 and France at 3.75.[37]	• Grounds for casual and fixed-term employment to be restricted to exceptional circumstances and prescribed in legislation about type of employment either through national standards or a mandatory award clause on type and mode of employment. • The default position for all purposes is that all types of employment are to be treated as if they were on-going with unrestricted coverage of all employment rights including unfair dismissal and adverse actions.[38]
Fixed-term employment • The national employment standards are silent on the grounds for employing people on a fixed-term basis. • Notice of termination need not be provided to employees employed for a specific period or task or a seasonal employee. • Non-renewal of fixed-term employees is not covered by redundancy provisions	• Legislative protection requiring objective reasons for using fixed-term employment • The mandatory award clause on mode of employment to set the maximum total duration of successive fixed-term employment contracts and the number of renewals. These to be set taking account of the industry and occupation but in no case to be greater than three years and three renewals for professional employment. • Where award requirement is not followed, automatic conversion of incumbents to on-going employment of unlimited duration • Redundancy payments for non-renewal of fixed-term employees
Casual employment • Definitions of "*Casual Employee*" are very vague often no more than "*a casual employee is an employee engaged and paid as such'* • Hiring is effectively by and for the hour and with no requirement that there be any work in any given period (in UK these are known as 'zero hour contracts') • Under the National Employment Standards,	• Legislative protection requiring objective reasons for using casual employment [39] • Mandatory award clause requiring that the letter of appointment for a casual employee either hires them for a set number of hours or guarantees a minimum number of hours for each pay period they are employed. • Casual employees entitled to notice of

[37]OECD Indicators of Employment Protection December 2013, http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm

[38] *Ongoing employment* is a more useful term than *permanent* and denotes employment for an open and indefinite period that can be ended only by the employee through resignation or the employer making a legal termination for demonstrated unsatisfactory performance, proven serious misconduct or a schema of redundancy. On-going employment can be full or part-time.

[39] For example *Casual employment is employment by the hour that is uncertain, irregular or informal and where the employer has only a short term need to have the particular duties performed or there is a short-term absence.*

employers can dismiss casual workers without giving them notice • No access to redundancy provisions • Very few awards have provisions for conversion of contracts (for example no provision in Fast Food Industry Award or General Retailing Award)	termination equal to hours they are guaranteed in a pay period • Casual employees to be entitled to redundancy benefit on pro-rata basis • Mandatory award clause on mode of employment to set maximum period a person can be employed as a casual before being converted to permanent full or part-time • Default position that conversion occurs unless employer demonstrates that the work being performed by the casual employee(s) is no longer be required and will not performed by other employees or outsourced.
Scam contracting and excessive use of independent contractors • *We would strongly argue that the freedom to choose to work or be engaged as a contractor rather than as an employee must be constrained, if the integrity of our labour law system is to be protected. The law does not permit an employee to agree – no matter how voluntarily, and no matter how well-informed they might be – to work for less than award wages, or to forego any right to take personal or carer's leave, or not to bring an unfair dismissal claim. So why then should it be lawful to achieve such outcomes by contriving a worker to appear to be a contractor, even if the worker consents to (or even initiates) the arrangement?*[40]	• All persons performing work to be deemed as employees unless express agreement that they are independent contractors meeting the majority of legislative criteria for being independent contractors in control of all aspect of their own work including hours and pace of work. (see definition of worker in Contract Cleaning Industry (Portable Long Service Leave) Qld Act 2005 • Standard award clause on type and mode of employment to apply legislative criteria for being independent contractors • Increase the powers of relevant tribunals to declare of independent contracts to be employees • Regulatory agency to do random audits in construction industry and other areas with high incidence of use of contractors
Labour hire • *In labour hire no one has job security*[41] • *Another agency, indicated that its clients were very free about stipulating whether they wanted a male or female for a job. Labour hire offered clients a potential way around the applications of anti-discrimination laws*[42] • *The majority of labour hire employees, both surveyed and who participated in focus*	• Labour hire agency and employer client to be jointly liable for health and safety of the labour hire employee. • Workers supplied by labour hire firms to be covered by terms and conditions no less favourable than those covering direct employees • Anti-discrimination laws to apply to relationships between labour hire agencies

[40] Andrew Stewart and Cameron Roles, Submission to ABCC Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry, 2011, fwbc.gov.au/sites/default/files/Andrew%20Stewart%20and%20Cameron%20Roles%20-%20SCRT%20Submission.docx

[41] Daniel Graham, *Regulation of Labour Hire Arrangements : A Study of Queensland Labour Hire Agencies* PhD Thesis, School of Law, University of Queensland,2007; quote at p211

[42] ibid p194 ,193

groups, were employed in labour hire because they had no choice. It was not their preferred mode of engagement because of the lack of employment security; unpredictable earnings; lack of control over when and where they worked; lack of workplace voice; having to accept unsafe placements; hostilities experienced from direct hire employees; and a lack of investment in their skills by their employer and the host.[43]	and client employers including a requirement that employer clients cannot make requests of labour hire agencies that would be discriminatory in direct employment relationships.
Leave entitlements for contingent workers • Casual employees do not get paid annual, personal, compassionate or community service leave as of right. • Casual loading of 25% in lieu of annual leave and paid public holidays • Casuals do get long service leave but on the same service basis (in Queensland 10 years continuous service) as permanent workers.	• Casual to be entitled to all forms of paid leave including carers and compassionate leave on pro-rata basis • A portable long service scheme for all casual employees by extending the current construction industry and contract cleaning industry arrangements.
Access to long service leave • Long service leave is regulated by state legislation. In Queensland employees are entitled to take long service leave after ten years continuous service. Employers must pay out service leave if they dismiss an employee with more than seven years service on grounds of redundancy. • Only a minority of employees qualify for long-service leave. ABS data shows that at November 2013 only 21.5 per cent of employees had more 10 or more years of service. Just under two-thirds of employees had less than five years of continuous service.[44]	• Reduce qualifying period for taking long service leave to five years • Require pro-rata long-service leave to be paid out in redundancy situations irrespective of length of service. • There is considerable scope to consider having a portable long leave scheme for all employees. One possibility would be for the employers to contribute to a central pool (organised on either an industry or a regional basis) and for the pool to be available to support breaks from work, education and training leave or periods of working shorter hours/weeks.
Flexibility • Almost all the emphasis is on giving employers 'flexibility' either in application of awards and agreements or in spread of hours and penalty rates. • Some workers undertake casual employment as a means of getting flexibility to balance non-work (including but not confined to family responsibilities) and work.	• Better flexible working arrangements including banked time arrangements over part of year as well as pay period • Pooled and shared job arrangements • Ensure that service entitlements are not lost for breaks in service • Better linkage between time off in lieu (TOIL) schemes and flexible study, sport and recreational pursuits

[43] Elsa Underhill, Submission to the Fair Work Building and Construction Inquiry into sham contracting arrangements in the building and construction industry, 2011 http://fwbc.gov.au/sites/default/files/Dr.%20Elsa%20Underhill%2C%20Deakin%20University.pdf
[44] ABS, *Forms of Employment*, Australia, November 2013, Cat No 6359.0

There is considerable merit in codifying the matters covered in the above table into a new *Employment Rights Act*. This could and should be justified as providing a new safety net of fairness at work. Such legislation could also make some improvements of unfair dismissals and related aspects of the Fair Work Act. These include making it a formal requirement that the employer gives reasons for dismissal (currently implied as something that the Commission must take into account) and reducing the qualifying period for access to an unfair dismissal claim to three months for all employees which is should be treated as a probation period with the onus on the employer to demonstrate that a person is not suited to the job.

Improving job security	
Issues	**Responses**
Managing change and redundancy • Employer required to consult after deciding there will be change[45] or redundancies [46]	• Change and redundancy only to occur after a managing change schema has been negotiated covering grounds, scale & scope and implementation of restructuring • FWA to require employers to maximise retention of workers, not increase casualisation, out-sourcing or contracting-out and to prefer retraining to redundancy • FWC to have powers to arbitrate over content during making of managing change schema

Employment Impact statements	• Employment impact statements to be required
	  ○ for major projects
	  ○ where a significant closure (eg entire business or part of business or more than 50 affected workers)
	• Statement to document and propose remedies from employer and government for impacts on workers and communities
	• Statements for new major projects to review sources of workers and how to maximise local skills development
	• Employment impact statements to require dialogue with unions and communities and to be publicly available and audited

[45] FWA Section 205 & FWC Determination PR546288, *Consultation clause in modern awards* 24 December 2013
[46] FWA Sections 530 & 531

Union representatives and union organisations	
Issues	**Responses**
Protection of union representatives • The Fair Work Act prohibits adverse action against someone *because the other person:... has a workplace right or engages in industrial activity. These include being or not being a union member or officer or acting for the union.*[47] • The protections are limited and have been substantially weakened by the High Court in the Bendigo TAFE case where action by the employer against someone taking action as a union delegate was deemed to be justified because the employer believed that the union delegate was acting against the interest of the college. [48] • The High Court agreed with the employer's explanation that they would have acted the same way against any employee.	• The issue is critical where employees hold positions as a union officer (including Branch committee members and job delegates). They are susceptible to action as employees for poor performance, misconduct, breach of codes, redundancy, cuts in overtime and casual hours and non-renewal of contracts. • The Act needs urgent rewording to say 'Adverse action' by employers against union representatives is illegal if it is related to actions or statements made when they were acting in their union capacity. • Prior order from Fair Work Commission order to be needed before employer can dismiss a union representative
Right to form union • No positive right is stated in Australia to form or join a union. For example, • *There is no Commonwealth legislation that enshrines the right to freedom of assembly and association in all circumstances.*[49] • Freedom House states *Freedoms of assembly and association are not codified in law, but the government respects these rights in practice. Workers can organize and bargain collectively.*[50]	• The 'respecting of rights in practice' need to be given positive force • Current bargaining arrangements allow employer to 'play the field' between unions (although now give unions with members who were bargaining representatives right to be listed as a party to agreements)
Competition and Consumer Act	

[47] FWA Sect 346
A person must not take adverse action against another person because the other person
(a)is or is not, or was or was not, an officer or member of an industrial association or
(b) engages, or has at any time engaged or proposed to engage, in industrial activity
(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity

[48] Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32 (7 September 2012) http://www.austlii.edu.au/au/cases/cth/HCA/2012/32.html

[49] Commonwealth of Australia, Attorney-General's Department, Public Sector Guidance Sheets *Right to freedom of assembly and association,* http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Righttofreedomofassemblyandassociation.aspx

[50] Freedom House, Australia Freedom in the World 2012, http://www.freedomhouse.org/report/freedom-world/2012/australia#.U33zCoUl6po

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- Competition law prescribes 'secondary boycotts' but 'permits industrial action about 'employment matters' against single employer [51]
- Freedom of association , in part, relies on 'exemption' in Competition legislation; Major employer organisations and think-tanks have argued for removal of this exemption making forming a union or taking collective action a breach of contract.
- The Competition Policy Review (announced in December 2013) specifically mentions the exemption in its Issues Paper and asks *Do the provisions of the CCA on secondary boycotts operate effectively,*[52]

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- Competition & Consumer Act to have no application to workers & unions
- To remove any doubt the principles of ILO Convention No. 87 : Freedom of Association and Protection of the Right to Organise, and ILO Convention No. 98 : Right to Organise and Collective Bargaining Convention, 1949 are to apply to the exclusion of the CCA Act
- This should extend to deleting secondary boycott provisions from the C & C Act

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Collective rights of unions

- restrictions on right of entry' of union officials
- no to individual or collective right to safe place of work
- issues of discrimination are treated as individual issues and require an individual complaint

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- Explicit right to recruit in workplaces
- Safety, non-discrimination, Indigenous rights and equal opportunity to be collective rights that can be invoked by unions not just individuals
- Unions able to demand workplaces that are safe, discrimination-free, and that advance the position of women, Indigenous and other vulnerable groups.

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Right to strike (industrial action)

- limited to 'employment matters'
- restricted to bargaining period

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- Grounds for strike action to be widened to industrial matters, environmental and social concerns
- Recognise right to strike on employment security including out-sourcing and to participate in protest activities
- Removal of onerous requirements on unions in the conduct of ballots for taking industrial action

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Unions as civil society organisations

- The registration requirements of the *Fair Work* system are not necessarily compatible with the role of unions as civil society and broad political organisations.
- Governments, including Queensland, have imposed restrictions on the broader activity of unions

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- Recognise unions as civil society organisations as well as industrial bodies
- The registration requirements for unions to explicitly state that they can pursue objections and activities that extend beyond those defined as industrial in the Fair Work Act
- No restrictions on use of union funds or

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[51] Competition and Consumer Act 2010 - Sect 45DD
http://www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/s45dd.html

[52] Competition Policy Review, Issues Paper, April 2014, p33-4
http://competitionpolicyreview.gov.au/files/2014/04/Competition_Policy_Review_Issues_Paper.pdf#page=39&zoom=auto,69,369. Note the Chair of the Review is Ian Harper who was the first chair of the Fair Pay Commission and one of the four members is Peter Anderson, previously Chief Executive of the Australian Chamber of Commerce and Industry.

	limits on donations that can be made