Australian Charter of Employment Rights

Edited by Mordy Bromberg and Mark Irving, with a foreword by Bob Hawke
Hardie Grant Books, Prahran, Victoria 2007, 158 pages

Australian Charter of Employment Rights is the title of a short book that sets out, explains and promotes the Australian Charter of Employment Rights (hereafter, the Charter). The Charter was a project of the Australian Institute of Employment Rights, which acknowledges 'the steering committee of workplace relations experts whose deliberations over many long meetings formulated the text of the Charter and shaped the content of this book'.

Although it may have been motivated by a shared discontent with the existing state of labour law, the Charter offers an alternative, probably constructed with the likely change of government at the forefront of everyone's thinking. According to Mordy Bromberg in his introduction to the book, the Charter is 'a back-to-basics attempt to define the rights of workers and employers'; a template 'which all workplaces are encouraged to adopt and observe'; and 'an instrument for advocating the reform of labour law in Australia' which can be used 'to critique the current law and any proposals for change'. Bob Hawke, in his foreword, says that the Charter 'leads the way for industrial relations in Australia — a way towards greater harmony and greater prosperity'.

Bromberg writes (p 6):

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

Inasmuch as this implies that the Charter is ideology-free, it must be rejected. The ideology is unmistakably social democratic — 'centre-left', in current parlance. Certainly, the Charter ascribes some rights to employers and some obligations to workers, but one would hardly expect otherwise.

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

The Charter begins by 'recognising that improved workplace relations requires [sic] a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers'. It draws upon 'Australian industrial practice, the common law and international treaty obligations' in framing 'a statement of the reciprocal rights of workers and employers in Australian workplaces'. These rights fall under 10 headings: good faith performance; work with dignity; freedom from discrimination and harassment; a safe and healthy workplace; workplace democracy; union membership and representation; protection from unfair dismissal; fair minimum standards; fairness and balance in industrial bargaining; and effective dispute resolution.

The book has 13 chapters. The first 10, written by various authors, correspond to the above headings of the Charter. An 11th, by Bromberg and Mark Irving, is 'The scope of the Charter'. This is about the kinds of 'workers' who would enjoy the benefits and protections of the Charter (an issue about which the Charter itself is silent). 'Workers' would, for example, include dependent contractors. A 12th chapter, 'Economic perspectives on workers' rights', seeks to counter an anticipated objection: that observance of the Charter would impose economic costs. Its authors (Peter Kriesler and John Nevile) argue that, on the contrary, it would confer significant benefits. The final chapter, 'The right to work' (by the same authors), is about the importance of full employment and the possibility of modifying economic policy to achieve it. The right to a job is not enshrined in the Charter because it 'is not a right that any individual employer can fulfil'. This and the previous chapter may be intended to pre-empt the likely criticism that the Charter prefers rights to jobs. Part of the answer is that government and the Reserve Bank can, if they choose, increase jobs by according a lesser priority to the avoidance of inflation.

The Charter itself, understandably, contains no arguments. What of the book? In the main, the various chapters explain, elaborate and assert, rather than argue. The authors repeatedly invoke the authority of international 'treaties' — ILO Conventions and the like — to which Australia is a party. Many people (though not, apparently, the Howard government) would agree that Australia should honour its commitments, but some may question the wisdom of entering into them and thus be reluctant to applaud a Charter that celebrates them. The existence or absence of treaty commitments cannot be allowed to silence debate on the merits of postulated rights. Mrs Thatcher availed herself of periodic opportunities to denounce ILO Conventions, and it was open to the Howard government to follow that more honourable course rather than simply to disregard its obligations. A centre-right charter might list the treaties from which Australia should escape at the first opportunity.

Thus there is no compelling case in the book as to why anyone should 'sign up' to the Charter. It is a matter of personal opinion — as are my comments.

My values are, in the main, similar to those that underlie the Charter and the book. I would, however, differ from the authors of both in drawing a distinction between ends and means. Employers and workers conducting themselves in good faith; respect for the dignity of the worker; eliminating discrimination; more democratic workplaces; avoidance of unfair dismissals; and the observance of fair employment standards (pay, hours, leave and so on): all of these I see as ends. Generally, I agree with them, though in some instances there may be issues of definition. How are they to be achieved? That is a question of means.

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

'Fair and balanced industrial bargaining', say Ron McCallum, David Chin and Anne Gooley (p 92):

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

Likewise (p 97):

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

These are strong claims, and I may be foolhardy to raise issues about 'universal human rights to which all civilised societies subscribe'. But what *are* 'fairness' and 'balance'

in bargaining, and how do we know when bargaining power is 'equivalent'? It is not self-evident to me that allowing and even assisting unions with muscle to impose their will constitutes fairness, balance or equivalence.

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

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

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

- Limitation of collective action in furtherance of economic self-interest offends no generally accepted principle of public policy. Price-fixing agreements between businesses (including small traders), which are a form of collective action to improve their economic position, are prohibited and attract severe penalties.

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

> Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

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

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

At various points in the book, the Charter is depicted as a high road to productive performance. In Bromberg's words (p 7):

> A successful workplace relations system will be built on the premise that high productivity and high worker satisfaction are both enhanced by investment: workers investing in their workplace and employers investing in their workers. This workplace investment compact

> will be founded on an appreciation that the legitimate expectations of workers and those of employers are not mutually exclusive but are largely complementary.

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

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

Keith Hancock
National Institute of Labour Studies
Flinders University
<keith.hancock@flinders.edu.au>