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Industrial Relations 'Reform' – the risks of unjustified changes and the need for a better approach

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Address by Innes Willox, Chief Executive, Australian Industry Group

Thank you for inviting me to speak today.

To the many members of the Australian Industry Group here today, and to those watching on television and online, thank you for your support in this debate which is vital to our future and that of our workplaces.

Today, I am talking about workplace relations from the perspective of the thousands of Australian businesses who employ millions of Australians – about 80 per cent of the workforce of 14 million people.

Australian employers – be they business owners or business leaders – are rightly very agitated about the impact of the workplace measures now being considered by the Federal Government. They are deeply alarmed that what is hanging over their heads appears to be unnecessary, unproductive and conflict inducing – just like the multi-party bargaining measures passed by Parliament late last year.

Today I'm going to focus on five issues: where we are at with multi-employer bargaining; proposals around same job, same pay – whatever that means; casual employment; the gig economy; and the suggested ability for unions to wander around workplaces at any time pretty much unimpeded.

Firstly, I'd like to take a minute just to explain where our viewpoint comes from.

My organisation has been an important voice at the table since our inception 150 years ago this year. We will be celebrating that anniversary later this month at an event with our members and both the Prime Minister and the Opposition Leader, among others.

The Australian Industry Group has thousands of business members from across the economy – manufacturing, construction, transport, retail, energy utilities, the health and community care sector, the technology industry, mining services and the gig economy.

Members use our services to help make their workplaces safer, more productive and, in so doing, they help make Australia and Australians become more prosperous.

Our 250 staff across the country have hundreds of thousands of conversations with our members every year. Employers big and small. We get instant feedback which informs our approach to good policy – including, of course, on the current state and future of our workplaces.

On a personal note, I am sure, like me, many of you will have started work at woollies or in a café and will remember clearly what it's like to work as a casual and getting that first pay cheque.

My first real paid job was packing cans of pet food at the end of the production line. For extra money, I got to clean out the pet food mixing machine on weekends. I can still see and smell it to this day.

Of course, much later I spent a long time as a journalist in Canberra's Parliamentary Press Gallery (perhaps the pet food factory was good training for that), and so it is always a pleasure to spend time at the press club and I recognise your key role in fostering debate.

So, let's turn to what is being proposed.

I need to let you know that as part of the consultation process we have signed a confidentiality agreement with the Government, and so there is some detail I cannot go into. We are committed to continuing to play a central role in the room working through these issues and giving employers a voice as decisions are made.

However, a lot of what is being considered is on the public record – none of it is at face value great for employers. I must say I believe strongly that we are having an impact during the consultations but the proof of the pudding will be in the eating.

Let's start with what could be done to improve things, to make us more productive and to create more jobs. That after all should be the focus of workplace reforms.

One place to start is with the complexity of our workplace relations system. It is the world's most complicated by far. The *Fair Work Act* itself is 1200 pages long – just as long as Tolstoy's War and Peace but even harder to follow.

There are more than 120 modern industry and occupational awards, each immensely detailed with more than 1000 different classifications and minimum wage rates.

No other country has an award system and given the complexities for businesses, large and small, as well as for their employees, you can understand why.

Our system is built on conflict, it is expensive and it is bureaucratic. That's where we would start – working towards the goal of a simpler and more transparent workplace system.

The second point as the government embarks on potentially even more complexity and change is to ask – why are we doing it? All we hear as rationale are slogans: "*Get wages moving", "Same Job, Same Pay", "Close the loopholes*". We deserve better. Changes to workplace laws need to be based on facts and research, not on political slogans and union claims.

If you believed all the myths and legends being peddled as reasons for huge change, you would think that the Australian labour market is on the verge of collapse. Nothing could be further from the truth.

Ai Group is today releasing a detailed research paper which finds that employment growth has been strong since 1983 and particularly strong from 2015 to today – notwithstanding the pandemic.

Workforce participation has risen strongly. In large part this has been driven by a decisive and welcome increase in female participation. Over the medium term, we find wages have risen broadly in line with productivity.

The link with productivity is the key – the more productive we are the more we can be sustainably compensated. That clear link to productivity is what is missing in these latest workplace proposals and in the consultations around them. No real demonstrated productivity benefit is ever given.

The research we release today shows we do well in international comparisons of OECD-plus nations in terms of wages, workforce participation and unemployment rates. There are strong opportunities for Australians to participate in the workforce, those looking for work are comparatively successful and pay is relatively high.

Only Iceland, with a population smaller than Canberra (87%), fared better on each of the metrics.

To burst another bubble, the slogan of "*record corporate profits*" is another nonsense. We are not seeing a business profit boom. There is broad stability in the share of wages and profits in national incomes once the impact of surging global commodity prices is removed.

Despite our relatively favourable standing internationally, there are red flags in our economic performance due to the closely related slowdowns in productivity growth and the pace of improvement in real wages.

In the pre-COVID years productivity and real wage rates all but stalled. This left us highly vulnerable to the inflation surge from mid-2021. Again, that word – productivity.

What has boosted average household income from wages is the surge in labour market participation, especially among women, and a strong growth in full-time employment. For very many households, the growth in incomes during this surge in employment has been higher than the sudden increase in consumer prices in the past couple of years.

Let us not understate the pain thousands of households and businesses are going through right now as inflation and the interest rate rises needed to curtail it take hold. And sadly, there is more pain to come as hundreds of thousands of mortgages roll into the new world over the coming months and energy, rents and other costs rise. We all know it hurts.

The recent erosion of real wage rates driven by inflation is not due, as some would argue, to the systematic failure of our labour arrangements.

Rather, wage rates have recently lagged the sudden and unexpected price increases because of the inherent inertia in annual wage setting and multi-year agreements. We all hope the recent signs of abating inflation are real but sadly it needs to be reiterated that driving wages up with no productivity trade-offs will only increase the pain.

But there is a systemic problem. This is the sustained drop in productivity growth. We need to address that to fix the associated slowdown in the growth of real wages.

Even the Treasurer has acknowledged that Australia has a productivity problem.

It would be easy to throw our hands up and say it's all too hard. But if we don't raise our productivity – through skills, training, infrastructure, taxation reform, workplace measures and more to give us all the tools to work smarter not longer – we risk missing our broader societal ambitions.

Net zero by 2050 becomes harder if not impossible. Building the houses for our increasing population becomes harder. The same with the infrastructure we need. Dealing with our ageing population gets trickier.

Our government budgets are stuck in structural deficits disguised only by windfall commodity profits. Our geopolitics is uncertain.

I could go on.

These are the reasons we need to act quickly to reset ourselves in a rapidly changing world.

Instead, here we are spending time talking about what is a misguided workplace agenda – developed in 2021 in the lead up to the last election. It was a strategy driven by outdated union fixations and with concepts borrowed largely from unions in Europe and New Zealand.

The world has fundamentally changed since then.

Since then, COVID has deeply impacted business, supply chains were disrupted, costs have risen, labour shortages are rife, and more increases in energy prices are in the pipeline.

A 2021 election campaign plan is no good for our economy today and the years ahead.

It threatens to make the vital productivity growth we need even harder to achieve.

We fear that much of what is on the table is actually anti-productivity.

Let's look now at the five key union objectives that the government is unfortunately looking one way or another to deliver.

The Government's workplace relations agenda

The Government's workplace relations agenda is moving workplace relations laws in entirely the wrong direction.

There is one slogan that has been missing from the government's rhetoric and that is 'fix our lagging productivity'. The word productivity has hardly been mentioned as a desired outcome of the government's measures.

It should not be forgotten that it was the Rudd Government in 2009 that introduced the current laws. The Rudd *Fair Work Act* increased employee entitlements and union powers in more than 100 areas.

That Act also put clear barriers in place to productivity improvements in enterprise agreements. Those same changes saw a shift away from enterprise bargaining and a move back to award reliance.

Since the Act was introduced 14 years ago, virtually all the amendments have been directed at improving entitlements for workers often to the detriment of productive and efficient business operations.

The one substantial and positive change for businesses – reaffirming the common law definition of a "casual employee" – is now under attack.

Multi-employer bargaining

Let's turn to multi-employer bargaining laws that came into operation less than two months ago.

When enterprise bargaining was introduced by another Labor Government in the early 1990s, there was a welcome and big increase in productivity.

At the time, it was widely and correctly recognised that the centralised wage fixing system of the day was a barrier to productivity and real wages growth.

Despite not raising the issue before the election, the Government has implemented a multi-employer bargaining system that is inherently inconsistent with Australia's successful enterprise bargaining system.

As we warned at the Jobs and Skills Summit last year, the new bargaining laws don't just apply to Government-funded sectors like aged care and community services.

The laws give unions the right to pursue multi-employer agreements and take industrial action across whole industry sectors.

The exemptions are very narrow.

For example, in the building and construction sector the exemptions do not apply to numerous workers that are critical on construction projects such as electricians, plumbers and air-conditioning tradespeople.

Given that the laws only came into operation in June, the productivity-killing effects are yet to become apparent.

The Government and the unions perversely argue that the laws will boost productivity because they will stop businesses competing on wages. I will leave you to think that argument through! But in any case, enterprise agreements are about much more than wages.

There is no doubt that the multi-employer agreements that will be pursued by unions will contain a raft of highly restrictive provisions that will further inhibit productivity and boost union powers.

Many of the agreements will no doubt deliver millions of dollars to the unions by requiring employers to contribute to worker entitlement funds like *Incolink* and *Protect* that distribute regular and highly lucrative dividends to unions at the expense of workers.

This is what is happening under the pattern agreements that the unions push throughout the construction and electrical contracting industries. There is no reason to believe that the new multi-employer agreements will be any different.

The unions will hunt for a few accommodating employers that are prepared to reach a multi-employer agreement with them in return for a place on the unions' list of preferred contractors.

Once the agreement is in place, they will undoubtedly apply to the Fair Work Commission to rope-in a large number of other employers against their will.

Beyond small businesses, the permitted scope for employers to resist being roped-in is very limited.

We will watch this unfold with dread.

It is nonsense for anyone to suggest that these laws are not going to be very bad for productivity.

“Same Job, Same Pay”

Another productivity killer is the Government’s “Same, Job Same Pay” policy.

It is a policy that risks imposing unjustifiable and unfair requirements on industry.

A consultation paper released by the Department of Workplace Relations indicates that the Government’s policy seeks to address, and I quote:

“…the limited circumstances in which host employers use labour hire to deliberately undercut the bargained wages and conditions set out in enterprise agreements made with their employees.”

However, the paper also reveals a clear risk that the implementation will extend far beyond what this proposition suggests.

Relevantly, the paper suggests that labour hire may be defined very broadly, potentially including arrangements that go well beyond what today is commonly seen as labour hire.

The risk is that it could capture a much wider range of service arrangements or relationships between businesses.

Ai Group is urging the Government, in the strongest possible terms, to avoid such a deeply problematic approach.

Beyond this, there is a raft of fundamental problems with the proposal.

The Department’s consultation paper suggests that two jobs could be deemed the “same job” simply because an employee of a labour provider and an employee of a client business are classified at the same level.

Such an approach would ignore the reality that classifications are typically broad in order to promote multi-skilling and work flexibility. Two employees covered by the same classification often perform very different jobs. Similarly, two employees in the same classification can have very different levels of experience and competency.

The Government has indicated, in effect, that its policy is not intended to require two employees with different levels of experience to be paid the same amount. We hope that they will deliver on this intent.

However, if its argument is that employees with different levels of experience will be in different classifications, this is not typically correct. For example, when a fitter completes an

apprenticeship, they often have the same classification as a highly productive fitter with decades of experience.

The Government has also given no commitment that the two jobs to be compared would even need to be in the same location to be captured by the policy.

Further problems relate to the concept of the “same pay” and how this will be calculated.

The Department’s consultation paper suggests an approach that would require all pay elements to be taken into account.

This would include, for example, all allowances, penalty rates, shift loadings and other amounts in an agreement. If adopted, this approach would visit an often entirely unworkable obligation on a labour hire provider to effectively apply the terms of their client’s enterprise agreement to their own employees.

The “Same Job, Same Pay” proposal is unfair to both businesses and employees. It will kill productivity and remove the incentive for people to work hard, increase their skills and take home more pay.

The policy is not supported by the facts. As acknowledged in the Department’s “Same Job, Same Pay” consultation paper, the ABS statistics show that labour hire workers represent only 2.3% of employed persons. Four years ago, this figure was 2.7%.

The policy is an unjustified attack on the labour hire sector and it will hurt the many businesses and workers that rely on it.

No doubt because of all its flaws, the Government has rebadged its same job same pay policy as “*closing the labour hire loophole*”.

There is no loophole or other labour hire problem that needs fixing.

Casual employment

Moving on to the proposed changes to casual employment.

The Government has recently made broad statements about its intent in this regard, but many of the key details are still to be fleshed out.

So, let’s start with the facts relevant to whether any changes in this area are even warranted.

According to the latest ABS figures, there are around 2.5 million casual employees in Australia. This equates to less than 20% of all *workers* (if independent contractors and owner-managers are included in the workforce).

Looking just at *employees*, casuals comprise 22.2 per cent of all employees in the workforce. This compares with 25 per cent of all employees in 1998. The rate of casualisation has gone backwards.

The claim that the Australian workforce is becoming increasingly casualised is clearly an outright myth – to put it politely.

It appears that the Government proposes to change the definition of a "casual employee" to reflect elements of the approach that were erroneously applied by the Federal Court in two highly controversial decisions concerning a major employer, Workpac, in 2018 and 2020.

In so doing, it seeks to simply disregard the fact that the High Court unanimously overturned the Federal Court's flawed approach (in its *WorkPac v Rossato* judgment in August 2021.[1])

The Federal Court's approach was never the correct interpretation of the common law definition. It was unworkable and vastly different to the definition of casual employment that applied very widely prior to that time.

In throwing out the Federal Court's approach, the High Court determined that prime consideration needs to be given to the intentions of the employer and the employee as seen in the terms of their employment contract. Crucially, it also rejected the notion that a regular pattern of hours would be inherently inconsistent with casual employment.

A return to the Federal Court's vague and uncertain approach would provide no certainty to employers or employees. A person could be engaged as a casual and paid a casual loading but at some later stage be deemed to not be a casual, largely because the person worked a regular pattern of hours.

This is the reason that prior to the High Court's decision and the amendments that were made to the *Fair Work Act* employers were facing the risk of $39 billion in back-pay and were defending eight class actions.

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[1] [2021] HCA 23.

The definition of a “casual employee” that was inserted into the *Fair Work Act* in 2021 closely resembles the common law definition, as articulated by the High Court.

It is absurd that the Government would contemplate replacing this definition with one that reflects elements of the unworkable approach that was so roundly rejected by the High Court.

Over recent days, the Government has stated that the new definition would not be retrospective and that casuals will not be able to pursue back-pay. It has indicated that employers will have a reasonable right to refuse conversion of a casual employee to permanent employment.

Such assurances are welcome, but there are still major questions about how precisely any change to the definition will operate in practice, and an obvious risk that devil will be in the detail of any amendments.

It is essential that any definition of a “casual employee” does not lead to employers once again becoming cannon fodder for class action lawyers and foreign litigation funding firms.

Even if some of industry’s concerns are addressed, there is still a very real question as to why it is necessary to make any change at all.

The simple truth is that under the casual conversion provisions in the National Employment Standards, casual employees working regular hours have never had a stronger pathway to permanent employment than they do now.

There is no compelling evidence that these provisions aren’t operating effectively.

This should come as no surprise. Two test cases on casual employment heard by the Fair Work Commission and its predecessor, one in 2017 and one in 2000, concluded that a large proportion of casuals work a regular pattern of hours and have no desire to convert to permanent employment.

Further, over the past two years, hundreds of thousands of casuals have been offered the opportunity to convert to permanent employment. Employer after employer has reported that very few employees have taken up their offer. In many cases it is the employer who would prefer that the offer was accepted.

The reason for such low take-up of these offers is clear. Most casuals are happy with their work arrangements. They either do not want to lose the flexibility that casual employment offers, or lose the 25% loading, or both.

So I ask again – what is the compelling case for change?

And perhaps more importantly, what is the Government risking by pursuing unjustified and unnecessary amendments?

Casual employment often delivers a genuine win-win outcome for employees and employers. It delivers vital flexibility to employees and vital flexibility to employers.

A big risk is that the changes being considered will introduce unnecessary new barriers to the engagement of casual employees or recreate uncertainty over who is a casual employee. This will only serve to reduce employer willingness to offer casual employment opportunities in the first place.

Such an outcome might be welcomed by the union movement, but it will hurt many employees who may find it harder to find casual work.

Gig workers and other independent contractors

Another area where there is a serious risk of the Government overreaching to the detriment of the Australian community is the area of gig work and other independent contracting arrangements.

It is important that any new regulations implemented for certain types of gig work do not extend beyond sensible light touch minimum standards. Any increased protections for gig workers should be crafted in a way that preserves the flexibility that gig workers and consumers greatly value.

Numerous surveys show that most gig workers typically supplement their income with this form of work rather than it being their major job.[2]

My own dad was effectively a gig worker back in the day, driving a cab as a second job to get extra income for the family.

[2] For example, AlphaBeta, *Flexibility and fairness: What matters to workers in the new economy*, March 2019, p.16

The surveys show that most gig workers wish to remain independent contractors and have no desire to carry out that form of work as an employee.

The unions are pushing for the Government to implement heavy handed, excessive regulations. The union approach would cause major problems, not only for gig businesses and gig workers, but potentially for many other independent contracting arrangements in sectors such as transport, construction and professional services.

Hundreds of thousands of fiercely independent electricians, plumbers and carpenters run their own businesses as independent contractors. They would no doubt be horrified at the prospect of being redefined as "employees" or subject to new regulations that might discourage other businesses from hiring them.

The Government appears to be contemplating bringing back some version of the discredited Road Safety Remuneration Tribunal that was threatening to destroy the livelihoods of thousands of owner drivers before it was abolished in 2016. (Who can forget the 200 truck blockade of Canberra in that year protesting against the Tribunal and supporting its removal).

The current uncertainty about the scope of the Government's proposed amendments is bad for investment and bad for the many workers who must be worried that their opportunity to earn extra income could be disturbed.

The Government should immediately rule out disturbing the accepted meaning of "independent contractor" as determined by the High Court (as recently seen in its *CFMMEU v Personnel Contracting*[3] and *ZG v Jamsek*[4] judgments).

Our hard working and battling Australian tradies risk having their lives and livelihoods turned upside down.

Rights of delegates and union officials

One final Government policy that I'll mention briefly is the proposal to expand the rights of union delegates and union officials.

Seriously?

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[3] (2022) 96 ALJR 89.

[4] (2022) 96 ALJR 144.

This is a free kick out of left field for the union movement and was never mentioned in the lead-up to the last election.

The role of union delegates is already protected under the *Fair Work Act*. Heavy penalties apply for anyone who takes adverse action against a union member or officer, including a delegate.

There is no need for any new laws about union delegates' rights. Delegates' rights and entitlements should be dealt with at the enterprise level.

There is also talk of the Government amending the *Fair Work Act* to give unions the right to enter workplaces to inspect all wage records without the 24 hours' notice that is currently required, including the right to inspect the pay records of non-union members.

More than 90% of non-government workers are not union members. They face having unions combing through their personal details and pay records without any right of refusal.

There is simply no case to trample on the rights of employers and non-union members by widening union rights of entry.

Conclusion

Why is this happening?

At its simplest, the government is seeking to deliver a union agenda.

These measures are designed to grow union membership.

None of these measures are designed to improve productivity, jobs, growth and investment which are the ingredients of a successful economy.

Why attack gig workers, labour hire companies, tradies and other independent contractors? People who want to work in their own time and on their own terms.

The answer is that commonly none of these groups have any real interest in joining unions.

Be assured, we will continue to work positively with the Government and the unions, in the interest of employers, their employees and the community – as we have been doing for 150 years. In doing so we aim to achieve the best outcomes for <u>all</u> Australians.

That work will continue once we all see the final legislation as it works its way through Parliament. We owe Australian employers and all Australians nothing less.

We all want productive workplaces, well-paid jobs and successful businesses that contribute to a prosperous Australia.

Nothing in what is being proposed will achieve any of this.