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Relations Special Interest Group**

*Time for the Government to change
tack on Workplace Relations*

The past six years have been a very frustrating time for employers with regard to workplace relations

We saw the *Fair Work Act* implemented in 2009 which increased union powers and reduced employer flexibility in numerous areas.

We then saw the former Labor Government make a number of changes to the Act which further tipped the scales in favour of unions, including expanding the right of entry laws, reinforcing penalty rates in awards and imposing more restrictions on transfer of business.

The Coalition went into the last Federal election with a very modest agenda for workplace relations changes but nearly all of those changes have been stymied by the Opposition, Greens and Crossbenchers in the Senate.

So far, the best thing that has happened during the current term of Government to deliver a more productive, flexible and fair workplace relations system has been the establishment of the Productivity Commission Inquiry into the Workplace Relations Framework and the Heydon Royal Commission into Trade Union Governance and Corruption.

At the end of this year, both of these major inquiries will recommend a series of important legislative changes. Amongst the changes proposed will be some big ticket items that would deliver genuine reform; which would encourage employers to increase their investment in Australia and take on more workers.

It is crucial that the Government does not take the easy way out in an election year and rule out all the significant changes that would benefit employers. Changes that are of benefit to employers will typically be of benefit to employees too. Employees are of course amongst those worst affected when their employers decide to close plants, relocate, downsize or offshore.

In the past week we have seen a new Prime Minister and a new Employment Minister appointed and this provides the opportunity for the Government to change tack on workplace relations. The early language around the need to foster innovation and competitiveness is very encouraging when it comes to recognising the fast changing nature of work and of workplaces.

The world has moved on. In many ways the legal framework has not and what we still have are a series of laws that stifle competitiveness, hobble productivity, discourage investment and, when all is said and done, make Australia a less robust and flexible place in which to do business.

It is very important that Prime Minister Turnbull and Employment Minister Cash get on the front foot and play a leading role in the community debate about what legislative changes would be worthwhile to deliver a workplace relations system which is consistent with the needs of 21st century workplaces.

There is about 12 months to go before the Federal election is due and we cannot afford another wasted year. This year should be used to deliver some worthwhile workplace relations changes, through legislative amendments and several other means, whilst

educating the community about why more comprehensive, structural changes need to be implemented during the next term of Government.

Today I want to map out what the Australian Industry Group believes the Government should be doing over the next 12 months to deliver a more productive, flexible and fair workplace relations system.

But, before turning to workplace relations, it is worth reflecting on some of the broader challenges which Australia is facing, and some of the workplace trends that will require different workplace relations approaches.

Challenges facing Australian businesses and their employees

The Australian economy is facing a range of important challenges and it has before it profound opportunities. We have a lot to lose by not addressing the challenges and we have a lot to gain by positioning ourselves to make the most of our opportunities.

The economy is currently undergoing fundamental restructuring and, while they are quite well understood, it is worth listing the main drivers at work.

Most fundamentally, the global economy is undergoing a seismic shift as the populous economies of China, India and Indonesia among others have embarked or are embarking on their processes of industrialisation. This is profoundly disruptive and is throwing down competitive challenges to existing centres of production.

It also presents its share of opportunities of course. Australia as a large, low-cost supplier of key inputs to industrialisation – particularly energy, coking coal and iron ore – was an early beneficiary of the opportunities. Many more opportunities are also flowing from the increase in per capita income among the populations in the emergent economies.

In a very real sense both the challenges and the opportunities are only just beginning.

The pace of technological development is similarly a mix of challenges and opportunities. In the words of the new PM we need to be agile and ready to adapt. He takes it a step further and urges us to embrace disruption. Technological change has far-reaching implications for our workplaces. In many senses the implications are most far reaching if we don't embrace disruption.

Demographic developments present other challenges. We are set on a course of demographic change that is seeing a steady increase in the proportion of older people. In many countries, workforces have stopped growing. This sets up well-known changes both for public finances – who will pay the taxes? – and for the future direction of per capita living standards. This is of course a global challenge and is putting more pressure on finding new sources of productivity growth.

Turning from the underlying global drivers of the changes in our economy, we can add in a few home-grown ones.

The strength and extent of the mining investment boom and the now-reversing surge in commodity prices that were such dominant forces over the past decade have changed our economy much more significantly than is often credited.

The associated lift in the value of our currency did more than make overseas holidays cheaper for a while – it substantially weakened significant parts of the domestic economy.

It reduced their capacity to invest and innovate and it meant that segments of industry were simply unable to compete. As a result we have lost or are losing some industries – automotive assembly is a case in point. Others are much, much weaker – the primary metals sector for instance.

For some supply chains there are now missing links: lost capabilities. Some of these are irreversible.

This is in large part why we are finding the current period one in which non-mining sources of growth are thin on the ground. Or at least not thin enough on the ground to make up for the decline in mining investment and the retreat of commodity prices.

We have quite a bit of recovery to do and many of these industries remain cash strapped.

In addition to the lost capabilities, our costs structures have also shifted. While wages growth has been relatively low in the past couple of years, for most of the past decade – at least, our wages were growing faster than those in other countries. That sounds like a positive and of course to an extent it was. The bad news is that over the same period our productivity growth was poor – we were positioning ourselves behind the eight-ball. Now we need to find a way out.

And it was not just labour costs. Our energy costs also rose substantially over the opening decade and a half since the turn of the century. What was once a source of comparative advantage, has now been negated.

These global and domestic factors mean that we need now to play our way back into the game.

We need to lift our competitiveness and in particular we need to raise productivity. There are roles for governments in all of this but a very large share falls on individual workplaces and on the changes that can be made to re-establish competitive performance.

Leading the community debate

Since the Howard Government was defeated in the 2007 election, the Coalition has adopted a far too cautious approach in the community debate about workplace relations.

While there is an important role for industry groups in the debate, Governments have a lot more resources and can command a lot more media attention than other parties.

The unions will have the incentive to keep going with their repetitious WorkChoices slogans, like some kind of a tiresome parrot, for so long as the Federal Government responds by being intimidated into taking a back seat in the community debate.

The Government needs to get on the front foot in the community debate. The obvious reality is that Australia needs a workplace relations system that is consistent with the needs of 21st century workplaces.

What are those needs? Flexibility and change management above all. Many of the trends that will reshape the workplace of the future are already apparent. Here are three.

First, the ‘sharing economy’ is a new way of organising production, consumption and the use of assets, enabled by cheap computing and ubiquitous communications.

Services like Uber and Airbnb create huge efficiencies and new possibilities. They also create working arrangements that don't necessarily fit into old categories of employment. The law is going to have to catch up and meet the needs of service providers and customers.

Second, automation is going to move well beyond the factory floor to shake up an ever wider set of activities, including many personal and professional services.

Some kinds of jobs will disappear, but many more will transform as workers shift focus to managing machines and programs to augment and increase their total productivity. The law is going to have to support constant evolution in the nature of jobs and the reskilling and redeployment of workers necessitated by automation.

Third, the ageing of our population will put a premium on workplace flexibility. An increase in the ratio of dependents to workers will require increased productivity to maintain prosperity; retaining older Australians in the workforce for longer, with arrangements that suit their changing capabilities and needs, will be essential.

In all three of these areas, our workplace relations system will need to provide flexibility to meet needs that evolve ever faster, and help businesses and workers navigate that change effectively.

In short, we need an agile workplace relations system that can rapidly respond to changes in markets, the economy, technology and demographics.

There is a key role in such a workplace relations system for some of the measures in the Draft Report of the Productivity Commission's Inquiry into the Workplace Relations System, including:

- An expanded role for Individual Flexibility Arrangements (IFAs);
- The introduction of Enterprise Contracts – a new agreement-making option;
- A reduction of emphasis on procedural aspects under the unfair dismissal and agreement making laws;
- Preventing collective agreements restricting the use of IFAs, contractors, labour hire and casuals; and
- Reducing Sunday penalty rates in certain industries where Sunday is a day of high customer demand and a standard working day, e.g. fast food, retail, hospitality, restaurants and entertainment.

There is no role in such a workplace relations system for the abuses of union power that the Heydon Royal Commission has uncovered. Unions have a legitimate role in representing their members but there is no role for coercion of companies to fund trade unions.

Unions should be funded by their own members. Funding of unions by employers is wracked by conflicts of interests, including conflicts between unions and their members.

No-one is stopping unions developing products and services and freely offering those in the market to anyone who may wish to purchase them. However, the workplace relations system should not be misused by trade unions to coerce companies to fund their operations through:

- Coercion to contribute to redundancy, training and other funds which were purportedly established to provide benefits to employees, but which nowadays often deliver vast revenue streams to unions; and
- Coercion to buy particular sub-standard income protection insurance products at grossly inflated prices offered by insurance companies which pay huge commissions to unions.

Again these arrangements are wracked with conflicts of interest.

When employers contribute to particular funds, union members are entitled to expect that the benefits go to them, not to union head offices.

This is often not the case for a large portion of the funds contributed.

Also, when a union insists that an employer must purchase income protection insurance through a particular insurance provider, a union member is entitled to expect that the product compares favourably with other products in the market in terms of benefits to the employees.

This is often not the case.

Further, a union member is entitled to expect that money paid by their employer will be used to provide benefits to them, rather than a large portion of it being transferred to union head offices in the form of commissions.

An increased focus on these practices in the community debate would be worthwhile. Surely there can be no valid justification for allowing these arrangements to continue.

Hopefully, over the coming months Prime Minister Turnbull and Employment Minister Cash will lay out a vision for the workplace relations system that 21st century workplaces need, and hopefully they will play a leading role in convincing the community to support those changes.

The Productivity Commission Inquiry and the Heydon Royal Commission have already generated a vast amount of relevant material to inform the community debate, and much more of course will be included in the final reports.

Industry groups have an important role to play but they cannot be left by the Government to do all the heavy lifting. A productive, flexible and fair workplace relations system benefits the whole community and hence the Government has a legitimate leading role. For example, the workplace relations system:

- Has a direct impact on the amount of taxation paid by companies and workers;

- Has a direct impact on the amount of unemployment benefits paid to workers without jobs; and
- Facilitates the successful implementation of many important Government policies and programs in areas such as: lifting skill-levels, enabling new technologies, encouraging innovation, and encouraging investment.

Negotiating with the Crossbench Senators on existing legislation

An informed community debate about workplace relations, with the Government taking a leading role, would increase the likelihood of gaining the support of key Crossbench Senators for the workplace relations bills that are before Parliament.

The Government has introduced a number of workplace relations Bills into Parliament during this term. Each of them contains relatively modest reforms, all of which were spelt out in detail in the policies that the Coalition released ahead of the last Federal Election. Unfortunately, the Bills are being blocked in the Senate by Labor, the Greens and the Crossbenchers.

Given the evidence before the Heydon Royal Commission, it is very hard to understand why the Government's *Building and Construction Industry (Improving Productivity) Bill 2013*, which would re-establish the Australian Building and Construction Commission with all of its former powers, was voted down last month.

It is also hard to see why most of the Crossbench Senators do not appear to support many of the measures in the *Fair Work Amendment Bill 2014*. Most of the measures in the Bill were recommended by the 2012 Fair Work Act Review. The IFA changes are in this category; they would benefit employers and employees.

The Government needs to maintain good lines of communication with all of the Crossbench Senators and make a concerted endeavour to reach agreement with them on the passage of the workplace relations bills that are before Parliament.

A more informed community debate would reduce the ability for the unions to spread misinformation about legislative reform proposals, and this in turn would make it easier for agreement to be reached.

Introduction of new legislation

Given the commitments that the Coalition made ahead of the last Federal election, it appears that the Government does not intend to make any amendments to the *Fair Work Act* in this term, beyond those measures in the Bills which have been introduced into Parliament.

Notwithstanding this, some changes that would have a positive impact on the workplace relations environment are not within the scope of pre-election commitments, and are appropriately implemented during this term of Government through amendments to relevant legislation.

Some of the recommendations of the Competition Policy Review (Harper Review) fall into this category, including the recommendations relating to:

- Increased enforcement action regarding secondary boycotts by unions;
- Higher penalties for secondary boycotts; and
- Amending sections 45E and 45EA of the *Competition and Consumer Act 2010* to deal with enterprise agreement and award provisions that impede supply or acquisition, including clauses which impose restrictions on the engagement of contractors.

Legislation implementing the above changes should be introduced into Parliament without delay.

Participation in key FWC test cases

In the pre-*Fair Work* era, major test cases in the Industrial Commission came along every few years and they typically continued for about two years. In this era, the Federal Government typically played a major role in the test cases with Government advocates giving lengthy submissions, and assembling detailed evidence.

These days, test cases in the FWC are pursued as part of the 4 Yearly Reviews of Awards. During the current Review, a large number of test cases are underway with huge risks for industry in terms of potential significant cost increases and the loss of vital flexibility. The test case claims that are currently being pursued by the unions include:

- Giving casuals an absolute right to convert to full-time employment;
- Preventing employers hiring new staff unless additional hours are offered to, and refused by, existing casual and part-time staff;
- Four hour minimum engagement periods for casuals and part-time employees, even though in many industries this is inconsistent with current work patterns and would cause major problems;
- 10 days domestic violence leave, per employee, per year;
- Two days antenatal leave, per employee, per year;
- An absolute right to part-time employment for employees returning from parental leave;
- Widely expanded accident make up pay entitlements; and
- Giving employees a right to a day off for each public holiday, even if the holiday does not fall on a work day.

The 4 Yearly Review has been underway for over 18 months with at least another 18 months to run. So far, the Federal Government has chosen to play a very minor role.

A different approach from the Government is needed. The Government can and should play an important role in assembling evidence and pursuing arguments to convince the FWC that the unions' claims, if granted, would be extremely damaging for the community.

Ai Group is devoting vast resources to the 4 Yearly Review to protect the interests of employers and the broader community but the Government's increased involvement is extremely important.

Participation in Court cases

A similar situation exists regarding Government participation in major workplace relations cases in the Courts.

Achieving and maintaining a productive, flexible and fair workplace relations system is not simply a matter of the implementing legislation, it involves taking the necessary steps to ensure that legislation is interpreted in a productive, flexible and legally correct manner.

In the past, Federal Governments of all political persuasions have regularly intervened in important workplace relations test cases in the Courts to ensure that laws are interpreted correctly.

The current Federal Government has, so far, intervened far less frequently than previous Governments. Over the past few years we have seen a number of court decisions which have interpreted the *Fair Work Act* in a problematic manner for employers.

The Federal Governments needs to increase its involvement in this area to protect the community's interests.

Regulation making powers

While new legislation can be blocked in Parliament, most existing Acts of Parliament give the Government the power to make regulations and other instruments to give effect to the legislation.

While regulations can be disallowed by Parliament, this has occurred relatively rarely in the past.

So far, during this term of Government, the Federal Government has used its regulation-making powers very sparingly in workplace relations areas.

One change that would be very beneficial would be amendments to the *Building Code 2013* to ensure more productive enterprise agreement content and site practices in the construction industry, consistent with arrangements that were in operation for several years following the Cole Royal Commission into the Building and Construction Industry.

There are many other important areas where the Government could ensure that relevant legislation is given effect to in a flexible and productive manner, through the making of regulations and other legislative instruments.

Conclusion

Today, I have argued for the Government to put the approach of the recent past behind it and take a new approach to workplace relations reform.

TIME FOR THE GOVERNMENT TO CHANGE TACK ON WORKPLACE RELATIONS

Prime Minister Turnbull and Minister Cash are well positioned to take a leading role in the upcoming community debate about the shape of Australia's workplace relations system.

Two major inquiries into workplace relations matters will shortly deliver their findings and it is important that the Government get on the front foot quickly. It is not sustainable, nor in the community's interests, for the Government to take a back seat in the debate about the future shape of Australia's workplace relations system.