SPEECH

Australia needs a sophisticated workplace relations public policy debate – one based on the facts

Innes Willox, Chief Executive, Australian Industry Group
Speech to the Brisbane Club Workplace Relations Special Interest Group
10 April 2018

Three years ago, when I last spoke at the Brisbane Club, the first line of my speech was *"The past six years have been a very frustrating time for employers with regard to workplace relations".* I highlighted the numerous increases in union power and reductions in employer flexibility that resulted from the introduction of the *Fair Work Act* in 2009, and the changes made to the Act over the following few years that tipped the scales even more in favour of unions.

At the time, no changes of benefit to employers had been made to the Act but at least there was the prospect of some positive workplace relations changes flowing from the Productivity Commission inquiry into the workplace relations framework that was then underway. Do you remember that inquiry? Unfortunately, here we are three years later and the Commission's report gathers dust.

Perhaps I should have been a little more up-beat three years ago given the current dismal state of Australia's public policy debate about workplace relations, and how much more frustrated employers have become about the lack of action from our Parliamentarians on changes to drive increased productivity and competitiveness. After all, standing still means that you are really going backwards as the world around us pushes on.

In the current public policy debate, too often, facts are ignored. Today I want to focus on the facts that demonstrate why a few key positive changes should be made to Australia's workplace relations laws and why the unions' arguments for sweeping changes to benefit themselves, must be rejected.

The ACTU's latest proposed changes to the *Fair Work Act* are obviously self-serving, aimed at shoring up the union movement's declining membership, but the changes are not in the community's interests. They will do nothing to facilitate improved productivity and competitiveness which, in turn, will facilitate increased employment levels and higher paid jobs. That is what we all want and need, after all.

The ACTU want us all to believe that giving unions more power to organise strikes and to force employers to cave in to their job-killing destructive demands is just the medicine that the community and our economy needs. Their arguments, many of which appear to be unresearched, naïve, and purely attention seeking are, more often than not, breathtakingly simplistic, and just plain wrong.

The reality is that we live in an increasingly connected world where Australian businesses, large and small, need to remain productive, efficient and globally competitive in order to survive and grow. The success of workers is integrally connected to the success of their employers. More secure jobs and higher wages can only be offered by businesses that are successful.

Australia deserves a sophisticated public policy debate about the shape of our workplace relations system, based on facts, not on deliberate distortions and mistruths. There is too much at stake.

The need for Australia to maintain a flexible labour market

As background to these points, I would like to take a few minutes to talk about our national economy.

I think we all know that Australia has not had a recession since 1991 and that just under a year ago we broke the record for the longest run of uninterrupted growth by a western economy. We broke the previous record of 103 quarters held by The Netherlands.

Without doubt, luck has played its role in our recession-free run. The rivers of iron ore revenue from China were certainly flowing at a convenient time in the years after the GFC for instance.

But luck did not stop us having recessions – and worse – in earlier times. It did not stop us overheating and contracting during various episodes of Dutch disease. And it has not been simply good luck that we have avoided the most chronic version of Dutch disease - the so-called “mining curse”.

Our economy has held its head above the troubled waters of the Asian financial crisis, the dotcom bubble and bust, the GFC and the recent mining boom and its end. It has done so in the midst of one of the largest-ever transformations in the global economy – the emergence of China.

It is true that the rise of China has brought more than our share of opportunities. But it has also brought exchange rate movements that have forced some very painful adjustments on our economy and in particular in our industrial sector.

We can be proud that we have weathered these intense pressures without recession. But what does that really mean? Let me give you some idea:

- At the end of 1981, Australia's unemployment rate was 6 per cent. The recession of the early 1980s took it to 10.3 per cent a mere 18 months later.

- The unemployment rate did not return to 6 per cent until the end of 1989. So, while it only took 18 months to go from 6 to 10 per cent it took 78 months to get back down to 6 per cent.

- And from the level of 6 per cent at the end of 1989 - 34 months later - unemployment was as high as 11 per cent.

- And this time it was not until August 2000, some 96 months later, that it returned to 6 per cent again.

We can view the recessions we avoided as some sort of abstract achievement. But it is an achievement with a very human face. We avoided the costs to individuals and families of the protracted periods of unemployment that start during and then follow recessions. I don't think that any of us who have experienced the impacts of prolonged unemployment close-up will question the depths of these human costs.

And how have we avoided these costs? We have done so by being flexible. The key pillars of these reforms were our floating exchange rate; our openness to trade; National Competition Policy; our liberalised yet prudently-supervised financial markets; and the flexibilities of enterprise-based bargaining over wages and conditions and the winding back of centralised wage fixing.

To its great credit, it was Australia's trade union movement that provided some of the nation's most influential leaders of this direction. I'm talking of course of Bob Hawke and Bill Kelty who were great leaders of the union movement. Paul Keating also worked for a trade union in his young days.

Ironically, many of today's union leaders have turned their back on these achievements. Of course, this is pure opportunism and perhaps sadly they are seduced by the siren song of class-warfare rhetoric rather than seeking to be constructive in the national interest. And perhaps most sadly of all, they are prepared to junk some of the most profound achievements of their own movement.

If it all was just an ideological tit for tat, then who would care? But that is not all there is to it.

There is now talk from a range of union leaders of winding back the very structural changes that have made us flexible, adaptable and resilient. That have underpinned the foundations of our economic success since that recession of the early 1980s.

We need to retain and improve upon the flexibilities that have served us so well. If we do:

- we will be in a much better position to adapt to and benefit from the considerable opportunities emerging around us; and

- we will be in a much better position to navigate our way around the equally considerable challenges that could plunge us into recession with its all-too-real human costs.

A few key changes are needed to Australia's workplace relations system

A few key changes are needed to the *Fair Work Act* to support increased productivity and competitiveness but there is no current need to completely redraft the Act:

- **First**, the Fair Work Commission needs to be given more discretion to overlook minor procedural defects in enterprise agreement approval applications. This change is included in the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* which is currently before Parliament. Labor claims to support the Bill yet every time the Bill is brought on for debate Labor uses this as a means of attacking the Government about the Fair Work Commission's *Penalty Rate Decision*. The political tactics need to end and the Bill needs to be passed. Numerous enterprise agreements are being needlessly rejected by the Fair Work Commission at great cost to employers and employees.

- **Second**, current major problems with the Better Off Overall Test for enterprise agreements need to be fixed by amending the Act to require that the test is applied by the Fair Work Commission to logical groups of employees, and not individual employees, consistent with the recommendations of the Productivity Commission Inquiry into the Workplace Relations Framework. The decision of the Fair Work Commission in the *Coles*[1] case has made enterprise agreement-making unworkable for many large businesses which employ workers under a myriad of different roster arrangements; rosters which are heavily based on the needs and preferences of individual employees.

- **Third**, the transfer of business laws need to be amended because they are impeding businesses from restructuring to remain competitive, and are reducing job opportunities for workers.

- **Fourth**, the "permitted matters" for bargaining claims and enterprise agreement content need to be tightened, including outlawing enterprise agreement clauses that restrict the engagement of contractors.

- **Fifth**, the *Fair Work Act* needs to be amended to prevent enterprise agreements requiring that employers make contributions to worker entitlement funds that do not have appropriate standards of governance. This would be achieved through the enactment of the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017*. The Bill would implement long overdue governance standards for worker entitlement funds (e.g. construction and electrical contracting industry redundancy funds) which currently hold over $2 billion in workers' entitlements. Surely, no-one

[1] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd* [2016] FWCFB 2887.

could legitimately disagree that these funds should be required to adhere to high standards of governance to ensure that workers' entitlements are protected. It is not right that a substantial proportion of the investment earnings on employer contributions to many of these funds are being diverted to unions.

These five modest and sensible changes to the *Fair Work Act* would boost productivity and competitiveness, whilst preserving fairness for employees and employers.

At the present time, the only party that is arguing for sweeping changes to the *Fair Work Act* is the ACTU, which is counter-intuitive when the Act already tips the balance heavily in favour of unions, not employers. The ACTU has obviously decided not to let the facts get in the way of their arguments.

The ACTU's attempts to re-imagine the past

The ACTU is currently trying to convince us all that Labor's *Fair Work Act* is unfair to unions and workers. This is despite the fact that the Act boosted union power and employee entitlements in a very large number of areas. Here are just a few of many examples of increases to union power and worker entitlements that resulted from the introduction of the *Fair Work Act*:

1. An expansion in the coverage of the unfair dismissal laws.
2. The abolition of Australian Workplace Agreements.
3. An expansion in the legislated minimum standards, now known as the National Employment Standards.
4. An expansion in union rights of entry.
5. An expansion in the industrial action rights of unions and employees.
6. A reduction in the lockout rights of employers.
7. The replacement of the previous voluntary bargaining system with a system where employers are forced to bargain if a majority of their employees want a collective agreement. The new system gives unions a lot of powers that they did not previously have, for example, access to bargaining orders and scope orders, and the deeming of unions to be bargaining representatives for their members.
8. An expansion in the allowable matters for awards, with a consequent expansion in the rights of unions and employees.
9. An expansion in the permitted matters for enterprise agreements and a reduction in the unlawful terms, with a consequent expansion in the rights of unions and employees.

10. An expansion in the powers of the Fair Work Commission to deal with disputes and impose outcomes on businesses, with consequent expanded rights for unions and employees.

11. The introduction of the General Protections which have given unions and employees a lot more rights, and taken away many employer discretions.

12. The imposition of many new transfer of business restrictions, with a consequent expansion in the rights of unions and employees.

Given the one-sided direction of the changes introduced, not surprisingly Labor's *Fair Work Act* was widely criticised by employers and widely applauded by unions.

After the Act was introduced in 2009, a series of amendments were made by the Labor Government in 2012 and 2013 that tipped the balance even further in favour of unions and workers, including expanding right of entry laws, imposing more restrictions on transfer of business and increasing entitlements under the National Employment Standards.

To date, the Coalition Government has not pursued substantial amendments to the Act to restore a more appropriate balance. The most significant amendments that have been made since the Coalition Government was elected are the Vulnerable Worker reforms. These amendments increased maximum penalties for employer breaches of awards and record-keeping requirements by up to 20 times and introduced many new obligations upon employers.

The ACTU's attempts to re-imagine the past and discredit the *Fair Work Act* need to be seen for what they are – a push for even more union power at the community's expense.

The ACTU's proposed changes need to be rejected

The ACTU has recently proposed so many ill-conceived changes to the *Fair Work Act* that it is difficult to know where to start in addressing them. I will deal with just five of them today but similar points could be made about numerous other proposals that the unions have floated.

Their arguments in support of the changes are not backed up by the facts.

1. Defining casual employment in the *Fair Work Act*, based upon an employee's pattern of work

The ACTU wants the *Fair Work Act* changed to define casual employment in a very narrow way based on an employee's pattern of work. Under its proposal, people who work regular hours could not be employed on a casual basis. The ACTU is arguing that *"it is essential to limit casual employment to very exceptional circumstances that are of a temporary nature"*.

Currently there isn't a definition of casual employment in the Act, but the standard definition of casual employment in awards is *"an employee engaged as a casual and paid as a casual".* This sensible and clear definition has been the same for decades. It provides clarity and certainty for all parties. If a person is engaged as a casual and paid the 25 per cent casual loading, then the person is a casual.

The alleged basis for the ACTU's proposal is their assertion that the workforce is increasingly being "casualised". This is simply not true. 20 years ago, in 1998, 20 per cent of the workforce was engaged casually. Today, 20 per cent of the workforce is engaged casually. Throughout the whole of the past 20-year period, the level of casual employment has been about 20 per cent of the workforce. These are the ABS statistics.

The ACTU's proposal for a definition of casual employment based on an employee's pattern of work would be recipe for huge risks and uncertainty for employers, and widespread job losses for employees. Any employer with a casual employee would be exposed to back-pay claims for annual leave, sick leave and so on if the employee has worked regular hours for a period.

These days casuals often work regular hours for lengthy periods and this is often the preference of the employee. This is the reason why the *Fair Work Act* gives casuals who have worked regularly for a particular period the right to take unpaid parental leave and to request flexible work arrangements, as well as the right to make an unfair dismissal claim. Also, State long service leave laws give casuals who have worked regularly for a lengthy period a right to long service leave.

Under standard award clauses, casual employees have the right to request to convert to permanent employment after 6 or 12 months of regular employment. An employer can only refuse an employee's conversion request on reasonable business grounds. Casual conversion clauses were devised by the Commission in recognition of the fact that a large number of employees prefer to work casually and have no desire to convert to permanent employment. Only a very small proportion of employees who are offered the opportunity by their employer to convert, choose to do so. They either don't want to lose the flexibility that casual employment offers or they don't want to lose the 25 per cent casual loading, or both.

The ACTU's arguments in support of a narrow definition of casual employment, as well as their arguments to remove an employer's right of reasonable refusal, were recently rejected by a Full Bench of the Fair Work Commission in the major *Casual Employment Case*. In this case, which continued for over two years, the Commission decided that the ACTU's claims would impose unreasonable restrictions on businesses and would potentially lead to widespread job losses.

2. Regulating "gig economy" workers

The ACTU is arguing that the "gig economy" justifies new labour laws.

It is true that the nature of work is changing in the Australian and global economies as new technologies and new ways of working evolve. However, the number of people who carry out work through Uber, Airtasker, Foodora and other "gig economy" businesses is a tiny fraction of the workforce – much less than 1 per cent.

Also, over the years ahead, the current wave of digitalisation technologies is likely to prove to be no different to previous technological transitions. While it will generate some disruption, if accompanied with appropriate investments in the development of workforce skills and management capabilities and if the process of adaptation is not constrained by excessive regulation, it will bring far greater rewards, considerable opportunities and benefits to the broader community in the longer term, in the form of higher standards of living, more challenging jobs, higher incomes and greater productivity.

The ACTU is opportunistically using the public policy debate about the future of work as a vehicle to argue for more restrictions to be imposed on all businesses (not just "gig economy" business), including:

- Limiting casual employment to exceptional circumstances;
- Giving unions more power in enterprise bargaining;
- Introducing a national portable leave scheme.

I have dealt with the first of these proposals and I will deal with the enterprise bargaining issues shortly. The other one, the introduction of a portable leave scheme across all industries has no merit.

Portable leave schemes are typically funded by a hefty levy on businesses.

In a recent submission to a Senate inquiry into the concept of portable long service leave, the Australian Industry Group demonstrated that portable long service leave schemes are typically four times as expensive as traditional long service leave arrangements.

Any portable leave scheme covering annual leave, personal/carer's leave and long service leave would most likely require a levy in excess of 10% of payroll costs. This levy would operate as a tax on employment and would undoubtedly reduce employment levels and the competitiveness of Australian companies.

3. Lifting the minimum wage to 60 per cent of median earnings

The ACTU wants the national minimum wage lifted to 60 per cent of median earnings. This would result in an even bigger increase than the $50 a week or 7.2 per cent increase proposed by the ACTU in this year's Annual Wage Review – an increase nearly four times the rate of inflation.

Australia already has the second highest national minimum wage in the world, just behind France. If the ACTU's proposal was accepted, we would without doubt have the highest minimum wage in the world. Of course, given our system of industry and occupational

awards (which no other country in the world has anything like), Australia has thousands of legally enforceable minimum wage rates that are even higher than the national minimum wage.

As a medium-sized country with an open economy, Australia cannot afford to be uncompetitive in the global marketplace. Australia needs investment if jobs are to be created and living standards are to be improved.

In last year's Annual Wage Review, the unions tried to convince the Fair Work Commission to implement a target of 60 per cent of median earnings for the national minimum wage, but this was rejected by the Commission. The ACTU, yet again, wants the *Fair Work Act* changed to overturn sensible decisions that have been made by the Commission in the community's interests.

Legislating to take away the role of the Fair Work Commission in deciding what is a fair and sustainable minimum wage increase in each Annual Wage Review and dictating that it must be at least 60 per cent of median wages makes a mockery of the idea of having an independent umpire.

The ACTU's proposal is a recipe for inflicting harm on businesses, damage to the economy and destroying employment prospects for low paid workers.

4. Giving unions the ability to bargain across industries and supply chains

The ACTU wants the unions to have the ability to bargain across whole industries and supply chains, including the right to take industrial action.

If the ACTU got its way, unions would be able to make unreasonable claims and potentially cripple whole industries and supply chains until employers capitulated. We would see a return to the bad old days of the 1960s and 70s when industrial action was rife and Australia had a reputation internationally as an unreliable supplier of goods and services. However, unlike the 60s and 70s when Australian industry was propped up by high tariffs, Australia now has a very open economy, the world has become far more connected, and global supply chains are the norm. Gaining a reputation as an unreliable supplier would be a blueprint for multinational companies stopping their investment in Australia with consequent job losses and economic hardship.

The right to strike at the industry or supply chain levels has never been part of the Australian system, and it must never become part of it.

Since 1993 when enterprise bargaining was first introduced by the Keating Labor Government, the federal workplace relations legislation has recognised the importance of bargaining taking place at the enterprise level and of the economic problems that flow from centralised outcomes.

The only party that would benefit from the ACTU's bargaining proposals are the unions. The proposal would be very harmful for businesses, workers and the broader community.

5. Restricting the ability of employers to apply to the Fair Work Commission to terminate expired enterprise agreements

Both the ACTU and the Opposition have floated proposals to restrict the ability of employers to terminate expired enterprise agreements.

According to the Fair Work Commission's annual reports, there were exactly 400 applications to terminate an expired enterprise agreement in the last financial year and 403 in the previous financial year. These figures include applications made by employers to terminate agreements, as well as applications made by unions and employees. All of the decisions are readily available on the Fair Work Commission's website.

The Commission's own analysis of the decisions highlights that less than 3 per cent of the applications were opposed. This tiny 3 per cent figure includes applications made by unions that were opposed by the employer and applications made by an employer that were opposed by a union.

The facts show that:

- Only a miniscule number of the applications that have been made to terminate enterprise agreements were contested by one of the parties. A large proportion of the applications relate to enterprise agreements that apply to particular projects or operations that have ended and where there are no longer any workers employed under the agreement.

- The assertion that employers are applying to terminate expired enterprise agreements left, right and centre is simply not true.

There have only been a handful of cases over the last few years where an enterprise agreement has been terminated in response to an employer application which has been vigorously contested by unions (e.g. the Aurizon, Griffin Coal, Peabody, AGL and Murdoch University cases). In each case, the application was made by the employer after a lengthy period of bargaining and the Fair Work Commission was convinced that it would not be contrary to the public interest to terminate the agreement. Compelling circumstances were present in each case, for example, in a few of the cases the enterprise agreement gave the employer no ability to implement redundancies other than for volunteers. In most cases, the employer decided not to reduce the pay of the employees covered by the agreement that was terminated; the key issue was typically the employer's need for more flexibility to be competitive in the market, not cost reductions.

The ACTU's proposal is blatantly one-sided because it only wants to take away an employer's right to apply to terminate an expired enterprise agreement, not the right of a union or employees to apply for termination.

Conclusion

I have mentioned just five of the ACTU's proposed changes to the *Fair Work Act* today. There are so many other fanciful proposals that the ACTU is currently pursuing.

As I said earlier, Australia deserves a sophisticated public policy debate about the shape of our workplace relations system.

The debate needs to be based on facts, not on deliberate distortions and mistruths.

The unions are trying to convince us all that their retrograde, self-serving proposals are just what the community needs. Sensible people know that Australian businesses need to be productive and competitive if they are to continue to employ people and to offer generous wages and conditions.

Sensible people know too that if the regulatory environment in Australia is not conducive to doing business, many more businesses will move their operations off-shore or shut up shop altogether. This would result in rising unemployment and falling living standards.

Sensible people also realise that in contemporary workplaces flexibility and agility are critical, and that these benefit both employers and employees.

Let's hope that our Parliamentarians are, in fact, sensible people. Hopefully, over the period ahead we will see positive changes to our workplace relations system to support improvements in productivity and competitiveness, and that claims to impose greater rigidity in our workplaces, jack up wages to unsustainable levels and to give unions unfettered rights across supply chains will be rejected as economically unsustainable.

It is very important for our national economy, individual workplaces and individual employees that the retrograde, self-serving proposals of the ACTU never see the light of day. The proposals are obviously designed to create a utopian environment for militant unions, large and small, but they are not in the interests of the rest of the community including the workers they claim to represent.