The Government's Industrial Relations Agenda

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Introduction

The Australian Government is part way through the implementation of a significant workplace relations legislative agenda. Some who are misguided call it reform. Others would call it retrograde changes that are having a chilling effect on Australian industry.

The changes that have been introduced since the last federal election, coupled with those that are currently under development, represent the most profound and radical alterations to our system since the previous Labor Government implemented the Fair Work Act in 2009.

This comes at a time when our national economy is slowing, if not contracting.

It comes at a time when inflation remains high and sticky.

It comes at a time when unemployment and underemployment are creeping up and are expected to rise further as businesses adapt to increasingly worsening conditions.

It comes at a time when interest rates have had their steepest ever recorded rise in response to high inflation with households and businesses already feeling significant pain and with more increases and pain likely to come.

It comes at a time when business closures are rising and new business registrations are more than 20 per cent down on a year ago.

It comes at a time when the Fair Work Commission has just increased the minimum wage by 5.75 per cent, the second increase in a row way out of balance with both what business can bear and how our economy is faring.

It comes at a time when labor and skills shortages are holding back our progress and industry is more and more looking at automation, robotics and new technology such as artificial intelligence to drive much needed productivity growth. Just imagine for one of many examples the efficiencies AI will bring to inventory control and warehousing.

It comes at a time when building productivity at a business level should be a national priority but the appetite to build that sustainable growth seems to have waned. Productivity is a word that seems to have disappeared from the political lexicon. It is certainly not mentioned as a rationale for changes now being contemplated.

While a policy to strangle business growth and innovation and the employment that is created is never a good one, to implement such an approach at a time of immense and increasing economic stress I have to say borders on the reckless.

In my comments today, I want to talk about the risks inherent in the IR measures the Government has already taken and the directions in which it appears to be headed.

In particular, I will focus on the following areas:

- Changes to bargaining laws
- Same Job Same Pay
- Changes to casual employment
- Regulation of contracting arrangements, including:
    - Regulation of the gig sector
    - Further regulation of the road transport industry
    - Unfair contracts jurisdiction

Before zeroing in on these IR changes and potential changes, as well as the risks they carry, I want to just briefly set out the scale and nature of the task facing our national economy and the important need to lift the productivity and adaptability of our workplaces if these challenges are to be met.

The scale and nature of the task facing our national economy

Let's just look at one challenge – meeting a target of net zero emissions by 2050. This will require:

- extraordinary changes to the way we produce energy and the nature of passenger and freight transport;
- weaning ourselves away from emissions-intensive production;
- developing new industries, production technologies, processes, and markets; and
- reengineering our buildings.

We have embarked on these transformations at a time when our population is ageing; our rate of productivity growth has tanked; other environmental challenges loom; and, as we are adapting to ongoing technological changes. All this at a time riddled with considerable geopolitical uncertainties.

It is difficult to overstate the extent of these challenges. They are not insurmountable, but they require a coordinated major national focus and effort. It's an effort that requires that we work smarter, that we become more productive and that we have the flexibility to adapt.

That is why, even to meet the climate and energy challenge, our approach to workplace relations is crucial.

But when we look at the Government's agenda it seems instead it is asking Australia's employers to play their role with one hand tied behind their back.

There are several examples of this.

1. **Changes to our bargaining laws**

The first area covers the changes to our bargaining laws introduced late last year through the *Secure Jobs Better Pay* amendments to the *Fair Work Act* after the laughable claim of consensus at the Jobs and Skills Summit and a shambolic consultation process thereafter.

There was common concern among all parties that we had seen declining levels of bargaining following the introduction of Labor's *Fair Work Act*.

To revive enterprise level bargaining to continue to unlock productivity improvements and better outcomes for all parties was a laudable objective.

To achieve this, we needed sensible amendments to address the minefield of technicalities that had swamped the system and made employers increasingly averse to engaging in enterprise level bargaining.

However, rather than empowering employees and employers to determine the arrangements that best suit their diverse needs, the Government has implemented changes that represent a radical shift towards a more centralised system. A more 1970s-like system totally at odds with the more diverse and hopefully more complex economy that we aspire to be.

The changes incorporate a level of intervention in the setting of terms and conditions by an industrial tribunal that we thought we had long left behind us.

I point to both the potentially chaotic expansion of multi-employer bargaining and, crucially, the much greater capacity given to the Far Work Commission to intervene in bargaining to set the terms of agreement through an arbitrated outcome when bargaining becomes intractable.

This second aspect of the changes has received far less media attention but has the potential to profoundly impact on our workplace relations system over time.

Instead of removing barriers to enterprise level bargaining, the changes have handed unions much greater power to drag employers into bargaining at the industry level, or to rope employers into coverage of agreements that they never agreed to.

Industry concern about these retrograde steps has already been proven not to be alarmist.

Only days after the commencement of the new laws, unions filed an application seeking to bargain for an agreement setting standard terms and conditions for a large cohort of employers in part of the childcare sector. A key union has already indicated that it hopes to use the machinery of the new laws to flow these terms and conditions on across the sector.

Put simply, the changes pose a severe risk to to genuine enterprise bargaining that had previously been championed over decades by the Labor Party while in government and opposition.

2. Same Job Same Pay

The second area I want to call out is the same job same pay policy now under development. You may have, by now, heard of this policy.

The Department of Employment & Workplace Relation's Consultation Paper describes the proposal as "ensuring that labour hire workers are paid at least the same as directly engaged employees doing the same work".

The full details of this broad policy objective are yet to be revealed. Discussions continue. For employers, this is like wrestling with smoke. What is same job? What is same pay? The department is understandably struggling with those basic concepts let alone the detail.

The proposal isn't closing some undefined loophole, as the Government suggests. Instead, it looks to unfairly move the goal posts on business and to deliver on a longstanding union claim which would straight jacket businesses, substantially reduce necessary flexibility and, in the end, be a massive disincentive to employing Australians.

The proposal has caused massive alarm among industry. Not just among large business but among small and medium sized ones too.

At its core, it represents an unfair attack on labour hire businesses which provide a valuable and legitimate service and which, like all employers, must comply with relevant workplace laws.

Crucially, there is real fear that the laws will be drafted in a way that will go well beyond labour hire as traditionally understood, and will interfere with commercial contracting arrangements that extend well beyond the supplier of labour and sensible labour-sharing practices that are undertaken between related corporate entities.

This was never part of the Government's election commitment. They represent a completely unjustified overreach unfortunately driven by union leadership, representing 8 per cent of the private sector workforce and unfortunately as each day passes showing they are increasingly out of touch with workplace and economic reality.

Just as it was for multi-party bargaining, the case for making these changes has simply not been made.

Labour hire use in Australia has remained relatively stable and only represents a small but nonetheless important part of our workforce. The fact is that 1.06 per cent of the total Australian workforce is employed through labour hire. Those workers on average earn 3.95 per cent more than all equivalent workers.

For many businesses, including government which is actually one of the biggest users of labour hire, it is simply a necessary part of their resourcing strategies because of the tightness of the labour market. Often its use comes a cost premium that business would gladly avoid if they could.

However, to put it bluntly, many businesses simply can't find the staff they need and instead rely on expertise of the labour hire sector to source workers.

Crucially, labour hire is currently part of the solution to labour shortages in key sectors like manufacturing, in warehousing operations and in less obvious areas such as the aged care and disability sectors.

Many small and medium sized and smaller businesses rely on labour hire. It isn't just the kind of large businesses that ACTU have focused on that will be impacted.

Labour hire is playing a key role in keeping the economy moving in the face of sustained labour shortages. In all our interests, the Government simply must not sabotage the economy by an ill-conceived heavy legislative change to play cute with union leadership.

3. **Changes to casual employment**

A third area of potentially problematic change involves changes to the definition of who is a casual employee.

Again, the only ones demanding restrictions on the use of casual employment are our unions. They have long been antagonistic towards casual employment – after all those workers are not easy to unionise – and have prompted a myth of increased workforce casualisation.

The reality is the proportion of the workforce employed as casuals has remained relatively constant since 1998.

Indeed, currently, the proportion of casual employees in the workforce is lower than the average over the past quarter century.

A couple of years ago, industry was extremely concerned about the uncertainty that arose from two decisions of the Federal Court which had determined that two employees of WorkPac (Mr Skene and Mr Rossato) were not casuals, even though they were engaged and paid as casuals.

The decisions were rightly overturned by the High Court of Australia in 2021 in the *WorkPac v Rossato* case, and a common-sense approach was restored.

In the High Court proceedings, evidence was given by the Department of Employment and Workplace Relations that the potential cost to industry of not overturning the Federal Court's decisions would be up to $39 billion. That same department is now drafting legislation that could substantially increase business costs and potentially risk a return to this kind of exposure.

Around the same time that the High Court's decision was handed down, Parliament amended the *Fair Work Act* to define a 'casual employee' in a manner that closely reflected the High Court's ultimate clarification of the common law definition.

In addition, the Act was amended to protect employers against 'double-dipping' claims by employees who had been engaged and paid as casuals, but who turned around years later and argued they were entitled to annual leave and other entitlements even though in lieu of these entitlements they had been paid a casual loading.

A further major aspect of the 2021 reforms gave casual employees robust rights under the National Employment Standards to convert to permanent employment after 12 months of regular employment with a business. To be clear, casual employees have never had a stronger right or pathway to permanent employment than they do now.

Before the High Court's decision and the legislative amendments, at least eight 'double-dipping' class actions were being pursued. All of these actions were quietly withdrawn once the new definition of a 'casual employee' and the 'double-dipping' protection was inserted into the Act. Most were funded by overseas litigation funding firms that were hoping to make super profits at the expense of Australian businesses.

We now await their return. I'm guessing they can't wait to get back. Given the recent history and the potential costs to industry, it should be unfathomable for the Federal Government to contemplate re-creating all the problems that were only recently solved.

4. **Regulation of contracting arrangements**

The final area I want to discuss is the potential amendments to dealing with the regulation of contracting arrangements. Again, the precise parameters around what the Government intends to in this respect remain unclear and unsettled.

The public comments and commitments indicate that it will potentially include permitting the Fair Work Commission to set terms and conditions for what has been described as 'employee like work', which appears set to include regulation of the gig sector at the very least.

This agenda will potentially also include setting of terms and conditions in the Road Transport Industry and the creation of a new jurisdiction through which contractors more broadly can challenge unfair contract terms.

Regulation of the Gig sector

The genie is out of the bottle when it comes to the rise of gig or platform work. This is now an established part of our economy.

That does not mean that sensible regulation of these kinds of work arrangements cannot be considered, but the trick will be avoiding a regulatory response that fails to grapple with the complexities of this kind of work and the need to approach such regulation in a very different manner to regulation of employment arrangements.

Many entitlements that commonly apply to employees do not suit the work arrangements of platform workers. For example, the three- or four-hour minimum engagement periods that commonly apply under awards would be unworkable for platform work.

The whole notion of when work begins and ends for a platform worker is far more complex than for an employee. A platform worker may be logged on to one or more apps waiting for a job while they are sitting on their couch at home.

The Government needs to ensure that any new regulatory regime does not 'throw the baby out with the bath water'.

On-demand platform businesses are delivering huge benefits to the Australian community, in some sectors.

Such businesses provide flexibility that is often not available with conventional forms of work. Individuals who wish to work flexibly around other commitments,

such as study, recreation, family commitments or other forms of paid employment often find the experience of working via online platforms a useful and convenient way of earning or supplementing income.

Providing avenues to earn an income through platform work alleviates the adverse effects associated with unemployment, such as social isolation, poorer mental health and reduced confidence. Periods of unemployment are often longer for mature age workers than other workers, making the ability to earn an income, even temporarily through an online platform, a useful option.

For younger workers, entry into the labour market can be difficult without relevant work experience. Online platforms provide paid work opportunities that do not require extensive work experience or professional qualifications.

Crucially, on-demand platform work has been particularly important to the community and the economy during the pandemic. For example, many restaurants would not have survived without on-demand platform delivery services and many thousands of people have continued to earn income in circumstances where they have been stood down from their regular jobs.

Road Transport

The Government's proposed consideration of further regulation of the Road Transport Industry has had a chilling effect on many businesses in that sector. It raises the spectre of a potential return of the widely condemned and thankfully abolished Road Safety Remuneration Tribunal, or RSRT as it became known.

For this sector, there is a sense of regulatory déjà vu and growing dread about the prospect of the adoption of this failed and disastrous policy approach being repeated.

The RSRT was a Tribunal that was largely comprised of members of the Fair Work Commission. It was empowered to set minimum rates of pay and conditions for contract drivers in the Road Transport Industry.

After years of deliberations, and engagement with industry, it issued an order setting minimum rates of pay for contract drivers in the Long Distance and Retail sectors.

Predictably, and consistent with warnings from industry at the time, the order priced large numbers of contractor drivers out of work overnight. It was set to have a devastating effect on the livelihood of contractors whose engagements were being terminated because of the order.

Once again, the inherent diversity of the Freight task and the complexity of industry means the regulatory changes that appear to now be under contemplation risk having perversely adverse consequence for the very workers that such regulations are perversely intended to assist.

Unfair Contracts Jurisdiction

There are still fundamental questions about how the foreshadowed potential creation of a new unfair contract regime might operate. This includes questions about which categories of contractors can potentially access it and what kinds of contractual terms could be challenged. Given the breadth of industries that utilise independent contracting arrangements, any changes in this area could have profound implications.

Whatever the Government does in relation to the regulation of contractors, be they contractors in the gig sector, the road transport industry or the broader economy, it must reflect the reality that most independent contractors want to be contractors – not employees. The Government must not undermine this.

Relevantly, it is crucial that any changes do not create uncertainty over who is a contractor.

In 2022, the High Court handed down judgments in two important cases in which it was argued that particular persons engaged as independent contractors were in fact employees.

- In CFMMEU v Personnel Contracting, a young backpacker engaged by a labour hire business to work as a labourer on construction sites was held by the High Court to not be an independent contractor but rather an employee.
- In ZG Operations v Jamsek, two truck drivers engaged by a company were held by the High Court to be independent contractors and not employees.

The reasoning underpinning the High Court's judgments in these cases have delivered increased certainty for businesses and workers. The court sensibly emphasised the importance of looking to the terms of any written contract between the parties when assessing the nature of a relationship. This certainty will have a positive impact on investment and jobs. It is essential that the Court's decisions are not disturbed through legislative changes.

Doing so would undermine the viability of the many contracting arrangements in place throughout Australia which are operating to the mutual benefit of the independent contractor and the businesses that engage them.

Conclusion

For far too long workplace relations has been treated as a political football. Certainty, predictability, sustainability and productivity have suffered.

The Hawke-Keating Labor Governments, in partnership with industry and what in those days was a progressive union movement, eased Australia away from a highly centralised IR system to a much more decentralised one centred around enterprise bargaining which opened up channels to negotiate productivity improvements identified at the individual enterprise level. Strong safeguards were put in place.

The current legislative regime, the *Fair Work Act*, also implemented by a Labor Government in 2009, significantly expanded the safeguards but in so doing, erected major obstacles to the operation of the enterprise bargaining system. Our national productivity growth has been weak since that time, in large part as a result of these obstacles.

Since elected, the current Labor Government has gone further and has implemented or is developing a series of unbalanced industrial relations changes that will do nothing to boost productivity or assist businesses to grow, adapt and increase employment. A trite three-word slogan reflecting a desire to 'get wages moving' seems to be the intellectual basis for the measures taken or considered.

The changes implemented so far have delivered on a wide range of longstanding union claims, with no sign of a fair or balanced approach being taken.

This needs to change.

Only in September last year, following the Jobs and Skills Summit, the Albanese Government committed to seeking to maintain a spirit of cooperation and collaboration in the months and years ahead.

Unfortunately the brutal manner in which the Government's implementation of its secure jobs better pay tranche of amendments were pushed through Parliament, frankly even without enabling proper scrutiny of the Bill by the Senate, gives us understandable concern over this commitment.

Industry does not expect to hold the pen when it comes to the development of the Government's legislation. Nor should unions hold the pen.

But the views of industry must be genuinely heard and taken into account if we are to move towards a stable system that works for all Australians and that assists rather than hinders the achievement of our national priorities.

Our role, Ai Group's role, is to bring our considerable legal and policy expertise, as well as our coal-face knowledge of Australia's businesses to the negotiating table and to achieve as good an outcome as we possibly can.

Nobody wants confrontation and conflict to spread like a contagion across our workplaces. Nobody wants businesses to close, investments to be directed elsewhere, workers to lose jobs and opportunities, productivity to stagnate. But that's what we face.

We are still talking and working with the Government in good faith as our members ask us to do. We hope the current round of consultations helps us all find a sensible path forward. We hope common sense not partisanship and division prevails.

The jury though is still out.

[ENDS]