ACTU D No. 23/2013

The IR Reform Agenda

Address by ACTU President Ged Kearney to the 8th Asian Regional Congress of the International Labour and Employment Relations Association
Melbourne Convention and Exhibition Centre, 11 April 2013

***** CHECK AGAINST DELIVERY*****

I would like to acknowledge the traditional owners of the land on which we meet, past and present.

Thank you for the invitation to speak today, and congratulations to the steering committee for this conference for the calibre of speakers you have put together for the conference program.

This is, of course, the first time the regional Congress of ILERA has been held in Australia, and I would like to welcome all of our international visitors to my home town of Melbourne. The peak body of the Australian union movement has always been based here in Melbourne. The first meeting was held at the Victorian Trades Hall building in 1927.

Melbourne has always occupied a significant place in the history of Australian unions. It was here that the principle of the eight hour day took root. It was not achieved without a fight: the first union campaign in recorded Australian history took place in Melbourne when stonemasons marched on the Victorian Parliament to demand the eight hour day – which they won on 19 April 1856.

The stonemasons' victory inspired other tradesmen, and over the next two decades, dozens of new trades associations were formed and strikes rolled across the colony as others also sought the eight hour day. That first victory is still celebrated in a modest ceremony every year, just as it will be next week.

I tell you this not to boast, but to illustrate that throughout our country's history, Australian unions have performed a central role in protecting and advancing rights in the workplace and in building a fairer and more equitable society.

Workers - taking collective action and campaigning through their unions – have fought to win and defend such basic rights in the workplace as the eight hour day, public holidays, penalty rates, annual leave and sick leave.

Unions have also taken the lead in extending and updating employment standards as economic and social conditions change. Examples include ACTU test cases on work and family, working hours and redundancy. More recent examples include the the social and community sector equal remuneration case – one of the most significant advances in pay equity in decades, and our current efforts to improve wages and conditions for apprentices through the modern award review process.

We have – and continue to – advocate for decent minimum wages, so that low paid workers are fairly remunerated and share in our country's prosperity.

Unions in Australia have also played a fundamental role in promoting and securing fairness and equity through our broader social policy framework. In the 1980s and 1990s, unions were partners with government in changing Australia's economy to recognise and respond to the realities of global competition, while seeking to preserve the fairness of the system. The legacy from that era is a superannuation system that is the envy of the world, and a social wage

developed in co-operation with the Labor Government and the leadership of business groups of the time.

Australian unions have a long history of speaking not just on behalf of their members, but on behalf of all workers. We do this in the workplace and we do this more broadly – in ensuring that the voice of workers is heard in debates about our industrial relations system and about which direction our society should go.

And so, in congratulating the organisers of this Congress, I also welcome the recognition in your program that the voices of workers – through their representatives in unions - must always be heard in discussions about work and employment. They must be heard because they are affected by changes to workforces and to labour markets. But they also must be heard because workers have much insight and fresh-thinking to contribute.

The Australian industrial compact

For the most part, Australian unions have worked within an industrial relations system which rests on a basic and enduring, if sometimes fragile, consensus between capital and labour. This bipartisan consensus has its roots in Australia's original federation compact - the grand political compromise comprising protection of industry, regulation of labour, and universal social security standards. The industrial relations plank of this consensus led to our conciliation and arbitration system, to the Harvester Judgment and much later, to the social wage.

For most of the 20th century, this consensus has endured, underpinned by a shared recognition of the importance of combining economic competitiveness with fairness.

Changes to our industrial relations system, when they occurred, have generally taken place within the framework of this consensus. The shift in the late-1980s and early-1990s away from centralised conciliation and arbitration towards a system based on enterprise bargaining underpinned by an Award safety net is but one example.

And by and large, the consensus has fostered industrial harmony and common purpose.

The introduction of WorkChoices by the former Coalition Government shook this longstanding consensus to its core. Through slashing the safety net upon which so many Australian workers rely on, encouraging unfair individual contracts, undermining collective bargaining, and stopping workers from accessing union help, the legislation challenged a number of the very precepts upon which Australia's industrial relations system rested.

Fortunately, WorkChoices was short-lived, an aberration. The Australian people – in ousting the Coalition Government at the ballot box in 2007– firmly rejected this model as the way forward. Australians clearly voted *against* a system which pitted worker against worker and saw economic progress and fairness as mutually exclusive and *in favour* of the enduring consensus upon which our industrial relations system stands, and its values of fairness and a decent safety net.

We see the Fair Work Act as representing a continuation of the longstanding – albeit bruised - consensus in Australian industrial relations. The Act represented a significant step forward in terms of rights for working people and fairness in Australian society. It has restored a decent safety net and returned unfair dismissal rights. It ended AWA-style individual contracts, provided for good faith bargaining and restored a central role for the independent umpire in resolving disputes.

Since the Fair Work Act was introduced, we've also seen other key improvements to working lives, including the introduction of a national paid parental leave scheme, stronger protections for workers when companies go under, pay equity for workers in the female-dominated social and community sector, and a much-needed increase in the Superannuation Guarantee. We've also seen significant industry-specific reforms, such as the hard fought abolition of the Australian Building and Construction Commission, safe rates in the road transport sector, and stronger protections for outworkers in the textile and clothing industry.

These developments have all had significant and positive impacts on the lives of working Australians.

And, despite claims to the contrary, the Fair Work Act has not had a negative effect on the Australian economy.

The Australian economy has instead prospered under Fair Work Act. Especially when compared to other developed countries, we have low unemployment of about 5%, resilient economic growth close to trend while much of the world around us has been negative or sluggish, steady wages and last year recorded the best labour productivity growth in a decade at 3.5%.

As the ACTU and many others have demonstrated,[1] Australia's slower rates of productivity growth over the past two decades are for reasons almost entirely unconnected with labour law. This is also the conclusion reached by last year's major review of the Fair Work Act.

The Fair Work Act has not led to a 'wage breakout'. This myth has recently been comprehensively debunked in the ACTU research paper '*A Shrinking Slice of the Pie'*.[2] The paper tells the story about the distribution of the gains from productivity growth in Australia. It shows that Australia has experienced the opposite of a 'wages breakout' since 2000. Over this period Australian real wages have not kept pace with productivity growth - meaning that labour's share of total income has fallen and capital's share has risen. This is a worrying trend (not least because the decoupling of wages and productivity means higher household income inequality) but certainly not in the form or for the reasons that the business groups would like us to believe.

Recent amendments to the Fair Work Act

A scheduled review of the Fair Work Act after two years of operation was conducted last year. Unions did not call for major changes. This review was limited to considering whether the legislation is meeting its stated objectives. And we think by and large it is.

Of course, this is not to say there are not things we think should be improved in the Fair Work Act. These include matters that have been the subject of criticism by the ILO – such as ongoing restrictions on the content of agreements, on the level at which parties can bargain, and on the right to strike.

---

[1] *Working by numbers: Separating rhetoric and reality on Australian productivity*

http://www.actu.org.au/Publications/WorkingAustraliaPapers/WorkingbynumbersSeparatingrhetoricandrealityonAustralianproductivity.aspx

[2] *A Shrinking Slice of the Pie*
http://www.actu.org.au/Publications/WorkingAustraliaPapers/AShrinkingSliceofthePie.aspx

In our submissions to the review, we identified a number of modifications that we thought were necessary to improve the operation of the Act. We've been pleased to see a number of these proposed amendments subsequently adopted by the Government.

The ACTU has welcomed improvements to the Fair Work Act announced by the Government in the wake of the Review. These include:

- further flexibility in relation to unpaid parental leave, and rights for pregnant women to transfer to a safe job regardless of how long they have been with an employer;
- an expanded right to request flexible working arrangements
- new consultative requirements on employers to genuinely consult employees before changing rosters or working hours;
- a new modern Award objective that recognises the importance of penalty rates in compensating workers for working unsocial hours; and
- changes to right of entry rules so as to assist union representatives being able to talk to workers in lunchrooms if agreement on another location can't be reached.

We also strongly support the changes that will enable workers who believe they have been bullied at work to apply to the Fair Work Commission for prompt assistance, including orders to stop the bullying. This is an important and long-overdue reform.

An outstanding issue for us, however, remains the ongoing inability of the Act to deal with situations in which recalcitrant employers simply refuse to negotiate in good faith and enter into collective agreements with their workers.

As many of you are aware, our current bargaining system has a number of mechanisms to facilitate collective bargaining at the enterprise level. Unfortunately these mechanisms have proven incapable of dealing with situations where vulnerable workers with little bargaining power are engaged in bargaining and the employer simply refuses to ever make concessions or reach agreement.

I'm talking here of course of the failure of our laws to effectively deal with Cochlear-style protracted bargaining disputes.

Workers at the bionic ear maker Cochlear – represented by our affiliate the AMWU – have been engaged in an epic struggle to negotiate a collective agreement with the company since 2007. This is over five years now.

Soon after the Fair Work Act came into operation in 2009, the AMWU sought and successfully won a majority support determination, requiring Cochlear to bargain.

Over three years have now passed since this determination was made. Yet Cochlear has yet to propose, or agree to, any enterprise agreement that would be in a form capable of approval by the Commission. The company is meeting with the union but merely going about the pretence of bargaining, without any genuine intention ever to reach agreement.

Now let's contrast this situation with the readiness with which the Act intervenes on the side of employers where workers are in a strong bargaining position.

For workers that are unionised and can take effective protected industrial action, the current rules for stopping industrial action often save the employer from having to make concessions and agree to terms. This was demonstrated in the Qantas dispute in late 2011. In the face of low-level industrial action by three unions, Qantas grounded its fleet and proposed a lockout of employees.

This self-inflicted economic harm and resultant damage to the Australian economy triggered termination of the industrial action by the Commission and ultimately a workplace determination.

Let me make myself clear. Contrary to some of the exaggerated claims made by employer groups in response to potential law reform on this issue, our proposal does not constitute the re-introduction of compulsory arbitration across the board. Nor would it mean that disputes are arbitrated every time an employer "has not capitulated to union bargaining claims". This hyperbole is inaccurate and unhelpful.

What we are saying, however, that there is something fundamentally unfair about a situation where big companies like Qantas can force their way into getting arbitration when they want, while vulnerable workers can't access arbitration in the Commission after literally *years* of bargaining in good faith for a collective agreement.

We will continue to lobby the government to adopt a more balanced role for intervention by the law in bargaining disputes, particularly through providing greater power for the Commission to arbitrate intractable bargaining disputes. We fully expect the Government and the Minister Bill Shorten to honour the commitment given to workers and deliver this important improvement to our laws.

The ACTU will also vigorously defend against any reform proposals by the Coalition which have the effect of undermining existing rules on collective bargaining. We will not stand by, for example, and let the rules for Greenfield agreement making be changed so that we return to the absurd situation (as in WorkChoices) when an employer can make an agreement with itself. An agreement made with oneself is not an agreement at all. The right of workers to representation and the promotion of collective bargaining are two fundamental principles of the Fair Work Act. We believe these principles must apply equally to Greenfield agreement making stream.

Insecure work

One area in which we believe there are significant shortcomings in Australia's employment laws is in the area of insecure work.

We continue to have a system of employment rights and protections which is based overwhelmingly on the notion of a full time worker engaged in ongoing employment. Yet the realities of our labour market are that work is more insecure for more people. Today many workers simply miss out on basic entitlements because they don't spend long enough in one job, or are engaged in types of work that don't provide access to these entitlements at all (such as casual, contract, temporary or labour hire).

Just to give you a quick glimpse into the scale of the problem in Australia today. Today, one out of every four employees is in casual employment. This is over two million workers - without any entitlement to basic entitlements that many of us take for granted, such as paid leave and job security. In some industries, such as education, insecure work in the form of fixed-term contracts has reached epidemic levels. While many of the over one million workers who are now engaged as independent contractors are genuinely independent, many others are in reality economically dependent on a single client, or in sham contracting arrangements.

Hundreds of thousands of other workers are employed through labour hire agencies, many without job security and not knowing when or where they will work next. And for thousands of others, insecure work is experienced in the form of irregular or unpredictable hours of work which mean fluctuating incomes and difficulties planning for their lives outside work.

The growth of insecure work has been the outcome of both labour market deregulation and the emergence of a business model across the entire economy that shifts the risks associated with work from the employer to the employee, and minimises labour costs at the expense of job quality. Incidentally, we are seeing a similar shifting of risk from the state to the individual through privatisation and the flawed ideology of "the big society".

In 2011, the ACTU commissioned the Independent Inquiry into Insecure Work to investigate the issue and its impact on workers, their families and the community, and to provide recommendations on what might be done. Chaired by former Deputy Prime Minister Brian Howe, the Inquiry took hundreds of submissions from workers, unions, researchers and community organisations and held 25 days of public hearings across the country.

The Inquiry found that a worrying divide has opened up in the Australian workforce between those in the 'core' of the workforce and those in the 'periphery', employed on various insecure work arrangements.

There is a genuine risk that we are witnessing the emergence of a permanent working poor in Australia – people who do not know what hours they will work from week to week, and often juggle multiple jobs to attempt to earn what they need.

Their skills are low, or outdated, and they are not offered training through work. Their work is not a "career" but rather a series of unrelated temporary positions that they need to pay rent, bills and food.

For them flexibility is not knowing when and where they will work, facing the risk being laid off with no warning, and being required to fit family responsibilities around unpredictable periods of work. They cannot even afford to take time off when they or a family member is sick, because of the impact this has on their income and job security.

In identifying the need for action on this issue, we are not calling for the clock to be wound back to the days when everyone had a full time job with one employer for years at a time or even for their entire career.

But we do believe that *all* workers, regardless of the way in which they are engaged, should have decent, secure jobs and control over their working lives. And we do believe it is possible to formulate workplace standards that both meet the basic aspirations of all Australian workers to decent and secure jobs *and* are appropriate for a modern, prosperous, internationally competitive market economy.

We believe future industrial relations reforms must be directed at, and evaluated against, this basic proposition.

The Howe Inquiry confirmed that the costs of insecure work are far-reaching and significant, and that many people engaged in insecure work want better, more secure working arrangements. The Inquiry emphasised that while industrial responses to insecure work are essential, policy actions in a range of other areas, including skills, tax and welfare, are also critical to addressing work and income insecurity.

Australian unions are also directly engaging with community organisations, academics and business to develop solutions to this issue. Just last month, we held a National Community Summit in Canberra, which we hope represents the first step in a national debate that seeks to understand and tackle this growing problem of insecure work.

Industrial reforms

The drivers of insecure work are complex and there is no one single solution or remedy. But we believe a number of key reforms to our IR laws are needed to begin to address the issue.

First, a basic protection against the growth in insecure jobs is ensuring that non-standard forms of work – casual and fixed-term employment, labour hire and contracting – are only used for genuine and legitimate purposes. Measures must be in place to ensure these types of work cannot be abused by employers as a means of avoiding their responsibilities under our labour laws. This includes implementing stronger protections against sham contracting to ensure vulnerable workers are protected.

A second area of reform is strengthening the right to request flexible working arrangements in the Fair Work Act. Earlier I mentioned improvements the Government is making to this right. We know that without real choices to accommodate their responsibilities, many carers today (mostly women) are forced out of decent jobs in to low paid, low skilled, insecure part-time work. In this context, the Government's amendments to the right to request flexible work arrangements, including extension of the right to a wider range of workers, are very welcome. But they do not go far enough.

The current right to request flexible working arrangements is still not enforceable. Employers can simply refuse on 'reasonable business grounds' and employees have no right of appeal. The right to request flexible work arrangements and the right to request an extension of unpaid parental leave are the *only* two rights in the Fair Work Act that specifically deny employees access to dispute resolution.

The ACTU has consistently argued that the right to request needs to be underscored by an effective right of review. Employees must have the right to appeal an employer's unreasonable refusal of their request for family friendly work arrangements in Fair Work Commission, including access to arbitration if necessary.

Third, the dramatic shifts we've witnessed in how we work and in the structure of our labour market also raise questions over the effectiveness of our traditional accrual models of leave entitlements.

Paid leave entitlements are fundamental to the financial and social security of workers. Yet we continue to have a system of contingent entitlement to forms of leave – whether it be long service leave, annual leave or sick leave - that tends to presuppose permanent, ongoing employment and so exclude a significant proportion of the workforce.

The ACTU is currently investigating models for a nationwide national portable leave scheme, so as to ensure that all workers can access basic paid leave entitlements.

Australian unions are also committed to pursuing better protections for workers engaged through labour hire arrangements.

In Australia today, increasing number of workers are employed by labour hire companies. Many of these workers are engaged in triangular employment relationships, whereby they are formally 'employed' by a labour hire firm but work on a daily basis under the direction and control of a single client business.

In many cases, these labour hire employees do not, under Australian law, have an employment relationship with the client business. In practice, this often means that a business can absolve itself of the responsibilities and risks associated with employing a worker by engaging labour through a labour hire agency. For workers, this means that they may not have any recourse

against the company for which they work on a daily basis for any unfair treatment, or unpaid wages or entitlements.

The doctrine of joint employment – which exists in a number of overseas jurisdictions and in our own OHS laws – recognises the basic principle that, where two or more entities exercise substantial control over the terms and conditions of employment of a worker, both should bear legal responsibility.

The ACTU believes there is merit in amending the Fair Work Act so as to enable the Commission to determine that where two or more are controlling or benefiting from employees' work arrangements, a joint employment relationship exists. There also needs to be an effective licensing system to regulate labour hire.

Finally, of course, unions will continue to defend against attacks by employer groups which have the potential to make working life even harder for those engaged in insecure work. This includes, for example, efforts by employers to remove penalty rates, or to remove basic protections for workers embodied in the rules on making individual flexibility arrangements.

Conclusion

The Australian model of industrial relations is one in which unions have had a central role in constructing and maintaining, and it is one of which we are proud. It has proven both enduring and highly adaptable to social and economic changes within the workplace and more broadly.

As I have said, since Federation – with the short-lived aberration of WorkChoices – there has been a bipartisan consensus, a compact if you will, in support of this model of decent wages, a safety net of Award conditions, and rights to collective bargaining, all overseen by a strong and independent umpire.

We believe the Fair Work Act embodies a number of the basic precepts upon which the Australian industrial relations system has long been based. These include recognition of: the importance of a decent safety net of minimum wages and conditions (that is capable of evolving with social and economic developments); the benefits of collective bargaining; and an active role for our industrial relations tribunal.

Having said this, there are no doubt a number of improvements that can be made to our current laws. There are also a number of changes in the world of work which our industrial relations system has yet to catch up. Perhaps greatest among these challenges is ensuring that workers do not miss out on basic rights and protections simply because of the manner in which they are engaged within the workplace.

The Australian union movement is committed to defending and advancing these objectives over coming months and years. And we extend our hand to the business community to recognise your role in the Australian workplace consensus, and work with the union movement to contribute to the solutions needed to ensure we have a system that delivers economic prosperity alongside fairness and rights.

Thank you.

Media contact:
Mark Phillips: (03) 9664 7266 or 0422 009 011