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AWA FOCUS IGNORES BROADER BUSINESS CONCERNS WITH LABOR'S IR POLICIES

Statement by Heather Ridout
Chief Executive Australian Industry Group

"The almost exclusive focus on AWAs is ignoring the breadth of concerns business has with Labor's industrial relations policies which in their current form carry substantial economic risk," Australian Industry Group Chief Executive Heather Ridout said today.

"Far from resolving the issue, Labor's position on AWAs is creating more uncertainty by raising the prospect of upsetting existing contracts and effectively applying legal retrospectivity. This would be a direct challenge to important principles which underpin business certainty.

"Beyond AWAs we have four further areas of major concern:

1. Labor's collective bargaining model is flawed and dangerous;
2. the Fair Work Australia proposal is ill thought through, unworkable and arguably unconstitutional;
3. the prospect of Labor abolishing the construction industry reforms threatens to undo generational change which has delivered unprecedented industrial harmony for the industry; and
4. Labor's unfair dismissal plan has real problems in both scope and implementation.

"We disagree with Labor's whole concept of **compulsory** collective bargaining, the breadth of what can be bargained for under Labor's policy and under what conditions industrial action can be taken and the easy access to arbitration. Also, despite assurances which to some extent allay our concerns about pattern bargaining, we remain fearful for the potential for industrial disputation in pursuit of pattern bargaining to re-emerge.

"Ai Group supports the existing enterprise bargaining system, which is based on the original 1993 ALP reforms, under which people have the right to freely pursue collective bargaining and to take industrial action in support of their claims. Collective agreements in this model are underpinned by a comprehensive and fair safety net of minimum conditions, which apply to those with and without agreements. This **voluntary** system which well and truly pre-dates WorkChoices continues to work well for Australia. In fact, 38 per cent of the Australian workforce is on such agreements compared with 3.1 per cent on AWAs.

"The prospect of overturning such a successful system and introducing in its place a model based on very loose access to compulsory collective bargaining is deeply worrying and unnecessary. The easy access to the system through a 'rickety gate' based ultimately on the discretion of Labor's Fair Work Australia heightens our concerns.

"Labor's proposal for arbitration if agreement is not reached and protracted industrial action occurs which harms either party, is dangerous. If a negotiating party is aware that arbitration is available, there is less incentive for the party to make concessions in order to reach agreement. A union would be able to make a series of excessive claims which no company would agree to, organise industrial action in pursuit of those claims and then wait for a "compromise" position to be arbitrated. Potentially this would open the floodgates leading to an escalation of industrial action and a return to the old days of arbitration around ambit claims.

"Arbitrated outcomes (particularly those favourable to unions) would undoubtedly flow-on across companies and industries. For example, shorter working hours arbitrated from one dispute could become the industry norm with huge costs for business and the economy.

“Arbitration should only be available in a bargaining system under very limited circumstances such as where a dispute is threatening major damage to the economy. Arbitration carries huge risks in Labor’s compulsory collective bargaining model.

“Ai Group also has serious concerns about the Fair Work Australia proposal. This plan to abolish the Australian Industrial Relations Commission and bring together into one new authority the functions of adviser, investigator, prosecutor, mediator and judge is ill-thought-through, unworkable and arguably unconstitutional.

“We are also deeply disturbed with the prospect of Labor abolishing the construction industry reforms which consist of five key planks: (1) the Building and Construction Industry Improvement Act; (2) the Australian Building and Construction Commissioner; (3) the Federal Safety Commissioner; (4) the anti-pattern bargaining laws and other elements of the WorkChoices legislation; and (5) the National Construction Code and Implementation Guidelines. It is essential that each of these key planks be retained. Each one has combined in a mutually reinforcing manner to achieve the existing very positive environment in the industry.

“These reforms have supported a generational change in the culture of the construction industry. The industry has never been a better place in which to work and invest as is evident in the record low level of industrial disputation, high wages growth and higher productivity. Winding back the reforms would be an extremely retrograde step that would be very strongly resisted by the industry.

“On unfair dismissals, we have real problems with the scope and process proposed by Labor for dealing with unfair dismissal claims. In relation to the scope, Labor proposes to abolish virtually all of the existing exemptions from the unfair dismissal laws. These include casuals, seasonal workers, fixed term staff and small business. For seasonal workers when the fruit is all picked for example, there have been celebrated cases where unfair dismissal compensation was sought by the fruit pickers and compensation awarded. Ai Group was successful in having this exemption put in to the law. To remove the exemption would be a folly.

“In relation to the unfair dismissal process proposed by Labor, while there is merit in an informal process, in many cases it would be impossible for a member of an independent tribunal to justly decide at a single conference whether a dismissal is fair. Often there are two directly conflicting accounts of the events leading up to the dismissal. It potentially could lead to gross unfairness for both employers and employees if tribunal members were “required” in all cases to determine whether a dismissal is unfair and determine an outcome at a conference, without giving the parties the opportunity to present evidence, cross-examine witnesses, and so on, should they wish to.

“Returning to the issue of AWAs, the AWA transitional plan being considered by Labor would have significant commercial consequences for business. Labor has said that it is considering allowing workers to remain on AWAs for their full term (up to five years) if they are ‘happy’ with them. This implies that if workers are not happy they may be able to opt out of their AWAs during their term.

“If Labor decides to change the law to allow opting out of AWAs this would amount to a repudiation of legally binding contracts and would create a huge commercial mess for business. Companies that tendered for work, for example, on the basis of certain set wages and flexible conditions face the very real risk of finding themselves in commercial difficulties. Also, companies would be faced with the risk of industrial action and additional claims during the life of settled agreements,” Mrs Ridout said.

“Mr Rudd has been quoted in the media over recent days asking business to explain why common law contracts are not an acceptable alternative to AWAs. The reasons are set out in the attached fact sheet. It can be seen that AWAs with a fairness test are much fairer for both employers and employees than common law contracts. Common law contracts are very difficult and expensive to enforce and do not provide desired and necessary flexibility. Also, common law contracts are inconsistent with the assertion in Labor’s IR policy that a “deal is a deal” and there should be no right to take industrial action during an agreement’s term.

“It should also be understood that AWAs are operating in a wide range of industries including telecommunications, information technology, construction, transport, and manufacturing. It is therefore essential that any transitional fix to Labor’s proposal to ‘rip-up’ AWAs, apply to all industries and not be just a political fix for the mining industry.

“These are some of the issues Ai Group has with Labor’s IR policies. We continue to have dialogue with Labor on these and other matters,” Mrs Ridout said.

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Common law contracts are no substitute for AWAs

AWAs – which are reached between employers and individual employees - were introduced into the *Workplace Relations Act* in 1996. They are an integral component of Australia’s flexible agreement-making system. A flexible system is vital to enable companies to work with their employees to improve productivity and competitiveness.

Employers and employees should have the right to pursue the form of agreement which best suits their needs, whether a collective agreement, an individual agreement, an agreement with a union or one directly with employees. There should be no “one size fits all” collective approach.

Common law contracts are not an acceptable alternative to AWAs. Such contracts are very difficult to enforce and do not provide sufficient flexibility because they cannot modify award provisions. Also, common law contracts are inconsistent with the assertion in Labor’s IR policy that a “deal is a deal” and there should be no right to take industrial action during an agreement’s term. AWAs and common law contracts are compared in the following table. It can be seen that AWAs are much fairer for both employers and employees.

	Common law Contracts	AWAs
Vetted and approved by a Statutory Agency	No	Yes
Required to meet a fairness test	No	Yes
Are subject to a maximum nominal term	No	Yes
Relatively easy to enforce	No	Yes
Specific penalties apply for breaches	No	Yes
Industrial action outlawed during term	No	Yes
Can override award provisions, subject to a fairness test	No	Yes
Can override collective agreements	No	Yes
Can override State legislation	No	Yes

Under the *Workplace Relations Act*, substantial protections are in place to prevent unfairness to employees covered by AWAs including:

- It is unlawful for an employer to coerce or apply duress to an employee in connection with an AWA;
- It is unlawful to terminate an employee’s employment for refusing to make, sign, extend, vary or terminate an AWA;
- It is unlawful for an employer who takes over a business to require an employee to sign an AWA as a condition of employment (*legislative amendment announced*);
- The terms of an AWA must be no less favourable than the Australian Fair Pay and Conditions Standard which covers key conditions of employment including wage rates, casual loading, annual leave, personal/carer’s leave, compassionate leave, parental leave and maximum ordinary hours of work;
- Penalty rates, allowances, loadings and other “protected award conditions” apply under an AWA unless the employee has agreed to any modifications;
- AWAs are subject to a “fairness test” if any “protected award conditions” are removed or modified (*legislative amendment announced*);
- AWAs are vetted and approved by a Statutory agency to ensure that legal requirements and the “fairness test” are met (*legislative amendment announced*); and
- An employee negotiating an AWA is entitled to appoint a bargaining agent to represent him or her.

Over a million AWAs have been approved by the Office of the Employment Advocate (OEA) and hundreds of thousands are currently in operation. AWAs have been a key feature of Australia’s workplace relations system for more than a decade. To abolish them would cause widespread disruption and disadvantage to both employers and employees. It is essential that AWAs be retained.