# ‘THE IR REFORM AGENDA’

**Address to the International Labour and Employment Relations Association**

**8th Asian Regional Congress**

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I congratulate the International Labour and Employment Relations Association on convening this Congress, and especially acknowledge the work of our Australian colleagues in presenting such an interesting and inclusive program.

I am pleased to make this presentation on behalf of Australia’s internationally recognised and peak employer body, the Australian Chamber of Commerce and Industry (ACCI).

I am also pleased to share this stage with Ged Kearney, President of the ACTU. Our different constituencies lead us to advocate significant different positions on labour relations and especially regulatory policy. Some of these will emerge today, I suspect. I make no apologies for that.

However I do want to emphasise, especially for the benefit of our international guests, that the robust policy debate about labour relations law and practice in Australia does not occur without, at least from my end, an open acceptance of the legitimacy of trade union participation in our democratic institutions and labour market.

For example, I believe in freedom of association and espouse that principle, as a matter of law and practice abroad. I am hardly going to deny that same principle on home soil.

I mention this specifically because in a federal election year, as 2013 is, the differences that exist between industrial parties are magnified, and in a democratic system so they should be. There are important matters, especially on regulation, requiring resolution on which we differ.

There are however other less contested areas of institutional dialogue between us on important labour market issues, domestic and global. They include working relationships on occupational health and safety, skills and productivity, growth and jobs in Pacific nations, and global labour relations and human rights.

We certainly don't agree with each other on every aspect of even these issues, but there is generally a consensus on their goals and objectives, allowing for differences on pathways to achieve some of those agreed goals.

By way of three further examples:

- the ACTU is currently a partner with ACCI in jointly implementing a key element of the Australia-International Labour Organisation (ILO) Partnership Agreement – the Pacific Growth and Employment Project. We are right in the middle of that joint effort, aimed at strengthening labour markets in the transport sector on Papua New Guinea and in the tourism sector in Vanuatu;
- the ACTU and ACCI have both worked hard to bring about regional and global international pressure on the governments of Myanmar and Fiji for breaches of fundamental labour rights – in the case of Myanmar, forced labour; and in the case of Fiji, freedom of

association. I am pleased that a joint delegation to Myanmar last October, led by Minister Shorten, confirmed what the ILO Governing Body has concluded – significant progress has been made that has warranted an easing (with caveats) of international sanctions. However the situation in Fiji remains a serious concern, evidenced by an agreed resolution of the ILO Governing Body only a fortnight ago calling for the Fiji administration to accept a high-level fact finding ILO mission that it had effectively evicted from the country last year.

My third example is a domestic matter. The ACCI and ACTU leadership are each working towards an enhancement of Australia's skills base, in the wake of research and analysis which shows that as the Australian economy swings upwards, significant skills gaps will re-emerge. This work is done in high level dialogue around the board table of the Australian Workforce and Productivity Agency (on which Ged and I sit), and on the recently formed Prime Ministerial Panel for Economic Reform.

I make specific reference to this joint work on skills because I have a frustration that I need to get off my chest.

It is a frustration symptomatic of the way media, in most nations, tends to only see stories in controversy, not in consensus.

On 8th March the board of the Australian Workforce and Productivity Agency, on which we both sit, presented in a very public way a significant report to the Australian government on the future skills needs of our nation. It is a report worthy of consideration and debate. It's not without contest on some matters, but we, the board of AWPA, want to encourage that discussion and awareness on a matter that goes right to the heart of our nation's productivity.

To profile that important work, in March Ged Kearney and I authored a joint opinion piece for publication. One would have thought that a joint collaboration between industrial protagonists on a workforce issue would be noteworthy, especially in an election year.

However, despite our best efforts, the agreed opinion piece between the two national peaks has not been published. It simply does not contain enough controversy. It seems, common ground is not newsworthy, even on important economic and labour market matters. Divergent views and the creative tension of difference, is.

That's a reality we have to deal with, and one that I reluctantly accept. But it does highlight the difficulty of putting our strong areas of difference in the right context.

So, before I get to those areas of difference, I take the liberty of releasing, with Ged's agreement, our joint opinion piece, so that it is on the record, and capable of generating debate and discussion. It will be available on the ACCI web site, from today.

So, now to the IR Reform Agenda.

There are so many aspects to this issue that I will confine myself to three issues:

- The debate about skilled migration;
- The rights of small business; and
- The prospect of domestic ratification of Convention 138 on Minimum Age.

**Skilled Migration**

Our nation is currently debating, in a very unseemly way, the issue of skilled migration.

Leading industry bodies, like ACCI, have been balanced on this issue, but that's not what could be said about others. For our part, ACCI has:

- Said that it is legitimate to discuss and review, from time to time (as government did in 2008), the settings of skilled migration programs;

- Acknowledged that there are a handful of abuses of the 457 visa program and that those abuses need to be investigated and sanctions applied;

- Given industry direct advice about the existing rules, which include obligations to pay not just legally required minimum wages and conditions but, since 2008, to pay market rates of pay – thus preventing any downward pressure on domestic wages; and

- Highlighted that Australian business does and should always look first to the domestic market for labour, and only use the 457 program to fill real gaps.

In contrast, the biggest concern I have with the events of the past month on the 457 issue is not the policy changes themselves, even though some of the new rules are excessive. Rather, it was the intemperate language, and the highly political context used to communicate the message. Language calling on Australians to put 'foreigners' at the back of the queue was not only misleading (the rules already require that) but pitted Australians against migrant workers who are lawfully here, and whose employers are lawfully employing under the government's own program.

Doing so through the Prime Minister making a rallying call for political support in western Sydney gave the issue an overtly political edge and wedge, overshadowing whatever policy merits in Minister Brendan O'Connor's original decision.

Gone it seems was reference to the bipartisan nature of the skilled migration program and of the genuine need to supplement the 99% of Australians employed in Australia with a 1% skilled worker intake to fill labour gaps in specialist occupations and regions. The fact that government employers, not just private companies, are big users of the system – especially in the health sector – was also lost in the political moment. And as we now know, some trade unions also use skilled foreign labour in quite standard roles.

What has to be understood about the skilled migration and 457 visa issue is that it is not a purely Australian domestic issue. It plays out overseas, especially in Asia. It impacts our nation's reputation. It complicates life for Australians working in Asia. It challenges our collective sincerity about 'Australia in the Asian Century'.

If these clearer insights had emerged, and I am sure they will again after the 14th September election no matter who is in power, things would surely have been done differently.

Clearer thought would surely have led the Prime Minister and the Immigration Minister to think how the many thousands of Australians working in Asia felt – they too are 'foreigners' seeking to assert their working rights overseas.

I found emblazoned across an edition of Singapore's leading daily newspaper *The Straits Times* the headline: 'Canberra Closing Door to Migrants Ahead of Elections'. As an Australian business leader, this was an ugly headline, especially as it spawned an adjoining story reporting former One Nation politician Pauline Hanson's comments on the issue and her plan to resurrect a political career by contesting September's federal election.

As I wearily boarded a transit flight in Singapore (after a quick 72 hour overseas dash to meetings of the International Organisation of Employers and International Labour Organisation), I felt a deep sense of disappointment and frustration about the way Australia was again allowing itself to be perceived in Asia.

The obvious question from the Asian end is, 'if Australia wants to close the door to skilled migrants, then why should Australians be allowed to work in Asia in skilled professions and jobs'?

Coming on the very day that our own Workforce and Productivity Agency was advising the government of future skills shortages damaging our economy if we don't move effectively to improve vocational skills and adopt agile policy settings, made us look foolish, as if we can't

aggressively up-skill to meet demand and then fill gaps with targeted skilled migration if we don't get it 100% right.

Also not lost on me was the irony that in the previous 48 hours I had been negotiating with representatives of world union leaders and world governments (including our own) on global rights of labour migrants, at the very time our government and unions were souring the relationship between Australians and temporary skilled migrants.

At an ILO level, I have been part of major global discussions and negotiations about labour migration, including with Ged's predecessor Sharan Burrow, now ITUC General Secretary. Those discussions, which peaked at the International Labour Conference in 2005 when we were both global spokespersons on the issue, underline the legitimacy of workers moving across national boundaries to apply their skills and seek economic advancement, and how governments have to balance that right against their sovereignty over migration policy and their borders.

Not dissimilarly, this is acknowledged regionally. I can personally vouch for that, that having led Australian business negotiations with the Indonesian private sector in the second half of last year. It was clear that our mutual interest was not just in the movement of capital and goods, but also services and, where needed, human capital.

Yes, every country including Australia should establish organised rules for labour migration. But Australian conduct is rightly put under the microscope in Asia, especially with our not unblemished and clumsy track record on investment, on trade and now on people movement.

Unfortunately *The Straits Times* headline reinforced, wrongly in most respects, a negative image of Australian attitudes to targeted skilled migration.

**Small Business and Employment Regulation**

I also want to take this opportunity to highlight a conundrum in the domestic industrial relations debate – and that is the tension between

collectivism and the reality of a private economy which is largely non unionised.

Yesterday, in Sydney, I addressed a group of more than 700 small and medium business owners. It was the launch of a grass roots campaign to mobilise their voice in the lead up to this year's federal election and, hopefully, beyond. Local business people by nature are individually minded, spread across the country and in competition with each other. They're more comfortable making and doing things and employing people than attending meetings or getting involved in political matters. With such independent streaks, they're hard to mobilise.

Uniting like never before through the chamber of commerce and industry movement was a truly exciting moment. And good for Australian democracy and, if they are listened to, for the economy and community.

My point is, these were 700 businesses that reflect the two million small businesses across the nation that employ seven million Australians. These are incredible numbers. Yet, union membership in their businesses would be well below 10% - probably about 5%.

They have watched with growing frustration as governments, politicians and activist groups have, for the most part, taken them for granted, taxed them more, overregulated them, denied them family time, eaten into their profits, , undermined their business security, broken promises to them, spoken to them in platitudes, forced them to fund everyone else's retirement, and largely disrespected them.

And, for current purposes, tried to impose a one-size-fits-all model of industrial collectivism on them and their staff. In some cases, the rhetoric of governments has even been to pit their staff against them.

There is an absolute need for any credible and durable system of labour relations to have a set of standards and rules, especially in a prosperous country like Australia.

But for these people the rules, the one size fits all, and the collectivism enshrined in the Fair Work Act are very foreign to them.

The new economy largely does not organise through old structures that underpin institutional industrial relations systems.

We have not got that balance right in Australia between collectively determined rules and non-collective realities in our non-unionised small and medium business sectors. Until we do, we will alienate these employers and their staff from the system, and compromise the durability of the existing legal framework.

**Ratification of Minimum Age Convention**

Last month, the Gillard government announced that it would press ahead, despite years of ACCI and industry opposition, with ratifying an old (1976) international treaty on minimum age of employment, ILO 138.

I am today making it known publicly that ACCI will oppose that ratification and seek to persuade the Joint Standing Committee on treaties, when it meets in May, to reject the instrument of ratification that has been tabled by the government in the parliament.

Rather, it is important that I explain why. It is not, and I underline not, because we have any truck with exploitative child labour. We don't. Our track record here and overseas demonstrates that.

Ratifying a treaty effectively brings that treaty into Australian domestic law without parliament having to make the law.

The impact is to give an international body (in this case, the UN style International Labour Organisation) the right to set the rules and adjudicate on how Australia employs young people and whether under Commonwealth, State or Territory laws they should even be legally employed.

As with other initiatives of the Gillard government, good intentions are spoiled by regulatory overreach – and the same risk is here. In 95% of cases the international treaty is not a problem because we have minimum school age laws that act as a proxy to prevent underage employment. We don't need to ratify to protect young people. The law

and practice basically is, you learn until at least 14 and you learn or earn after that unless you are eligible for a welfare payment.

Given that Australia is not a country of exploitative child labour, and given our State Education Acts are a proxy for the ILO treaty's objectives, this smacks to me of a political agenda – to add yet another deliverable to the trade union movement before the 14 September election.

It needs to be understood that ILO treaty 138 sets the minimum age at 18 years unless employment falls into one of the exempted categories. Under the treaty "no one under that age shall be admitted to employment or work in any occupation" (article 1). There is an outright prohibition on any employment below 15 years (our compulsory schooling age) except light duties from 13 years.

Australia employs lots of people under 18. We also have formal school to work transitions (apprenticeships, traineeships) for 16 and 17 year olds who are not moving into tertiary study. We have special pathways involving work for disadvantaged kids at risk of dropping out of school or society or who have, even at ages 14 and 15. We have special programs for disadvantaged indigenous children that could involve work and where schooling opportunities are limited or rejected. We have trainees coming into the defence forces. We have child actors. We have after school work in shops. We have 14, 15 and 16 year old children selling programs at sporting events. Children of family businesses working an hour or two in shops, markets or fetes with mum and dad. These are some examples.

If we ratify the Convention then every employment arrangement of a person below 18 years would have to fall within one of the exempt categories in the Convention, otherwise Australia would be in legal breach and subject to international condemnation. Most, possibly all, would be exempt. But we are not sure, and cannot be. We would never be sure and completely at the mercy of the ILO to tell us so after someone has made a complaint of "child labour".

Even if the employer wins the case in the ILO, the stigma and reputational damage attached to being vilified publicly as an employer of "child labour" would be profound. For the Australian nation to be alleged to be defending or hiding "child labour" would convey a very false impression but damaging at the same time.

So, our employer position is because we don't need to ratify, and because we have a compulsory legislated school age which acts as a proxy for a minimum employment age, then there is no practical advantage to ratification, given the risk in doing so.

Our concerns are not theoretical. My experience, and I have a considerable amount of that, is that ILO rulings can be quite technical and create perverse results. In the mid-1990s for example, the ILO ruled that the Australian practice which required prisoners in prison to work in prison laundries was "forced labour" if the prison had been privatised. The Commonwealth was forced to legally defend the Kennett government against international litigation. It was still going on seven years later, when both the then government and I, on behalf of employers, personally had to put the case in Geneva in support forced prison work in the ILO's Committee on the Application of Standards. No one expected prison privatisation to result in breach of forced labour conventions, yet that's how the ILO's Committee of Experts ruled on the technical wording of the Convention. Similarly, we have no idea how perverse rulings on minimum age and child labour could be given the presumption in the Convention that work under 18 is illegal unless it can be proven that it falls strictly into an exempted category.

In short, the Gillard government is taking action to introduce into Australian law an international ruling that could, if the international body thinks fit, prevent employment of some disadvantaged or marginally attached teenagers in Australian workplaces under special labour market arrangements.

Even if the employment is in formal vocational training through an approved institution, the ILO treaty says that the arrangement would have to have been developed in consultation with Australian trade

unions. That is, unions would have to be consulted by every State, Territory or Commonwealth government before an apprenticeship or traineeship or other special vocational placement system was to be lawfully implemented.

State and territory governments have understandably said to the Gillard government that they think their laws comply with the treaty. Of course they would say that – none would want to concede on the record that they could be employing in breach of an international convention on child labour. But this does not give private employers enough confidence that their employment arrangements would be lawful or immune from attack by unions. Don't forget, international unions could force a hearing, not just local agitators.

It's for these reasons that ACCI has argued for the past three years against this ratification. We have done so in all forums, especially the tri partite International Labour Advisory Committee, which is a subset of the statutory National Workplace Relations Consultative Council.

It's for these reasons that successive Labor and Coalition governments did not ratify – neither the Fraser government, the Hawke government, the Keating government, the Howard government nor the Rudd government. Those Labor governments did not see the need to ratify, nor cede authority to an international body on a domestic issue that carried some risk of perverse rulings disturbing the employment of young people.

It might be a feel good story for 24 hours for the government, but the complications could have to be cleaned up by subsequent employers, training institutions, charitable employers, State, Territory and Commonwealth governments if the ILO doesn't for some reason like the way Australia allows teenagers under 18 to work.

Ladies and gentlemen, thank you for your interest in these matters, and the work of the Congress. I wish you well in your stay here in Melbourne, and the hospitality that Australia has to offer.