Collaborative Industrial Relations:
Australia's future or another pipedream

IRSQ Conference

27 August 2010

AUSTRALIAN INDUSTRY GROUP

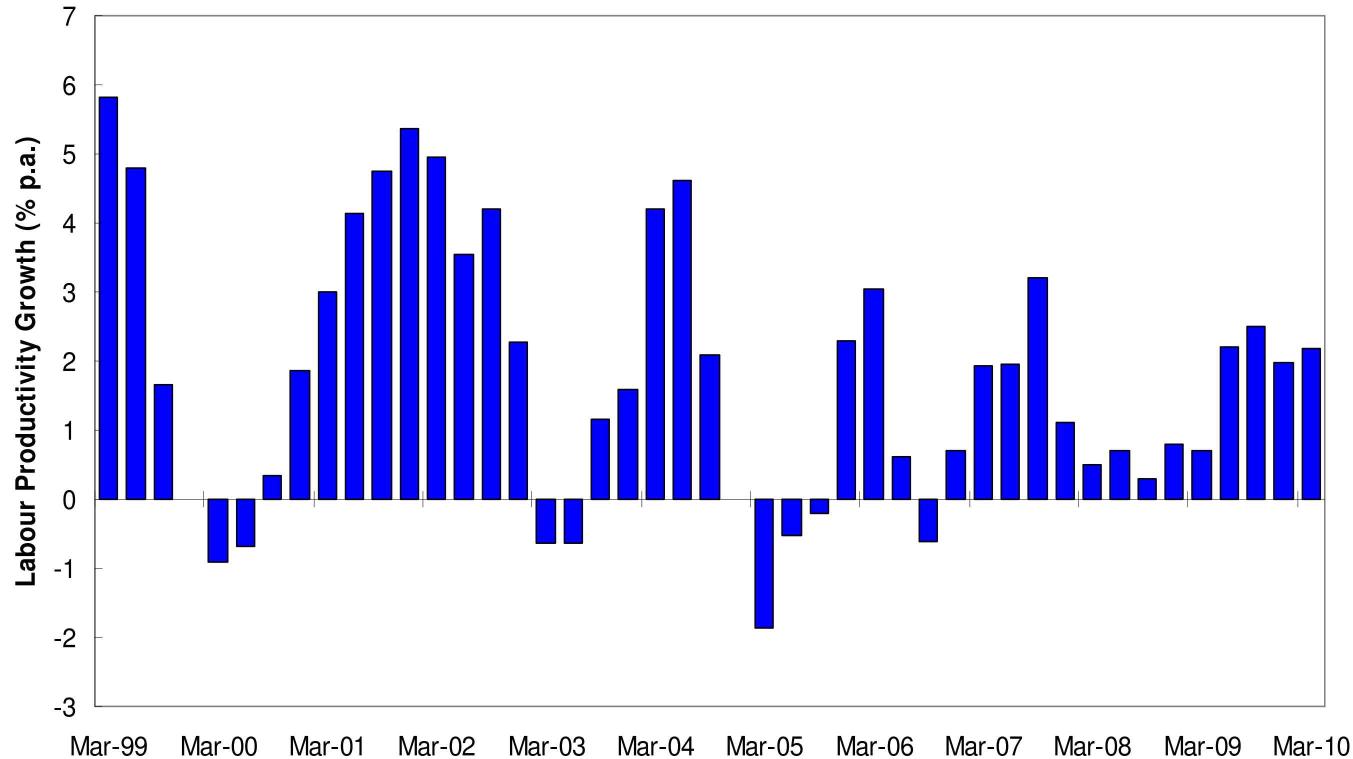
Collaborative industrial relations

- There is plenty of scope for Collaborative Industrial Relations in Australia
- Common ground should be sought around the needs of both employees and employers for more flexibility in the workplace
- It is in the interests of all parties that there is a focus on continuous productivity improvement
- There are plenty of other areas of common interest, eg. skills, OHS etc

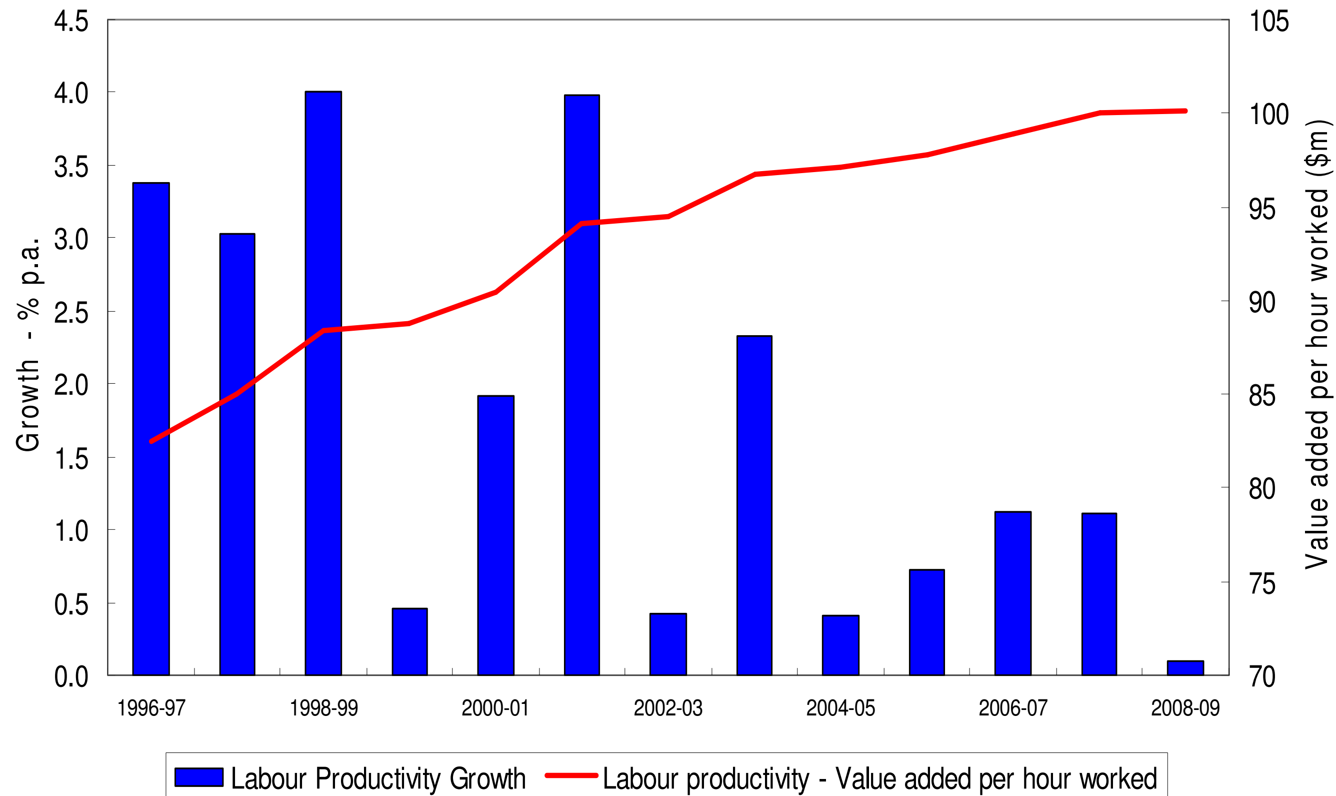
Fair Work Act

- So far, there is no evidence that the *Fair Work Act* is facilitating improved flexibility or productivity
- The decision of the major parties to rule out changes to the Act is not good policy, and should be reviewed
- The law is still unsettled and there is plenty of scope for problems to come to light
- Ai Group has pursued appeals or intervened in many Full Bench FWA cases to ensure that the law is interpreted properly

Recent labour productivity growth out of the downturn has remained modest



Australian labour productivity has risen more slowly in recent years



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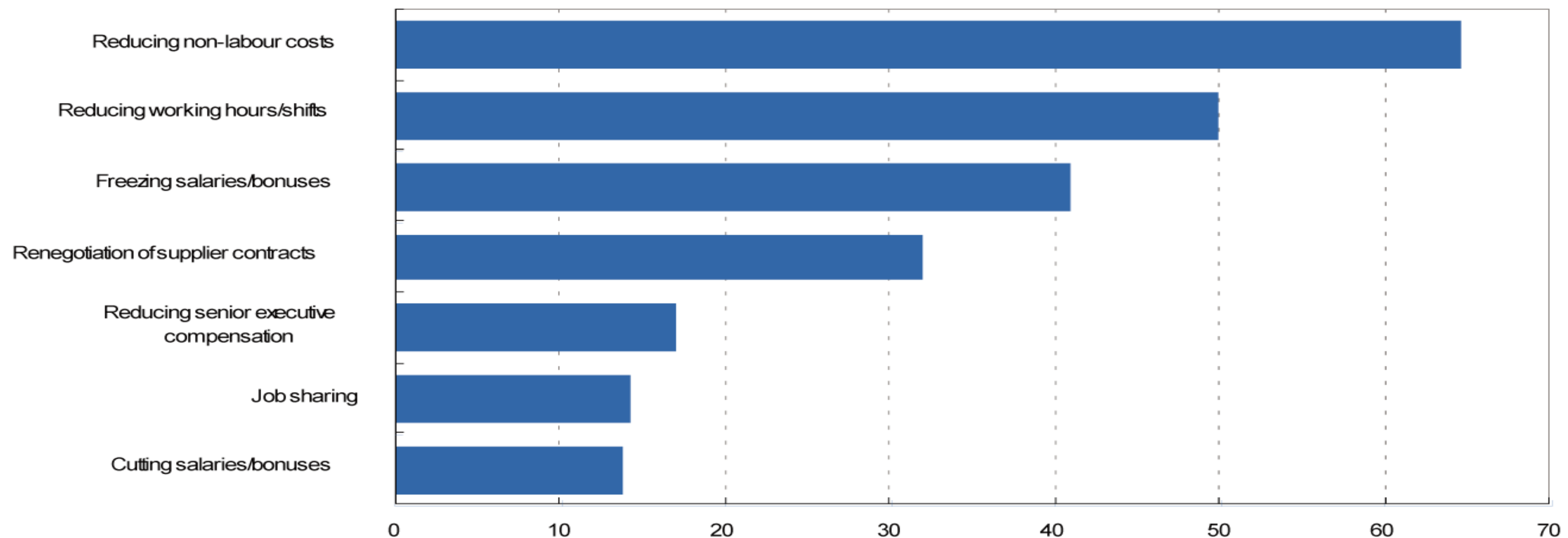
During the GFC, access to flexibility was a key factor

Employment strategies

Businesses have used a range of methods to avoid cuts in employment

Chart 30: Measures to avoid cuts in employment



Australian Industry Group / American Express Survey *Looking Towards the Upturn*, August 2009

The need to preserve flexibility and improve productivity

- The flexibility available during the GFC cannot be attributed to the FW Act which was not fully operative during 2009
- Continental Europe is being strangled by over-regulation (including IR):
  - Works Council structures
  - Industry bargaining
  - Restrictions on hours, forms of employment, transfer of business
- Australia needs to avoid the same mistakes
- If workplace flexibility is lost, future economic challenges will have much more negative effects on employment and living standards

Flexibility should be an area where there is plenty of common ground

- Employers need flexibility and employees want flexibility - there is plenty of scope for win-win outcomes
- Employees want:
  - Flexibility with hours
  - Flexibility with leave
  - Flexibility with work location
- So do employers in many cases
- It is important that there be a fair safety net, but fairness can be achieved with greater flexibility

A number of issues are impeding flexibility……..

- Modern awards will eventually reduce the compliance burden but:
  - The complexity of the transitional arrangements will increased the burden for many employers up to 2014
  - Modern awards are not very flexible – they largely reflect the conditions in the pre-modern instruments
  - Some restrictions which had been abolished have been reinstated, eg. casual conversion clauses
  - Flexibility terms contain some problematic provisions (termination at any time with notice)

Issues which are impeding flexibility

- Many unions view flexibility as a collective thing, but flexibility is often a very individual thing
- Why should the majority be able to veto flexibility genuinely wanted by an individual employee and the employer?
- Examples:
  - Continuous shift workers returning from maternity leave who need regular part-time work
  - Employees who want to start earlier or finish later
  - Cashing out of a proportion of annual leave

Issues which are impeding flexibility

- **Individual Flexibility Arrangements in EAs:**
  - Policy intent is not being achieved
  - Union clauses prevent any meaningful flexibility
  - Fortunately Ryan C's *TriMas* decision was overturned
  - Relevance of *Bupa Care* Full Bench Decision re. NDT / BOOT
  - Minimum shift issue is a classic example of where IFAs should be able to be used
  - The Act should include a mandatory flexibility term

Issues which are impeding flexibility (contd)

- **Union claims to impose restrictions on labour hire and contractors:**
  - The subject of more FWA Full Bench decisions than any other bargaining issue:
    - *Australia Post No. 1*, *Australia Post No. 2*, *Airport Fuel Services, Alcoa, Asurco Contracting, Kagan*
  - Many union claims appear to breach the adverse action provisions of the General Protections – issue is yet to be fully tested
  - FW Act should outlaw agreement clauses and bargaining claims which impose these restrictions

Issues which are impeding flexibility (contd)

Very different approaches are being taken by different FWA Members re. assessment of the BOOT when approving Enterprise Agreements:

– *McDonald's* Full Bench decision was welcome

– *BUPA Care* decision: NDT / BOOT appears to be a paper exercise

Issues which are impeding flexibility (contd)

- **Undertakings:**
  - A small minority of FWA Commissioners are using undertakings inappropriately in Ai Group's view
  - Undertakings are being insisted upon to remove or modify lawful clauses in agreements, for example:
    - Cashing out of annual leave clauses
    - Compulsory arbitration under dispute settling procedures
  - The extent of the undertakings in many cases constitute *"substantial changes to the agreement"* in Ai Group's view
  - Difficult to appeal because employers feel forced to agree to the Commissioner's position

Issues which are impeding flexibility (contd)

- **Transfer of business:**
  - The Act is a significant impediment to outsourcing
  - Creates a lose-lose-lose scenario
  - There is clear evidence now of the anti-employment effects of the Act, eg. ICT sector
  - Employers are not typically seeking FWA orders because of the risks involved
  - "Character of the business" test needs to be reinstated

Bargaining orders and flexibility

- To date, good faith bargaining decisions have mostly been practical and sensible
- FWA should not have the power to make bargaining orders which prevent employers from managing their businesses efficiently / productively or prevent employees exercising their democratic rights:
  - communicating with employees
  - implementing workplace changes
  - passing on employee remuneration increases
  - holding a ballot for employees to approve a proposed workplace agreement

Right to request provisions

- So far, these provisions have had much less focus in Australia than in the UK
- Employers typically try to accommodate requests for flexibility – the FW Act has not changed this
- It is surprising that unions have done little so far to promote the new provisions – may be due to the focus on collectivism

The modern workplace is diverse

- The modern day workforce is diverse, and diversity will increase in the future:
  - Need to increase participation of women, older workers, people with a disability etc, as the population ages
  - Cultural diversity
- Increased diversity in the workplace requires increased flexibility
- As stated earlier, flexibility is often a very individual thing

Gender equity

- Gender equity is an area where there should be plenty of common ground between employers and employees
- Employers are committed to gender equity and want to be involved in implementing initiatives
- Ai Group supported the new ASX Corporate Governance Principles (disclosure of proportion of women on Boards, in senior management etc)

Equal Remuneration Case

- Ai Group supports the principle of equal remuneration for work of equal value, but the unions' proposals in the SACS *Equal Remuneration Case* are highly problematic
- Wage increases of 15% to 50% sought across the entire SACS industry, to oust the modern award rates, plus watered down classification requirements
- Claim is based on a QLD award which has never applied to corporations

Equal Remuneration Case (contd)

- Unions are attempting to set modern award wage rates for the entire SACS industry on the basis of narrow equal remuneration criteria, rather than the more balanced approach in the Modern Awards Objective (8 elements)
- If claim succeeds, similar claims could be pursued in every industry where women are predominantly employed - potential for the award safety net to become distorted

Equal Remuneration Case (contd)

- Federal awards are intended to set minimum rates, not market rates – the safety net nature of awards is emphasised in the federal system
- The pay equity problem is a typically a market rates problem
- Implications of Government funding in SACS industry
- Space needs to be left for bargaining in all industries
- Low paid bargaining stream
- ASU in QLD has announced that it will not re-negotiate EAs in most SACS workplaces, given the test case
- Inspections and hearings in September and October

Upcoming equal pay issues

- Equal pay developments are likely to be of increasing importance over the next few years, particularly if Labor is in Government
- House of Reps Inquiry recommendations yet to be dealt with

Conclusion

- There is plenty of scope for Collaborative Industrial Relations in Australia
- Flexible and productive workplaces are in the interests of employers and employees
- The *Fair Work Act* is inhibiting flexibility and productivity improvement in some areas and some sensible changes need to be made