



Labour Relations & Pandemics: Past, Present, Future




**Prof. Emeritus
Ron McCallum
Debate 2020**

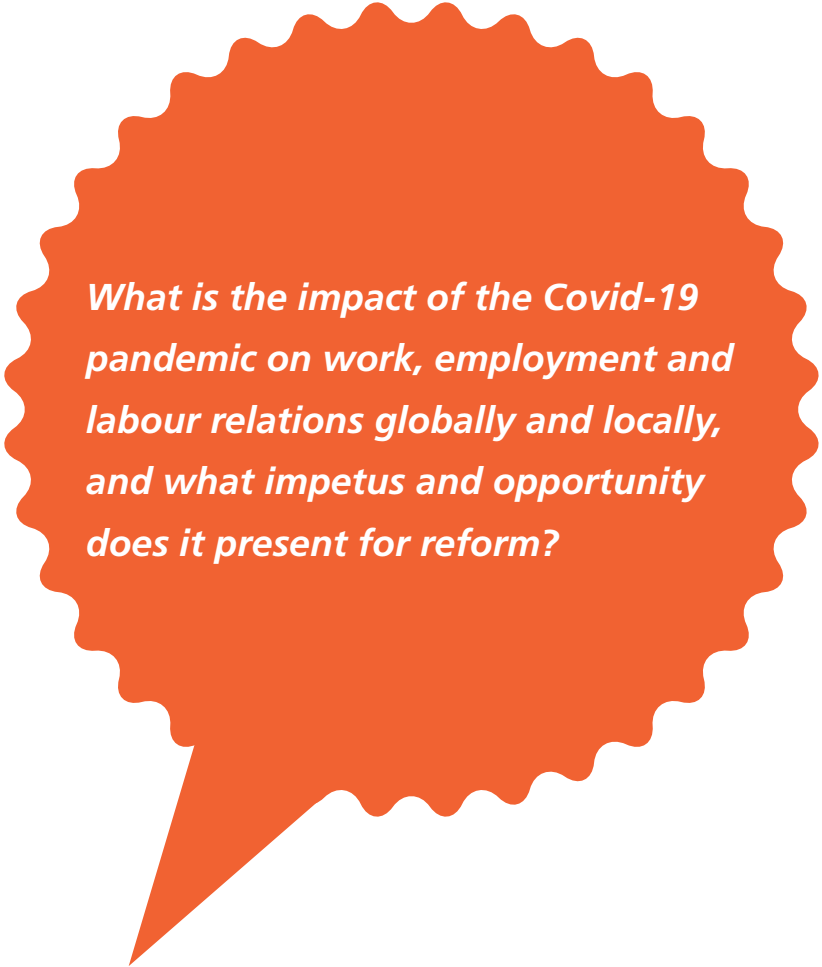
Background Briefing Paper

*Australian Institute of Employment Rights
By James Fleming and Keith Harvey*





What role have previous pandemics and crises played in labour regulation and labour relations?



What is the impact of the Covid-19 pandemic on work, employment and labour relations globally and locally, and what impetus and opportunity does it present for reform?

The Australian Institute of Employment Rights Inc

The Australian Institute of Employment Rights (AIER) is an independent, not-for-profit body that works in the public interest to promote the recognition and implementation of the rights of employers and workers in a cooperative industrial relations framework.

Our approach to workplace relations is outlined in our Charter of Employment Rights. The Charter identifies the fundamental principles on which fair workplace laws, policies and relationships should be based.

The extent of our work can be viewed on our website at www.aierights.com.au.

The Ron McCallum Debate

Each year since its inception in 2005, AIER has held a public debate regarding important issues in workplace relations. It is part of AIER's commitment to promoting public discourse around the fundamental rights and responsibilities of workers and employers.

This, the tenth Ron McCallum debate, marks the ten-year anniversary since we were honoured to have then Senior Australian of the Year Emeritus Professor Ron McCallum become a Patron of AIER and also agree to lend his name to our annual debate. Our debate has thus assumed responsibility for promoting important ideas and discussions that are consistent with Ron's own commitments to respect the rights of all working citizens in our democracy. One overarching theme for all debates is therefore "Justice at Work".

Welcome from the Chair and Executive Director

We at the AIER welcome you to this, the tenth anniversary of the Ron McCallum debate, which over the years has become an institution on the national calendar of industrial relations events. It is our hope that through forums like these, that bring business, unions, the legal profession, academia, government and interested members of the general public together to delve into the fundamental workplace relations issues of the moment, new insights, possibilities and space for co-operation will emerge.

It is with concern that we witness the social and economic devastation of the pandemic and the deep inequities it has highlighted. At the same time, it is with cautious optimism that we greet the possibilities for 'building it back better' and the renewed focus on tripartism attending some post-pandemic IR reform efforts. This spirit of tripartism is to be encouraged, as is a focus on ensuring that Australia's IR reform efforts help us uphold international and fundamental labour standards. We are sure our participants will pull no punches in expressing the full force of their ideas in this debate and we look forward to this. May it be a useful, insightful and entertaining debate for all. Your voice and contributions are most welcome.

*– Michael Harmer, Chair, AIER Executive Committee
James Fleming, Executive Director, AIER*

About the Participants

This year, we are pleased to welcome Justice Iain Ross AO, President of the Fair Work Commission to Chair the debate. Greg Vines Deputy Director-General of the International Labour Organization will provide a global and ILO perspective on the pandemic and Emeritus Professor **Ron McCallum** AO will give an historical perspective on the current and past pandemics and their relationship to labour law regulation, as well as reflecting on the debate.

The debate panellists include:

- **Sally McManus**, Secretary, Australian Council of Trade Unions
- **Jennifer Westacott** AO, Chief Executive, Business Council of Australia
- **Innes Willox**, Chief Executive, Australian Industry Group
- **Annie Butler**, Federal Secretary, Australian Nursing and Midwifery Federation
- **Joellen Riley Munton**, Professor, Faculty of Law, University of Technology Sydney
- **David Peetz** FASSA, Professor of Employment Relations, Griffith University

You can learn more about the debate participants in the Bios section below.

Attending the Debate

10th Annual Ron McCallum Debate

6-8pm (Sydney/Melbourne/Canberra time), Thursday 22 October.

An online link to the debate will be forwarded to all registered ticket holders before the event.

Registrations are through Eventbrite [here](#).

Please note, the debate will be recorded and published online but the audience will not be visible in the recording.

Background to the Issues

1. The Pandemic's impact

At the time of writing, there have been over 32 million confirmed cases of Covid-19 and over 980,000 Covid-19-related deaths globally.¹ Australia has had 26,983 reported cases and 861 deaths, or 32.97 deaths per million persons. That death rate is far higher than neighbouring New Zealand but the world's 56th lowest death rate overall.²

The likely duration and extent of the pandemic depends on many factors, including the speed at which vaccines are developed, their efficacy, social behaviour and government policy regarding mitigation efforts. According to the World Health Organization, over 180 vaccines are currently in development and 9 are in final, phase 3 clinical trials.³ Whilst vaccine development usually takes years, scientists are hoping to develop one in 12-18 months.⁴ Epidemiologists are indicating that even with a vaccine, ongoing infections and seasonal outbreaks of SARS-CoV-2, the virus that causes COVID-19, are likely.⁵

The Reserve Bank of Australia notes the pandemic represents "the largest shock to the global economy in many decades" and that labour markets "have been severely disrupted".⁶ In addition to its yet unknown extent and duration, the pandemic's effect on employment and the world economy will also be affected by many factors. These include government policy responses, including regulatory and fiscal responses, and social, consumer and investor behaviour. In the short-term, worldwide, the ILO has estimates 436 million enterprises face high risks of serious disruption and the wholesale, retail and manufacturing sectors will continue to be hit the hardest.⁷ One third of countries are currently implementing the strictest lockdown measures affecting all but essential workers.⁸ It is estimated 495 million

¹ as at 26 September 2020: see World Health Organization, *WHO Coronavirus Disease (COVID-19) Dashboard*.

² (albeit a crude measure when different countries are in different stages of the outbreak).

³ World Health Organization, *Draft Landscape of Covid-19 candidate vaccines – 26 September 2020*.

⁴ Niko Kommenda and Frank Hulley Jones, 'Covid vaccine tracker: when will a coronavirus vaccine be ready', *The Guardian*, 26 September 2020.

⁵ See Megan Scudellari, 'How the pandemic might play out in 2021 and beyond', *Nature*, News Feature, 5 August 2020.

⁶ Reserve Bank of Australia, *Statement on Monetary Policy*, August 2020, p1; Fair Work Commission, *President's Statement: The Fair Work Commission's Coronavirus (COVID-19) update – Draft Award Flexibility Schedule*, 31 August 2020, at [3].

⁷ See: International Labour Organization, *ILO Monitor: Covid-19 and the world of work – Updated estimates and analysis* (3rd ed.), 29th April 2020.

⁸ Ibid.

effective full-time jobs (17.3 percent) will be lost in the second quarter of 2020 compared to the same period in 2019, and effecting more women than men in all countries except France, Israel and Mexico.⁹ The ILO estimates the pandemic will result in a 10.7 per cent decline in global labour income during the first three quarters of 2020 or US\$3.5 trillion compared to the same period last year.¹⁰

In Australia, the Reserve Bank's "baseline scenario" is that GDP "grows modestly over the second half of 2020" driven by household consumption, whilst other areas of the economy and employment overall continues to contract.¹¹ The RBA predicts that unemployment could peak at almost 10 percent by the end of the year.¹² The latest ABS figures, for August 2020, show Australia is deep in recession but the seasonally/adjusted unemployment figures were better than expected as unemployment decreased to 6.8 per cent, albeit if much of the seeming resurgence of employment was from 'non-employees'.¹³ The national accounts for the June quarter show GDP fell 7 percent, down 6.3 percent from last year.¹⁴ Compensation of employees fell a record 2.5% this quarter whilst average compensation per employee rose an 3.1% this quarter reflecting a compositional shift in the work force with reduced employment in part-time and lower paid jobs.¹⁵

Government support to business through payment of subsidies resulted in a strong rise in profits this quarter. The COE [compensation of employees] share of total factor income fell below 50%, for the first time since September quarter 1959. Productivity has risen during 2020 and labour costs have fallen. GDP per hour worked rose 3.1% in the June quarter and was up 4.1 over the financial year. Real unit labour costs fell 9.8 and 9.3 over the quarter and year.

In this context, there have already been a range of industrial relations reforms and relevant fiscal measures, including:

⁹ International Labour Organization, *ILO Monitor: Covid-19 and the world of work – Updated estimates and analysis* (6th ed.), 23 September 2020.

¹⁰ Ibid.

¹¹ Fair Work Commission, *President's Statement: The Fair Work Commission's Coronavirus (COVID-19) update – Draft Award Flexibility Schedule*, 31 August 2020.

¹² Ibid.

¹³ ABS, *Labour Force, Australia*, 6202.0, August 2020, released 17 September 2020.

¹⁴ ABS, Australian National Accounts: *National Income, Expenditure and Product*, 5206.0, June 2020, released 2 September 2020.

¹⁵ Ibid.

- \$220 billion in income supports to workers and firms;
- \$130 billion JobKeeper wage subsidy scheme;
- various changes to awards, including:
 - The addition of paid pandemic leave in health sector awards;¹⁶
 - Flexibility around taking leave;¹⁷
 - Flexibility to allow:
 - full time or part time employees to request to compress their working week so that their usual weekly ordinary hours are worked over a reduced number of their usual workdays;
 - a change in the span of hours in a workplace or section of a workplace with the agreement of 75% of employees;
 - an agreement to share a reduction in working hours in a workplace or section of a workplace with the agreement of 75% of employees, in circumstances where an employer cannot usefully employ all of the full time and part time employees in a workplace or section of a workplace;
 - an employer to give a direction to an employee to perform all duties within their skill and competency;
 - an employer to give direction to an employee to work at a different workplace (including the employee's home); and
 - an employer to give a direction to employees to stagger starting and finishing times of work.¹⁸
- An expedited process for dealing with applications to vary enterprise agreements to accommodate changes to help survive the economic challenges of the pandemic. For a brief period at the beginning of the pandemic, the federal government introduced a temporary amendment to reduce the amount of notice that needed to be given to employees of a proposal to vary an agreement before they could be asked to vote, from the usual seven days to only one day, but this regulation was repealed from 13 June 2020;¹⁹ and

¹⁶ *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 (27 July 2020). This followed a decision to vary 99 modern awards to allow for unpaid pandemic leave: *Variation of Awards on the Initiative of the Commission* [2020] FWCFB 1837 (8 April 2020).

¹⁷ COVID-19 Award Flexibility Schedules [2020] FWCFB 5137 (24 September 2020).

¹⁸ Fair Work Commission, *President's Statement: The Fair Work Commission's Coronavirus (COVID-19) update – Draft Award Flexibility Schedule*, 31 August 2020.

¹⁹ See Fair Work Amendment (Variation of Enterprise Agreements) Regulation 2020, operating from 17 April 2020 and 12 June 2020, and Fair Work Amendment (Variation of Enterprise Agreements No 2) Regulations 2020, taking effect on 13 June 2020.

- A series of roundtable discussions on Industrial Relations reform.
2. *What problems and need for reform has the Covid-19 pandemic exposed in our IR system?*

The ACTU argues that the pandemic has both highlighted and exacerbated existing labour market inequalities, including having a

... deeply disproportionate impact on the most insecure segments of the labour market: including women, young workers, and workers in precarious and insecure jobs. Every recession tends to increase inequality, but this one is having a dramatic disequalising effect because of the concentration of job losses and reduced hours among workers who were badly-paid and insecure at the start of the pandemic. The decline in women's employment has been greater than for men: partly because women are over-represented in the consumer service industries that were shut down first, and partly because women are more likely to work in casual and other insecure jobs that employers were quick to eliminate.²⁰

On the disproportionate impact on women, Mihajla Gavin from University of Technology Sydney notes that,

Since the pandemic hit, women have lost employment at a higher rate than men, lost more hours of work than men and experienced higher levels of underemployment. Meanwhile, women have taken on the disproportionate burden of household and caring work during lockdown.

The ACTU's Sally McManus has criticised the government for forgetting female workers by prioritising promoting blue collar jobs in a 'pink recession'.²¹ Unions have also noted the links between insecure work and the virus' spread, particularly the impact of multiple job holding, and poor pay, conditions and training, and lack of adequate access to paid leave, especially in the aged care and security industries.²²

²⁰ ACTU, *Australia's Economic Reconstruction after Covid-19: A National Jobs Plan, And Five Ways to Get Started*, 22 July 2020.

²¹ See: Nick Bonyhady, 'Blue collar jobs not enough to fix 'pink recession', Sally McManus says', *The Sydney Morning Herald*, June 16, 2020.

²² For example, see 'Ban on Multiple Jobs Another Blow for Aged Care Workers', *Hellocare*, 17 July 2020; *Action for Aged Care: Workers Demand Policy Reform*, ANMF, HSU National, United Workers Union, Australian Unions.

In Australia and around the world there has been renewed debate about the low pay and conditions of the essential workers that have sustained the population through the crisis, including health care, transport, warehousing, food production and retail workers.

Business is naturally concerned about the devastating collapse in consumer demand across many industries, and the large numbers of businesses that have collapsed or face insolvency if the JobKeeper scheme is withdrawn too early. For many businesses needing to make quick adjustments to working arrangements in an unprecedented emergency, the usual processes required for negotiating variations to working arrangements under awards and enterprise agreements have been a source of complaint. Business groups have also identified the need for government support for retraining programs to enable workers to prepare for entry into new kinds of jobs, especially in industries unlikely to make a quick recovery (such as air transport).

Business has an IR vision of its own. The BCA's Jennifer Westacott has said:

On workplace relations, our priority is to simplify the complex awards structure and restore faith in the enterprise bargaining system. Let's not surrender the cooperation and shared interests we have established in managing this crisis and remember that secure work comes from secure and successful businesses working with their employees...²³

While yet to release its full proposal, the Ai Group has expressed similar objectives. Three key areas that it argues ought to be given attention include:

1. Australia's award system: *Sensible changes are needed to the relevant provisions in the Fair Work Act to deliver a simpler and more flexible award system...*

2. Australia's enterprise bargaining system: *Changes are needed to the enterprise bargaining laws in the Fair Work Act to encourage employers and employees to enter into enterprise agreements that suit their needs. Over recent years, the number of enterprise agreements in Australia has declined substantially due to the excessive complexity of the system....*

²³ Jennifer Westacott, 'No one should be left behind in the recovery', BCA, 27 April 2020, <https://www.bca.com.au/no_one_should_be_left_behind_in_the_recovery>.

3. Casual employment: *Casuals make up 20% of the Australian workforce, providing vital flexibility to employers and employees. The Fair Work Act needs to be amended to define a casual employee in a simple and clear manner...*²⁴

3. Possibilities for reform and tripartite co-operation

Deliberations in the Federal Government's Roundtable process had just concluded at the time of writing. This process sought to find a consensus on IR reforms that may assist recovery in the post-pandemic world. The process is confidential, and the Minister for Industrial Relations is yet to announce the shape of the Government's reforms. In announcing the Roundtable process, the Prime Minister said:

Now, on industrial relations. I've been genuinely heartened by the constructive approach of employers, employees, business groups and unions working together with the ACTU through this crisis to find practical solutions to keeping Australians in jobs.

We now need to turn that into cooperation to create even more jobs, especially during this all important recovery phase.

Our current system is not fit-for-purpose, especially given the scale of the jobs challenge that we now face as a nation.

Our industrial relations system has settled into a complacency of unions seeking marginal benefits and employers closing down risks, often by simply not employing anyone.

...

*No one side has all the answers, employees or employers. Unions or employer organisations. It is not beyond Australians to put aside differences to find cooperative solutions to specific problems, especially at a time like this.*²⁵

Before the roundtable discussions, stakeholders on all sides emphasised the need for new solutions and approaches. The Business Council of Australia's, Jennifer Westacott called for us to think about what's possible with "...shared vision and purpose... [as] we prepare for the long journey of the recovery" and called for "people to put aside their ideological constraints and abandon their biases against business."²⁶ She warned that, "There can be no trade-off between the health, social and economic recovery but older workers and those with high

²⁴ Ai Group, *Fresh thinking and new approach needed on IR reform*, Media Release, 19 May 2020.

²⁵ Prime Minister Scott Morrison, Address, National Press Club, 26 May 2020, transcript available at <<https://www.pm.gov.au/media/address-national-press-club-260520>>.

²⁶ BCA, *Making the right choices will be crucial to recovery*, Media Release, 27 April 2020.

school or below education will pay the highest cost of failure on any front."²⁷ The Australian Industry Group's Innes Willox likewise also called for "fresh thinking and a new approach" that transcends "tired old arguments about IR reform."²⁸

Whilst agreeing on many of the problems that need addressing, business and unions have been fundamentally at odds about the solutions and the proper path to recovery. For example, the former has emphasised the importance of increased employer flexibilities and the latter increased worker security. The BCA supports extending temporary flexibility measures to support businesses disaffected by Covid-19 but not receiving JobKeeper payments.²⁹ In an IR reform policy paper released prior to the Roundtable process, the Ai Group proposed simplifying awards, encouraging the use of individual flexibility arrangements, and greater take up of enterprise agreements by replacing the Better off Overall test with a No Disadvantage Test, introducing a legislative definition of casual employment, and extending the life of Greenfields agreements whilst avoiding introducing wage theft laws.³⁰

Unions on the other hand, have emphasised the need to address precarity in the labour market and have warned about the further erosion of labour standards. Aged care unions, for example, have called for an end to "insecure, underpaid and undervalued work" and have proposed a plan for the industry that includes mandated minimum staffing levels and skills in all facilities, increased public funding with more transparency and accountability and mandatory training requirements, including infection control and ongoing paid and accessible professional development, more direct employment of permanent staff, and enough hours of work to live on.³¹

The ACTU has released a Reconstruction Plan and said that in rebuilding our jobs and economy,

...we need to revise our labour laws and labour market institutions; re-visit our wage fixing mechanisms; reconsider the unfettered expansion of precarious employment arrangements;

²⁷ Ibid.

²⁸ Ai Group, *Fresh thinking and new approach needed on IR reform*, Media Release, 19 May 2020.

²⁹ BCA, *JobKeeper changes will save jobs*, Media Release, 26 August 2020.

³⁰ See: Ai Group, *Ai Group Policy Paper: Workplace Relations Reforms*, June 2020.

³¹ *Action for Aged Care: Workers Demand Policy Reform*, ANMF, HSU National, United Workers Union, Australian Unions.

*and strengthen the capacity for workers to protect their rights and genuinely participate in change by organising in their trade unions...*³²

In May 2020, the Ai Group, BCA, ACTU and other groups were signatories to a letter to the National Cabinet, energy ministers and Neville Power, Chairman of the National Covid-19 Commission, calling for an accelerated transition to clean energy as part of a pandemic recovery plan that stimulates growth and rebuilds a sustainable and strong economy.³³

In the midst of the pandemic, the BCA and ACTU agreed on the need for paid pandemic leave and jointly wrote to the Federal Minister.³⁴ During the roundtable process, the ACTU and BCA came to an agreed joint position on softening the "better off overall" test for approving enterprise agreements in exchange for fast-tracking union negotiated and approved deals. However, this agreement was strongly opposed by the new G4 business groups, including the Ai Group and discussions have since broken down. Whether the space for tripartite, co-operative industrial relations has expanded or contracted is unclear.

4. What does the future hold?

The AIER wishes to promote dialogue and co-operation to help enable Australian employers, employees and society as a whole emerge stronger, fairer and more productive in a post-pandemic world. The AIER has previously noted a range of issues and concerns with Australia's industrial relations system and outcomes. These issues include:

- insecure work/precarious employment;
- the rise of the gig economy and sham contracting;
- stagnant real wages;
- pay equity;
- declining collective bargaining rates; and
- limitations on bargaining rights, including the right to take protected industrial action and industry wide bargaining.

³² See: ACTU, *Australia's Economic Reconstruction after Covid-19: A National Jobs Plan, And Five Ways to Get Started*, 22 July 2020.

³³ Adam Morton, 'Business, unions and green groups call for sustainable Covid-19 recovery with clean energy transition', *The Guardian*, 21 May 2020.

³⁴ See: *ACTU-BCA Joint Letter: Pandemic Leave*, 3 August 2020.

The AIER is of the view that Australia's current industrial laws do not fully conform with our international obligations and wish to promote dialogue towards achieving these ends. The AIER supports the ongoing implementation of core international labour standards especially with regard to freedom of association and collective bargaining. It is the AIER's hope that these issues will be addressed in reforms aimed at combatting the pandemic and its impact. We wait with anticipation to hear the participants' views.

Australian Institute of Employment Rights Inc
29 September 2020

Participants' Bios



Hon Justice Iain Ross AO

President of the Fair Work Commission

On 1 March 2012, Iain was appointed a Judge of the Federal Court and President of the Fair Work Commission.

Prior to his appointment, Iain was a Judge of the Supreme Court of Victoria and President of the Victorian Civil and Administrative Tribunal.

Iain has also served as Chair of the Council of Australasian Tribunals, inaugural Chair of the Mediator Standards Board, a Judge of the County Court of Victoria, partner of a major law firm and a Vice President of the Australian Industrial Relations Commission. He was made an Officer of the Order of Australia on 13 June 2005 and elected a Fellow of the Academy of the Social Sciences in Australia on 25 September 2019.



Greg Vines

Deputy Director-General of the International Labour Organization

Greg Vines is Deputy Director-General of the International Labour Organization (ILO).

Mr Vines has had an extensive career in strategic and executive management within Australia and internationally. The focus of his work has been on labour relations, organization and workplace change, governance, and human resource management.

Mr Vines has also held senior executive appointments with the Australian and Timor Leste Governments, and leadership positions with Australian trade unions. He is admitted to practice as a lawyer and has studied law, management and labour relations in Australia and the USA.



Ron McCallum AO

Emeritus Professor

Ronald C McCallum AO is widely recognised as one of Australia's leading labour law academics. He was the foundation Blake Dawson Waldron Professor in Industrial Law in the University of Sydney Law School from January 1993 until 30 September 2007. This professorship was the first full professorship in industrial law at any Australian university. Ron is the first totally blind person to have been appointed to a full professorship in any field at any university in Australia or New Zealand. Ron was Professor of Labour Law at Sydney Law School from 1 February 2008 until 31 December 2010. In January 2011, he was appointed to an Emeritus Professorship in Sydney Law School. Ron is a past Chair of the United Nations Committee on the Rights of Persons with Disabilities and was named Senior Australian of the Year in 2011. Ron is Patron of the AIER.



Sally McManus

Secretary, Australian
Council of Trade Unions

Sally commenced her working life as a Pizza Hut driver, cleaner and a shop assistant prior to joining the ACTU's Trainee Organisers Program in 1994. From this she went on to become an Organiser and then the Branch Secretary of the ASU in NSW.

In 2017 Sally was elected as the ACTU Secretary, the first woman Secretary in its 90-year history.



Jennifer Westacott AO

Chief Executive, Business
Council of Australia

The Business Council of Australia is the nation's premier business organisation, advocating for a stronger and fairer society through a more prosperous Australia.

Jennifer Westacott AO has served as Chief Executive of the Business Council of Australia since 2011, bringing a unique combination of extensive policy experience in both the public and private sectors.



Annie Butler

Federal Secretary, Australian Nursing
and Midwifery Federation

Annie Butler is the Federal Secretary for the Australian Nursing and Midwifery Federation. Annie was formally appointed to the role in June 2018, having served as the Assistant Federal Secretary since March 2014, and following years of experience in the clinical, professional and industrial areas of nursing.

Annie is a registered nurse with more than a decade's experience working in public hospitals, the community and on health education projects, and a further decade working in research and education.



Joellen Riley Munton

Professor, Faculty of Law, University
of Technology Sydney

Joellen Riley Munton is a Professor of Law at the University of Technology Sydney. She has been teaching and writing in the field of employment and labour law since 1998 and is an author on a number of books in the field, including *The Law of Work*, and *Macken's Law of Employment* (7th and 8th editions). Her academic career includes six years as Dean of Law at The University of Sydney.



Innes Willox

Chief Executive, Australian
Industry Group

Innes Willox is Chief Executive of the Australian Industry Group, a leading industry organisation representing businesses in a broad range of sectors including manufacturing, construction, transport, defence, ICT and labour hire.

Innes was appointed Chief Executive in May 2012.

Amongst other appointments, Innes is also a Director of Australian Super, Chair of the Migration Council of Australia and a Board member of the Australian American Leadership Dialogue.



David Peetz FASSA

Professor of Employment Relations,
Griffith University

David Peetz is professor of employment relations at Griffith University and a co-researcher at the Inter-university Centre for Research on Globalisation and Work in Canada. He was recently a Distinguished Visiting Fellow at the Advanced Research Collaborative in the Graduate Center of the City University of New York.

