PRODUCTIVE AND FAIR WORKPLACE RELATIONS

March 2019

EXECUTIVE SUMMARY

Australia needs to maintain a workplace relations system that:

- *Enables businesses to operate productively and competitively;*
- *Is flexible for businesses and employees; and*
- *Is fair for employees and employers.*

Australia's current workplace relations system operates on some key principles which have served the nation very well and must not be diluted, including:

- *Enterprise agreements;*
- *A safety net of awards and legislated minimum conditions;*
- *An independent umpire – the Fair Work Commission; and*
- *Strong regulators to ensure that everyone complies with the law.*

The flexibilities in Australia's current workplace relations system, compared with the previous highly centralised arrangements, have been pivotal to Australia's economic and social success over the past 25 years, and are central to our future success.

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The importance of flexibility

Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to further improve Australian living standards.

Employers need the flexibility to employ the types of labour that they need, including full-time, part-time, casual, fixed term, independent contractors and labour hire. Employees also need flexibility. Many people prefer casual and part-time work and are not available or willing to work on a full-time basis. The ABS stats show that the level of casual employment is the same today as it was 20 years ago – about 20% of the workforce.

Maintaining or imposing workplace relations barriers adversely impacts employers and employees. Employees are of course among those worst affected when their employers decide to close plants, relocate, downsize or offshore because the operating environment in Australia imposes too many inflexibilities and other hurdles.

Priorities include:

- Defining the expression "casual employee" in the *Fair Work Act* as, in effect, an employee engaged and paid as a casual. This is consistent with the industry practice and the very common definition in modern awards. This approach is also inherently fair. It is unfair for an employee who has been engaged as a casual and paid a casual loading, to claim annual leave and other entitlements of permanent employees.

- Ensuring that any regulations that are implemented to provide more protection to 'gig workers' do not impact upon businesses that engage or employ other workers. For example, it is critical that the common law tests are retained for differentiating between an independent contractor and an employee. By far, the industry that employs the most independent contractors is the construction industry and any changes to the common law tests would cause major disruption for both businesses and independent contractors in the industry. Less than one per cent of the workforce are 'gig workers'.

- Avoiding the imposition of an unfair regulatory burden or other unfair structures on the labour hire industry. Removing the flexibility that labour hire businesses and their clients need would reduce employment, productivity and competitiveness.

Enterprise agreements

Genuine enterprise bargaining has served Australia well over the past 25 years and it has an important ongoing role.

The ACTU's demands for industry bargaining must not be entertained. The idea of giving unions the right to take lawful industrial action across entire industries, as the ACTU wants, is so obviously against the national interest that all political parties need to come out and decisively reject the idea.

The final report of the Cole Royal Commission identified the following reasons why industry pattern bargaining is not in the interests of employers, employees or the broader community. These arguments apply with even more force to industry bargaining because, unlike pattern bargaining, employers and employees in the industry would not have the option of entering into a different agreement:

- Pattern bargaining is, by its nature, imposed in a compulsory manner without the involvement of the employer or employees in the employment relationship;

- It denies employers the capacity for flexibility, innovation and competitiveness in respect of a major aspect of project cost;

- It denies employees the capacity to reach agreement with their employer regarding their own employment conditions – including leave arrangements, participation in bonus schemes, flexible working hours and other mutually acceptable arrangements;

- It assumes that all businesses and their employees operate in the same fashion, have the same objectives, adopt common approaches to working arrangements and are content with uniformity;

- It assumes that third parties such as unions, head contractors or employer associations understand better than either the employer or the employees what the business model of the enterprise is and what the wishes and desires of the employees are;

- It assumes that employees are not capable of negotiating satisfactorily on their own behalf; and

- In areas other than major centres, where pattern bargaining does not occur, there is nothing to suggest that the industry operates inefficiently or that the working conditions are not satisfactory for the employer or the employees.[1]

In recent years the enterprise bargaining system has suffered from an excessive focus on technicalities rather than on the facilitation of agreements genuinely reached between employers and employees. Some of the problems are the result of poor drafting of provisions of the *Fair Work Act,* but the drafting problems have been exacerbated by some unions searching for and pursuing every possible legal argument against the approval of enterprise agreements that they do not support.

The recent enactment of the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2019*, which gives the Fair Work Commission more discretion to approve agreements despite certain minor procedural and technical errors in the approval, addresses some but not all of the problems. Section 193 (Passing the Better Off Overall Test) needs to be amended to ensure that the test applies to the employees covered by a proposed enterprise agreement, as a whole, or at a particular classification level – not every single employee, which has proved to be unworkable.

The independent umpire – the Fair Work Commission

The Fair Work Commission and its predecessors have served the country well over more than a century.

It is essential that the Commission be able to carry out its role in adjusting minimum wages and maintaining awards in a fair and impartial manner. The minimum wages objective in section 134 of the *Fair Work Act* and the Minimum Wage Objective in section 284 of the Act included balanced criteria that require the Commission to take into account the interests of employees, employers and the broader economy.

There would be no point in having an independent umpire if the umpire was prevented by legislation from making a decision that benefitted one of the parties or was required to make decisions based on unbalanced criteria in the Act.

The need for strong regulators

The Fair Work Ombudsman (FWO), the Australian Building and Construction Commission (ABCC) and the Registered Organisations Commission (ROC) are strong and effective regulators.

Each of these regulators is playing a critical role in ensuring that employers, registered organisations, employees and others comply with the law.

There is no case for any of these regulators to be abolished. For example, over $16 million in fines have been imposed on the CFMMEU over the past decade or so, yet it continues to act as though it is above the law. If the ABCC is abolished, many cases involving intimidation, thuggery and unlawful conduct will never be brought before the Courts, because of employer concern about retaliatory action by the union.

Regulation of workers' entitlement funds

Workers' entitlement funds currently hold over $2 billion in workers' entitlements. The implementation of appropriate governance standards is long overdue, as recommended by both the Heydon and Cole Royal Commissions.

[1] *Royal Commission into the Building and Construction Industry*, February 2003, Final Report, Volume 5, p.53.

Superannuation funds are subject to rigorous governance standards, but these standards do not apply to construction and electrical contracting industry redundancy funds. Members of superannuation funds rightly expect to, and do, benefit from the investment earnings on employer contributions to superannuation funds. It is not right that a substantial portion of the investment earnings on employer contributions to most construction and electrical contracting industry redundancy funds are being diverted to unions and some employer associations (not Ai Group).

The Heydon and Cole Royal Commissions uncovered numerous examples of inappropriate conduct relating to workers' entitlement funds.

Surely, no-one could legitimately disagree that workers' entitlement funds should be required to adhere to high standards of governance to ensure that workers' entitlements are protected.

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