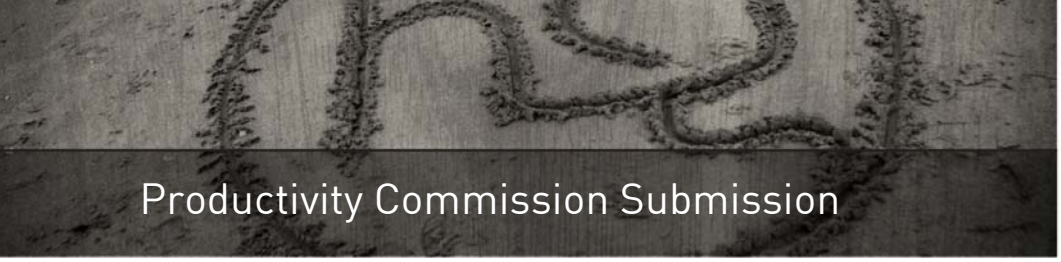
HopgoodGanim
LAWYERS

Submission to the Productivity Commission Workplace Relations Framework Inquiry

MARCH 2015

Shane Entriken, Special Counsel

P +61 8 9211 8138
E s.entriken@hopgoodganim.com.au



Productivity Commission Submission

HopgoodGanim LAWYERS

Introduction

HopgoodGanim Lawyers have consulted with business leaders in Australia to seek feedback on the strategic issues that should be considered by the Productivity Commission review of the Australian Workplace Relations System.

It is important to note, this document seeks to be independent and is not driven by political affiliations of any persuasion. It comprises the views of the author and those raised by business leaders consulted by HopgoodGanim, some of which were widely shared, and others which were related to particular enterprises.

Background

The Australian system of workplace regulation has long historical origins. It is regularly changing, has been, and continues to be shaped, by many factors including economics, politics, the legal structure of the Australian Federation and our national psyche.

The system has seen huge changes since the major policy shifts of the National Wage Case decisions of the late 1980s where the focus started to move from true industrial relations that played out between unions and employer associations at the industry level, to a greater workplace and individual rights focus.

The transition then continued with collective bargaining as the prime tool to regulate employment through collective agreements that were put in place between employers and unions. These agreements were required to pass a "no disadvantage test" that ensured the agreement was at least as beneficial as the Award. With a greater focus on individual protections, the centralised system started to shift power away from the centre.

As time passed, the system matured. The Corporations power of the Commonwealth Constitution has been utilised to extend the reach of the system, into what was previously the domain of the States. Most States with the exception of Western Australia, have also referred their power for industrial relations to the Commonwealth.

The system has tended to change in the balance of the respective rights and powers of the actors in the established system rather than any fundamental reform that is based on delivering the most optimal solution for the prosperity of Australia and its citizens.

Strategic themes

There are many approaches that can be taken to highlight strategic themes in a national framework system. We have chosen to look at the system from an employer perspective through the lens of the stated objectives of the Fair *Work Act 2009* (**the FWA**).

The objectives of the FWA are that the system is designed to be *"fair, flexible, co-operative, productive, relevant, enforceable, non-discriminatory, accessible, simple and clear".*

An employer may well ponder the following questions as they relate to their business:

- What are my compliance costs?
- Does it hinder my ability to set up my business the way I want to?
- Does it hinder my ability to reward my people the way I want to?
- Does it hinder my ability to make management decisions and protect my investment?
- Does it hinder my speed and flexibility to change?
- Does it reduce my ability to innovate in an international market?

- Does it consume an unnecessary amount of resources to do things that would otherwise be simple, efficient and lead to better outcomes for all concerned?
- Do I have to spend time and money defending claims and dealing with issues that should be resolved closer to the source or not exist at all?
- Do I have to prove my innocence rather than be found guilty of a breach?
- Can I have the representation I want before the Commission or Court?
- Can I trust I will receive a decision that is competent and without bias?
- Does it cost too much to protect my rights?

Is the system fair?

It is apparent that there are opportunities to make the system fairer.

While from time to time there is commentary on the balance of appointments to the Fair Work Commission (**FWC**), we did not receive any comments about any perceived bias or lack of competence.

The system is legalistic, complex and rapidly changing. Therefore it requires a considerable investment in time and resources for an employer to be able to understand and comply with the system. This is particularly problematic for smaller businesses.

The system is quite slow and rigid and is not designed to foster innovation at the local level or to be able to respond quickly to economic events or opportunity.

There is a view that it would be fair for employers in high paying industries, where there can be no question of exploitation, to have a much simpler and less prescriptive regime in place to ensure they maximise business value.

Some employers don't believe in the primacy of collective bargaining and that it is the best model for Australia going forward. It is not fair that employers can be forced into good faith bargaining with employees when it may not be the model that best suits their business.

The empowering of the FWC and the enhancement of rights and protections for individual and unions, particularly as it relates to bargaining, has served to reindustrialise the system. This pulls employers into matters and procedures under the FWA that add little value to their business, but increase cost, complexity, and reduce flexibility.

There is a view that it is unhelpful to have a reverse onus of proof for general protection claims. The onus should be on the claimant to prove their case. This impacts how employers manage legal risk and increase cost and complexity.

Due to the complexity of the system, and in keeping with modern trends, employers and employees should be allowed the legal representation they wish. They may seek advice in relation to taxation, investment, or a range of matters in their personal life, so why not allow a person legal representation before the FWC as a right?

Is the system flexible?

The system is increasingly slow, legalistic and relatively inflexible.

Bargaining flexibility only exists to the extent that allowable content can be included in agreements that satisfy the "Better Off Overall Test" (**BOOT**) and the National Employment Standards (**NES**). The process is heavily prescribed from the point of initiating bargaining through to good faith bargaining, to the approval of the agreement and subsequent variation, termination or expiry.

Underpinning the system are the NES and the simplified Modern Awards. There is a view that these simplified Modern Awards are neither simple nor modern and may lead to an escalated cost base for employers.

A greenfield agreement is critical for major projects and was once the province of innovation. This is no longer the case under the present regime.

There is a strong view that there is a need for a project agreement that covers all contractors on a project that an employer can put in place should contractors wish to opt in.

Under the current regime, one common industry practice for major projects has been to manage industrial relations risk by ensuring each contractor on the project has an in term agreement in similar terms. This is achieved by securing an agreement with one or more unions. This agreement is then provided to all employers on the project. This practice is inefficient and costly and is not without industrial relations risk. Not only may it hold up project operations as most will not allow any work to be done unless there is an agreement in place, but there may be hundreds of such agreements on a major project.

Employers are of the view they should be able to put in place agreements with terms longer than four years where the business circumstances dictate that to be sensible. An example may be a major infrastructure or mining project which will take five years to complete.

Renegotiation of agreements when a major change occurs in a business needs to be easier to achieve. In the past, unions have used these opportunities to break agreements to seek enhanced levels of terms and conditions.

The system needs to free up and be more market driven. Penalty rates should be restructured to reflect a world that operates day and night and seven days a week.

Is the system cooperative?

It is true the system has adversarial foundations long rooted in the legal and political process. It is also true good faith bargaining provisions purport to support a more "cooperative" approach.

In truth, the system has become **less** cooperative and **more** adversarial under the FWA. The empowering of the FWC and unions has provided a dynamic where employers are less empowered and have to work much harder and spend more money to achieve the same outcomes.

Employers want to work co-operatively with their staff and unions but the real focus of the legislation should be cooperation between an employer and employee.

Is the system productive?

The system that has been created is not focused on productivity. The primary focus of the system is to **distribute** wealth rather than to **create** it.

We will leave others with better visibility to comment on the productivity of the FWC and it must be said that we received no comments in this regard.

The slow and technical agreement making processes destroy productivity, as do the limited availability of project wide agreements, non union greenfield agreements and non collective workplace options.

The enhanced role of the FWC in the bargaining process and empowered trade unions, including right of entry provisions, has not increased workplace productivity. In some cases additional resource or cost was required to manage the impost.

The current bargaining settings and loss of options by employers are also more likely to lead to less innovation, higher costs, and encourage big industrial action events in some environments.

HopgoodGanim LAWYERS

Is the system simple, clear and relevant?

The law in this area is rapidly changing and has grown significantly in volume and complexity over the last 50 years. The primary sources of obligations for employers are from Commonwealth law, State law, regulations and guidelines and common law. Some examples include the FWA, the NES, Fair Work Regulations, Awards, Agreements, various union rules, Registered Organisations Act, in addition to Workplace Health and Safety, Workers Compensation, Anti-discrimination, Superannuation, Long Service Leave legislation and so on.

In Western Australia, the State system has not been referred to the Commonwealth and as such has an extra layer of complexity.

There will always need to be a body of law to protect the vulnerable and ensure appropriate protections. However, there has been a propensity in recent time to discard simplicity, clear thinking, and treating people as adults in preference for prescriptive legislative detail, and a very controlled approach.

Much of the prescription that exists is adding no value and is in fact destroying value in business.

There are areas of confusion between simplified modern awards and the NES which are slowing being ironed out of the system.

Conclusion

Sitting at the door step of Asia, Australia is a diverse economy and an educated society. We deserve a workplace relations system that will work to the benefit of Australia and its people.

The objectives of the FWA are that the system is designed to be "fair, flexible, cooperative, productive, relevant, enforceable, non-discriminatory, accessible, simple and clear".

The unfortunate reality is that the system is actually not delivering on its objectives and requires a substantial reset.

We have provided to the Productivity Commission the insights that we have from our recent business contacts and from our many years working in, and with, industry.

For further information on HopgoodGanim's submission to the Productivity Commission Workplace Relations Framework Inquiry, please contact:

Shane Entriken, Special Counsel
Ph +61 8 9211 8138
E s.entriken@hopgoodganim.com.au

Andrew Tobin, Partner
Ph +61 3024 0313
E a.tobin@hopgoodganim.com.au