

13 February 2015

Workplace Relations Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY 2601

(Submission by e-mail: workplace.relations@pc.gov.au)

Dear Commissioners and Members

Thank you for the opportunity to provide this submission to the Productivity Commission in relation to the inquiry into the Workplace Relations Framework, on behalf of the members of the Australian Sugar Milling Council (ASMC).

The Australian Sugar Milling Council (ASMC) is the peak policy body for Australian sugar milling companies, representing over 95% of Australian raw sugar production. Twenty four mills operate in Australia today, and as well as manufacturing raw sugar, they are collectively the largest source of biomass based renewable electricity in Australia. This submission is supported by ASMC's six member companies:

- MSF Sugar
- Isis Central Sugar Mill Company
- Bundaberg Sugar
- Wilmar Sugar
- Mackay Sugar
- Tully Sugar

The Australian Sugar Milling Council (ASMC) is generally supportive of the broad review of the Workplace Relations Framework, as there are a number of areas in the current suite of laws that increase the cost of labour without a resultant benefit to the employer.

Specific comment is made in relation to the Productivity Commissions focus areas as follows:

General:

ASMC provides this submission on this matter and has sought involvement from its members.

The ASMC is aware that this is a broad review of the WR Framework and there will be many contributors to the general improvements that will be desired by



employers and their representative associations. We have reviewed some of the draft comments being prepared by CCIQ and generally support their recommendations, however their strong response from smaller business means that some of the recommendations will not apply to the Sugar Milling Industry.

It is not ASMC's intent to reproduce the comments that will be contributed by the broader business community. ASMC's objective is to bring to the Productivity Commission, issues that are particularly relevant to the Sugar Milling Industry, and the way it is impacted by the WR Framework.

The Sugar Milling Industry is as acutely focused on achieving the productivity objectives of the FW Act balanced with fair and reasonable wage outcomes for employees, and seeks practical ways to achieve this. Accordingly the Industry seeks practical ways that the WR Framework can evolve to support this balance.

Minimum Wages and the Safety Net:

The Sugar Milling industry (through its award and individual enterprise agreements) typically pays higher rates than the NMW, and accordingly the NMW safety net has little impact on the industry as a whole.

The NES and Modern Awards:

The Sugar Milling Industry, through its historic and current Awards, and through the migration of Award conditions into individual Company's Enterprise Agreements has established rosters that form the 'normal pattern of work' for the respective sugar milling company. This pattern varies between the cane processing season and the maintenance season - nominally June to December and December to June, respectively. Accordingly, this forms the normal pattern of work for the industry.

This pattern has been developed around the growing, maturing, harvesting and processing requirements of a perishable product - sugar cane, and has changed little over the 150 year history of the Sugar Milling Industry in Australia. People who work in the industry accept this as the 'normal pattern of work' and over time, employers and employees have agreed various methods of compensating for the patterns of work that are sufficient to attract people to it.

Some of these methods provide compensation for employees who choose to work these hours. For example, weekend penalty rates, shiftwork allowances, shiftwork overtime rates, additional leave entitlements for continuous shift workers, Public Holiday loading, and call-out allowances (among others).



These penalties and loadings are paid to employees on top of any other payments they receive as entitlements over and above the NES and all this is done without any capacity to demand a higher price for the product that is processed at times during which the penalties are paid.

It is critical to understand that the Sugar Milling Industry deals with a perishable product, and accordingly rosters and work patterns are established to protect this product so as to provide the greatest amount possible return to the growers who produce the crop.

‘Perishability’ occurs at two main levels. First, at a high level, the crop grows and matures so that its yield peaks around September/October (dependent on region) and as such it is important to harvest and process the crop at a time to take advantage of the high yield peak, albeit in order to process the crop it must be harvested across a four to six month period. Second, at a more immediate level, once cane is cut it must be processed (ideally within 16 hours) before the sucrose in the cane starts to degrade to more complex sugars and starches, effectively lowering the capacity to produce high quality sucrose (sugar).

Because of this perishability, the industry has certain vulnerabilities, including the limited choice in production processes and schedules, and vulnerability to weather or other stoppages which may extend the season further from the peak yield period.

The industry has little choice but to work shift work including continuous shift work in some cases, and has no capacity to increase the returns on the product produced during these times.

Many penalty rates duplicate compensation for the same ‘disability’ suffered by workers. For example: weekend penalties and shift allowances compensate for working un-social hours. These penalties, described in agreements and awards, remain vulnerable to increase beyond the control of the employer. For example the decision by a previous Queensland Government to provide additional public holidays when Christmas Day, Boxing Day or New Years’ Day falls on a weekend - in order to, ‘...compensate employees who are not ordinarily rostered for work between Monday and Friday...’, effectively duplicated the benefits already enshrined in the Sugar Industry’s agreements and awards.

The escalation of penalty rates payable in this example significantly added to the cost of labour for those who work across that period, and added zero benefit for employers in the industry.

Penalty rates form a significant part of the cost of labour for many organisations including the Sugar Milling Industry and as such, need to be reviewed in order to



ensure the appropriate balance is achieved, between fairly compensating an employee for certain ‘disabilities’ and achieving productive outcomes for the respective business unit while still maintaining the safety net of the Better Off Overall Test (BOOT).

Enterprise Bargaining:

ASMC has collected information from its members suggesting that current bargaining processes are relatively efficient and effective. This has come partly from the implementation of Good Faith Bargaining (GFB) rules and tightening the processes around how and when Protected Industrial Action can be taken. A number of characteristics of the current system are important to the Sugar Milling Industry.

Enterprise Bargaining needs to remain focused on the enterprise, its employees and their employment relationship. Notions of including labour hire employees, independent contractors or instituting bargaining patterns detracts from the essence of an enterprise and its employees bargaining about the terms and conditions of their employment relationship.

While the processes and the general definitions of GFB provide a good guide to appropriate behavior around the processes of negotiation, the definitions themselves are not much assistance when dealing with the legal processes of seeking bargaining orders around disputes about GFB.

The general acceptance that ‘robust negotiations’ are appropriate or perhaps even required, is at odds with the intent of GFB.

Productivity:

ASMC poses the following question on behalf of its members: “Should there be a productivity focused BOOT for the Employer?”

ASMC understands that this is a complex issue and to determine how to quantify that the employer will be better off overall, will require detailed consultation - initially around the *principle* of requiring that the process be undertaken, then around the actual test criteria.

Perhaps the current Bargaining Processes inquiry will be sufficient to ensure that productivity is discussed, and that both sides of the negotiation table acknowledge that sufficient discussion has taken place.

ASMC remains open to being involved in a process to discuss the principle of an employer BOOT.



Contract of employment v legislation:

Members of ASMC require that Common Law Contracts (CLCs) need to be retained by the industry as these cover many non-Award employees. Where the CLCs cover Award employees the industry is satisfied by the protections available to employees through the application of the BOOT to the conditions of their respective contracts.

Industrial Action:

Currently the initiative to take industrial action rests solely with the employees and their representatives. Holding this initiative produces a situation that is less than fair in a process that has been designed to be fair and balanced.

While the employees and their representatives need to go through a significant and suitably robust process to ensure that the majority of their employees represented wish to take industrial action, the initiative for the time, place and design of this action rests solely with the employees and their representatives. The employer can only take response action once the initial action has been taken.

For the Sugar Milling Industry specifically, the perishable crop (described earlier) provides the employees and their representatives an unfair advantage, in that the direct and second-order impacts on the employer and third parties (such as harvesting contractors, growers, and transport contractors - and their employees) can be significant and irrecoverable. For employers whose agreement expiry date coincides with the critical timing of the processing season, their businesses and supply chains are particularly vulnerable. (Currently there is insufficient protection available in the 'significant economic harm' sections of the FW Act, due to the impact of specific sugar milling companies not being significant to state or national economies.)

In order to provide balance to this, the ASMC, on behalf of its members, seeks recommendations that would amend the legislation to provide for employers, the opportunity to initiate industrial action if required. The application for Protected Action Orders would need to be sought and the criteria for the decision about these orders would need to be determined so that they were no more or less onerous than those required of the employees and their representatives.

An amendment to the legislation in this area would contribute to the balance of Industrial Action options available during negotiations.

In regard to the issue of perishable crop, the Sugar Milling Industry is but one member of a small range of employers who are faced with similar perishability issues. Most maturing crops will have some form of perishability pressures that



might serve to hold the employer helpless and at the mercy of undue negotiating pressures (for example, cotton, grain, fruit, vegetables, and the like).

The Sugar Milling Industry remains open to other suggestions or models as to how the industry's perishable crop (and second and third order enterprises unrelated to the bargaining), might be protected from the asymmetric effect of industrial action at critical times.

Unfair Dismissal:

ASMC supports the intent of the Unfair Dismissal laws to the extent that no employee should be unfairly terminated, regardless of the size of the business in which they were employed. Additionally, any employee should have the right to apply for unfair dismissal remedies, and the onus of proof should rest with the applicant.

Currently the accessibility to unfair dismissal processes is too simple. Employees, regardless of the reasons they were dismissed are applying for (and are being encouraged to apply for) unfair dismissal remedies because the usual outcome of a mediated process is beneficial to the employee. There is a very low threshold for acceptance of unfair dismissal applications and the employee usually achieves some level of success - regardless of how valid the reason for termination.

Accordingly, the ASMC on behalf of its employer members seeks the following:

1. Higher threshold for the FWC to accept an application for unfair dismissal, on the basis of the onus for the provision of evidence to meet the threshold should rest with the applicant in order to convince the FWC that the dismissal is likely to have been harsh, unjust or unfair; and
2. A higher application fee for the application combined with costs potentially awarded against the applicant in the case of vexatious or frivolous applications, in order to force the applicant to commit to the process and dissuade frivolous applications.

Once the application is accepted by the commission, the process that is currently available to resolve the issue by mediation, then arbitration is (in our collective opinions) sufficiently robust to deal with the matter.

Anti-Bullying:

The members of the ASMC are generally satisfied with the current anti-bullying laws. While they might be dealt with by WHS jurisdictions, there are typically



sufficient overlaps into employment related issues for the FWC to be effectively involved in the resolution of disputes in this area.

General Protections and Adverse Action:

The adverse action and general protections provisions are typically accessed ‘when all else fails’. The threshold for applications in this area needs to be controlled by various mechanisms which describe the criteria that an applicant needs to satisfy before the FWC accepts the application, and perhaps a higher application fee - sufficient to encourage an applicant to carefully consider the merits of the application.

This approach would serve to dissuade frivolous claims by applicants as they will have some risk to bear if a failure eventuates.

The FWC needs to then determine if the acceptance criteria are met, and if not, reject the application. If it is found subsequently that the application was indeed hollow, vexatious or frivolous, then the FWC needs to have the capacity to award costs against the applicant.

Other IR Issues - Alternative Forms of Employment:

With regard to independent contractors, it is important that the Sugar Milling Industry maintains the capacity to manage the conduct of work through various means, including the use of independent contractors where this is determined to be the best approach to the particular work. The criteria for the use of contractors across the range of regions and businesses vary greatly. Accordingly, each enterprise needs to retain the prerogative to decide the best use of contractors.

While employers will need to retain the right to engage with independent contractors, it is important that the contractors remain separate from the negotiations an employer will have with its employees. Independent contractors are not employees of the enterprise and therefore have no employment relationship or entitlements.

The ASMC supports the protections afforded by the FW Act in relation to prohibiting sham arrangements, however the inference in the Issues Papers that ‘sham contracting arrangements’ are difficult to define and identify is a concern.

In light of the discussion in the Issues Papers, ASMC suggests a review and clarification of the definitions of ‘sham contracting arrangements’. These should be clear in order to prevent employment obligations being deliberately avoided.



Other IR Issues - Right of Entry:

Current ROE requirements for those appropriately appointed, are sufficient to control the access a Union might have to those people it is entitled to represent. It is critical to the members of the ASMC that the ROE for IR purposes is separated from WHS issues. There are sufficient powers for employees to stop working on hazardous tasks in the Sugar Milling Industry.

The Australian Sugar Milling Council thanks the Productivity Commission once again, for the opportunity to make this submission.

Should you have any further questions or wish to discuss the content of this submission further, please contact me on 07 3231 5000 or at asmc@asmc.com.au.

Yours sincerely

Dominic V Nolan
Chief Executive Officer