

Submission to the Productivity Commission on the Workplace Relations Framework Draft Report

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In this brief submission, we wish to draw the Productivity Commission's attention to something that we regard as an oversight in the Draft Report released in August 2015. It concerns the current and potential future role of the Fair Work Commission (FWC) in promoting cooperative and productive workplace relations. This is a matter that we are currently exploring as part of an Australian Research Council funded Linkage project, 'Facilitating Workplace Change: Redefining the Role of Industrial Tribunals in Australia'. The project is being undertaken in conjunction with the Fair Work Commission and the Newcastle Branch of the Industrial Relations Society of New South Wales.

The Draft Report repeatedly notes that it is improved relationships within Australian workplaces that are needed, rather than further legislative change. We agree wholeheartedly with this view and it is the main focus of our submission.

The Draft Report also notes on p 132 that it is a function of the FWC to 'promote cooperative and productive workplace relations and prevent disputes'. However, nothing is said there or elsewhere to highlight both the novelty of this function, its potential contributions to improved workplace relationships and, most importantly, what the FWC is currently doing to expand its work in this area.

As we have explained in a recent article (Stewart et al 2014), there is nothing new about Australian industrial tribunals being expected to help promote cooperation at work and prevent disputes. Historically, however, tribunals were not expected (or in the case of the federal tribunal empowered) to take a *proactive* role in pursuing this objective. Their role was generally confined to resolving *existing* disputes, even if in helping to settle those disputes (whether by conciliation or arbitration) they might hope and intend to minimise the prospect of further disagreement.

But one interesting exception, which we are in the process of researching, has occurred over the past two decades in the Hunter region, especially (but not solely) with major construction projects (Harrison 2014). This has seen members of the New South Wales and federal tribunals establish protocols for communication and consultation between management, workers and their representatives. Under what has become known locally as 'the Hunter model', the tribunal members' key interventions do not occur when a dispute arises, as would traditionally be the case. Rather, they occur before a project starts or enterprise bargaining begins, helping the parties to establish good relations and then scheduling regular meetings to hear reports on how matters are progressing. We have identified at least 20 large-scale construction projects within the Hunter region since 2000 that have used the Hunter model, consistently being completed on time, under budget and with no time lost due to industrial disputes or workplace injuries. The total value of

these projects was around \$8.88 billion, ranging from \$44 million to \$2.6 billion, with an average value of around \$444 million.

We have also completed case studies of two organisations (namely Delta Electricity and Port Stephens Council) where the same tribunal members have proactively worked with the parties to develop cooperative workplace structures that have dramatically improved processes of workplace change and organisational performance as well as producing job security and employment conditions that are acceptable to employees and unions.

These three case studies (ie. large scale construction in the Hunter region, Delta Electricity and Port Stephens Council) were presented in draft form to members of the Fair Work Commission and the Newcastle Industrial Relations Society in August 2015, but they have not yet been made public. We can make them available to the Productivity Commission, if it would assist.

Further examples of FWC members providing assistance and advice that goes beyond resolving an immediate dispute are documented in two case studies, involving Sydney Water and Orora Fibre Packaging, that members of our team have researched and written up for the FWC. Details in the form of short descriptive reports can be found on the FWC website.¹ Both cases involved FWC members proactively assisting the respective organisations to transform their workplace relations in highly cooperative ways, producing significant improvements in productivity and performance.

While the FWC's intervention at Sydney Water had a conventional trigger, in the form of an enterprise bargaining dispute, its role at Orora arose from high-level discussions as to how the FWC could assist the company turn its fortunes around. Any doubt as to the FWC's power to take this kind of initiative was removed by a 2013 amendment that added s 576(2)(aa) to the *Fair Work Act 2009*. It is this provision that gives the agency the function quoted at the start of this submission and in the Draft Report. The FWC can now offer 'facilitation' services to an organisation at any stage in the workplace relations cycle, without risk of being accused of exceeding its powers. It does not need to wait for a dispute to be notified to it under a dispute settlement procedure in an enterprise agreement or award, or during a bargaining round.

As part of the 'Future Directions' program initiated by the FWC's current President, Justice Iain Ross, a 'workplace engagement strategy' is being developed to find ways of helping organisations to develop 'a more cooperative workplace culture that facilitates change and fosters innovation' (Ross 2014: 16). It remains to be seen how far this strategy will be taken. But there is an interesting comparison here with the way in which government agencies in the United Kingdom, Ireland, Canada and the United States that were originally established to mediate disputes have come to offer a much wider range of services. Those services now include the facilitation of negotiations, or advice and training in relation either to workplace co-operation initiatives, or (more generally) better management (see eg Forsyth and Smart 2009).

We are confident from our research to date that the FWC is committed to expanding its work in this area, and that its efforts have the potential to deliver significant benefits to the productivity and success of the organisations it assists. The legislative initiative that has allowed this to happen

¹ See <https://www.fwc.gov.au/documents/engagement/case-studies/Syd-Water-Case-Study-2015.pdf> and <https://www.fwc.gov.au/documents/engagement/case-studies/Orora-Case-Study-2015.pdf>.

represents a genuinely novel development in Australian employment relations that is so far not widely known or appreciated. The further development of appropriate skills within the FWC and the 'roll out' of the program in a wider range of organisations could be greatly assisted by its recognition in the Productivity Commission's final report, and by recommendations that support the allocation of resources to it.

References

- Forsyth, A and Smart, H (2009) 'Third Party Intervention Reconsidered: Promoting Cooperative Workplace Relations in the New "Fair Work" System' 22 *Australian Journal of Labour Law* 117
- Harrison, R (2014), 'The Hunter Model: An Exposition of Practical Industrial Relations', Industrial Relations Society of New South Wales Annual Convention, Leura, 23 May 2014
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- Stewart, A, Bray, M, Macneil, J and Oxenbridge, S (2014), "'Promoting Cooperative and Productive Workplace Relations": Exploring the Fair Work Commission's New Role' 27 *Australian Journal of Labour Law* 258