

JW SHANNON ENGINEERS

# Workplace Relations Framework

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**JW Shannon Engineers**

This paper responds to the Productivity Commission invitation of January 2015, to provide public submissions and recommendations. It also refers to evidence reported by public hearings conducted by a concurrent and ongoing Royal Commission into certain union activities.

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## **1 Overview**

Australia has inherited unhelpful elements of imposed class division that inhibits our industrial procedures, concepts and laws. The worst consequence of this has been oscillation between extremes, tuned to the electoral cycle.

This paper will recommend modest changes to current laws framed to receive wide elector approval so that they can become permanent.

Since all proposals recommended for industrial change will be characterised and fought as biased attacks on workers hard earned privileges, this will be contested. However we hope workers themselves will see it as reasonable requirement and not a significant loss of their rights.

Proposals are included in four sections which are summarised below:-

### **1. General**

The concept of industrial relations should be based on a notion of fair treatment and responsible behaviour between those who employ and those who are employed.

### **2. Criminal Activity**

Criminal activities should be disconnected from industrial relations and handled by the appropriate law enforcement jurisdictions.

### **3. Industrial Relations**

This is in regard issues paper 3.

Disputes to be resolved in the first instance by direct negotiation between the parties. When this fails the parties undertake compulsory Arbitration. Industrial action by any party during this process to be illegal

If an enterprise and its employees agree to negotiate and sign a legally enforceable industrial contract this will take the place of most externally imposed industrial provisions.

Successful smaller enterprises do this to varying degrees already. This proposal creates the same opportunity for larger enterprises and we hope it will not be excessively controversial

### **4. OH&S issues to be quarantined from Industrial Relations mediation**

In the first instance immediate attention to OH&S issues should be addressed as a priority between workers and supervisors. When an employee, a group of employees or union claim OH&S issues are not being addressed, or an employer claims that safety issues are being misused, then the appellant should be able to call an urgent compulsory arbitration hearing.

## **Authors**

James Shannon is solely responsible for this document and all errors and omissions are his alone. The submission has been prepared in consultation with those listed as authors in the appendix. Our positions will be seen, by some, as managers or shareholders. In fact we are or were all employees who have more in common with workers. They and we are both victims when the IR procedures fail. It is likely that most other recommendations to the PC hearings will come from the IR movers and shakers, ie from the IR club. We are separate and distinct from this.

The authors are mature. Each has a lifetime of experience in Australian private industry. We have been employees, managers, consultants, directors and practical workers in Australia and for lesser

periods overseas. Combined we have had much one on one contact experience with workers in a number of industries.

We all wish to improve what is sometimes a vexed and difficult environment for workers and enterprises. We hope that the benefits from our proposals will be obvious to Australian workers, to managers and to the public so that they will be endorsed by electoral preference.

## **2 General Recommendations**

### **2.1 General**

2.1.1 The concept of industrial relations is based on a notion of fair treatment and responsible behaviour between those who employ and those who are employed.

Australia has inherited unhelpful elements of imposed class division that inhibits our industrial procedures, concepts and laws. It is the legal concept of contest between opposing views, expectations and strengths.

The consequence has been oscillation between extremes, tuned to the electoral cycle.

The most successful enterprises are small because they allow constant interaction between the enterprise and the employees. Recommendation 3 will propose a system that allows medium size enterprises to achieve similar success if this vision is shared by their managers and employees.

#### **Our first and most fundamental recommendations are.**

2.1.2 Any changes to IR must be seen as acceptable, fair and desirable to the Australian electorate so that the debilitating oscillations cease and fine tuning only is required in future. Unless we succeed in this, the Royal Commission and Productivity Commission findings and recommendations will be temporary in effect and a waste of taxpayer funds.

We believe that the PC recommendations should include suggestions for the manner by which the recommended changes are publicised.

2.1.3 The IR rules and regulations developed within federal and state jurisdictions are widely known and used. We recommend that changes be limited to the minimum. Remove unnecessary red tape. Make it simpler but leave in place the parts that work and are understood and relied on by so many.

2.1.4. Industrial disputes that linger, become toxic. Industrial dispute resolution procedures must be seen to generate confidence that fair and lasting solutions are achieved. Timely negotiations are critical.

### **2.2 Lawlessness and corruption**

On P6 of the WR framework this matter is listed as “(largely) not in scope” We do not know what this means.

The Royal Commission, set up by the current federal government, has reported evidence of so called union activity. Overwhelmingly the evidence exposes criminal actions. These have nothing to do with industrial relations. They are simply criminal behaviour and must be treated as such. Any exchange of cash or kind not included in a normal employment agreement is prima facie evidence of corruption.

To escape punishment every such event must be approved by court decision.

Criminality is not IR and should not be confused with IR. It should not involve the Fair work Commission in any way. It is criminal behaviour. We believe any commitment to electoral approval of IR reform cannot apply to actions required to control serious corruption. We believe electors including workers will not support criminal activity. If illegal actions are to be curbed it is essential they are seen as illegal and separated as distinct from industrial relations.

Our view is that, at every point, report, proposal and recommendation criminal activity should be treated as criminal.

Evidence before the current Royal Commission shows that in Australia, we have been harbouring, and apparently protecting, behaviour that would be admired by the most successful mobsters, mafia family, triad, or motor cycle gang that has ever preyed on their community.

We are appalled by what the Royal Commission has revealed. We are appalled that no controls have been applied.

The ability of the criminal elements to operate uncontrolled, indicates both inadequate legal framework and failure to enforce what is there.

2.2.1 Only trained and equipped police have the ability to deal with intimidation and thuggery. The USA was confronted by the teamsters and the mobs. They empowered the FBI and local police. It still took years to control the rackets.

We are starting with better information. Multiple investigations into police and political corruption, the Queensland anti bkie legislation and competition rules all provide examples that can be distilled into successful and lasting laws. Full cooperation between legislators, the legal fraternity, police both state and federal and specialist taxation law practitioners, is justified and expected.

Whilst we believe the PC should include recommendations to have a specialised police unit(s) set up to deal with any such activity. We also stress again that this must be kept separate from any and all recommendations for IR (WR).

2.2.2 Our judicial penalties must be severe enough to be effective, flexible and tailored to the source and nature of the offence,

For instance:

Corporate collusion and bribery, may best deterred by jail sentences. Thuggery and extortion, by fines and taxation investigations. Corrupt and inefficient super fund management, by fines and tax evasion investigation and by the banning of deficient Managers and Directors from office.

2.2.3 The need for independent, ongoing and timely surveillance of the potential for corruption of officials has been repeatedly demonstrated. Legislators, legal practitioners the police and taxation officers can all be rendered ineffective by it. Surveillance must be embedded by a standing independent body. Time based rotation of members and frequent public reporting are essential

## **3 Detailed Recommendations**

### **3.1.1 General**

We regard effective industrial relations as essential and an honourable task.

A strong and enduring relationship between a worker and employer produces advantages for both that cannot be achieved in any other way. However the expectations of workers and their enterprise cannot be always met and an adequate labour market to permit mobility is the best way to compensate for this.

## **3.2 Principals**

3.2.1 There is no limit to the variations in the detail of practical arrangements between an enterprise and employees, so industrial regulations must be strong in principal, broad in scope and self regulating to the greatest possible extent. Rules must be kept up to date but there can never be too much prior consultation and debate before each update.

3.2.2. The circumstances of the markets, behaviour of governments and expectations of society all oscillate and change in ways that enterprises are unable to control or anticipate. To the extent reason and fairness permit, industrial relations within enterprises should be flexible and able to accommodate to change.

3.2.3. Union membership of the work force is limited. IR laws and regulations must not harm alternative arrangements that are working to the satisfaction of the parties.

3.2.4. At some point mutual cooperation respect and tolerant behaviour will fail an enterprise or an employee or a group. Some mechanism for appeal or arbitration is required for all. It must be applied with minimum delay. It is better to have a rapid temporary solution refined over time than seek initial perfection at the expense of delay. A flexible system of co-payments for this service is required to discourage overuse and the vexatious litigant.

Members of our panel hold the view that Arbitration must be compulsory when just one of the parties takes the view that negotiation has failed. Also that industrial actions including lock outs should be illegal unless and until sanctioned by an Arbitrator.

## **3.3 Industrial law and regulation**

The relationships between workers and enterprises can vary from, cooperative endeavour between parties acting in mutual interest and satisfaction, to toxic distrust, mutual revulsion and hatred. Every employment relationship has many characteristics that are similar to marriage.

3.3.1. It is contractual.

3.3.2. There are limitless variations. At worst it is destructive to the parties and best dissolved. At best it is enduring and rewarding beyond any measure.

3.3.3. It is individually personal. Success depends on the goodwill and effort the parties apply to it.

3.3.4. It is dynamic with highs and lows. External pressures and circumstances change almost daily and fall unevenly on the parties.

3.3.5. Changes, differences and disputes are far best resolved between the parties, external influence should be limited. However unionised workplaces have long standing traditions and changes may be resented and rejected. Changes such as unionisation of a workforce or de-unionisation should be contemplated only after conclusive negotiations between an enterprise's employees and the employer.

3.3.6. Every relationship needs protection against disruption that penalises the many at the behest of a few.

## **3.4 Industrial Tribunal, -- Fair work Commission**

3.4.1 Minimum wages and conditions set by an independent tribunal provide a stable foundation for working conditions and fulfil the social objective of standards that all can expect. The minimum wage concept is a safety net.

They should be set and adjusted periodically after open hearings that allow evidence of fair treatment, employment opportunities and national wealth.

In many cases paid wages will be higher.

Special consideration is required for trainees in their early employment. The students and the very young who have the ambition to seek part time work must be encouraged.

Consideration should be given to areas of hardship such as rural and other areas of high unemployment.

It should be part of the Tribunal's chartered responsibility to minimise the number who suffer the serious disability of chronic welfare dependency.

3.4.2 The tribunal should also have responsibility for maintaining a mediation panel of experienced and respected part time arbitrators to hear and determine individual and group industrial disputes. The listing will include the commercial experience of those available. A schedule of fees negotiated annually with the Institute of Arbitrators is required.

It is intended that arbitrators be accredited by The Institute of Arbitrators. This will take advantage of well respected and understood legal procedures and bring the benefit of a panel which can be used as a basis for selection of the most suitable Arbitrator for each task.

3.4.3 The Commission should also be required to distil the plethora of federal industrial awards into those most useful. A document limited to three A4 sheets font 11 should be the goal. Once this is achieved it can be used as standard that will become familiar to those who comply and those who administer.

3.4.4 The commission should also be required to register agreements between enterprises and their employees and maintain them.

### **3.5 Arbitration**

If disputes cannot be solved by workplace negotiation, one or both parties may apply for an arbitration hearing. To allow for this the Industrial tribunal will maintain a list of part time, trained arbitrators to hear and determine them. These people will be accredited members of the Institute of Arbitrators and active practitioners in arbitration proceedings.

To achieve the advantages of arbitration, the rules will provide:

3.5.1 Quick action to solve a dispute.

3.5.2 Hearings limited to the parties, unless the arbitrator agrees to the presence of representatives.

3.5.3 Sworn and recorded evidence.

3.5.4 Individual arbitrators acceptable to both parties. Alternatively if this is not achieved an arbitrator shall be imposed by the President, at the time, of the Institute of Arbitrators.

Industrial action of all kinds to be illegal until an arbitrator has heard a dispute and finds that the circumstances justify such action.

3.5.5 Arbitration will not proceed during an industrial stoppage or if work bans have been imposed.

3.5.6 The cost of each arbitration to be set within the guidelines proposed by the Institute and agreed annually with the Industrial Tribunal. In each case the Arbitrator will subdivide the costs between the parties and the Tribunal according to general principles. These to include the nature of the dispute, and the capacity to pay. Penalties for vexatious litigants and immature substance must be available.

The panel views unnecessary and premature applications for hearings as abrogation of responsibility. We believe arbitrators should consider the circumstances and history of the dispute when allocating the costs between the parties.

### **3.6 Unions**

No substantial change is proposed to established relationships or practices. One restriction should be imposed. Union representatives as employees are inappropriate and do not justify a worker wage. They should be made illegal.

Unheralded and instant industrial action is a powerful union and enterprise tactic. We recommend it be made illegal. Ready access to arbitrators provides sufficient opportunity for a prompt hearing.

If the hearing fails industrial action may follow. Our only recommendation is that this be subject to the existing constraints including those discussed in **Section 2** and/or to legal action.

Some of our panel members take the view that elected Union officials should be required to have publically declared incomes and compliance requirements similar to company board members.

### **3.7 Employee/enterprise industrial agreements**

If an enterprise and its employees agree to negotiate and sign an industrial contract this will take the place of most externally imposed industrial provisions. In other words they will be free to decide their own relationship.

Several procedures must be followed:

The enterprise must appoint a representative or a group to represent it. Similarly employees must, appoint a representative or group to represent them.

A standard industrial contract as per **Section 3.4.3 above** must be considered clause by clause, each to be individually accepted, rejected or accepted in modified form by representatives of each party. Additional clauses found suitable to both parties to be negotiated and agreed.

The final document to be registered by the Fairwork commission.

A successful agreement presupposes several conditions.

The enterprise must believe in the benefits the agreement will confer. In practise this means board endorsement.

The employees must foresee the benefits the agreement will confer. In practise this means wide agreement between employees who have been adequately informed.

The enterprise negotiators and the employee negotiators must respect each other and be capable and authorised to make the necessary decisions. In fact this means that each negotiating person or team must approve of the other before negotiations start.

The infinite variations that can occur in enterprise employee relationships mean that close prescription of negotiation events is not helpful.

We recommend for consideration,

Enterprise negotiators should be full time company employees endorsed for this purpose by the board and remaining in full time employment during the course of all negotiations.

Employee negotiators should be full time employees with at least six months service, elected by secret ballot held among all other employees who have least six months service. These people will remain in employment during the course of the negotiations.

An agreement working successfully be refreshed by regular two way reporting between the enterprise and the employees.

The joint arrangements foreseen here will only be negotiated for the benefit of both employees and an enterprise. Effort will be required to establish them and they can only survive while they suit the participants.



### **3.8 Industrial OH & S**

Under section 1.1 – Scope and aim of the inquiry it is stated that “separate Workplace Health and Safety (WHS) institutions and laws, including workers’ compensation schemes is not included. However, the more general impact of the WR system on WHS is relevant to this inquiry”

We are concerned by this. WHS has no place in IR (WR) . The two are separate, they are administered by separate jurisdictions and one should not have any influence upon the other.

Nevertheless there are many examples where OH&S has been brought into a dispute as an IR (WR) issue. This is harmful both to the safety of workers and to legitimate IR (WR) practise. It must be discouraged and penalised if it persists.

Immediate attention to OH&S issues should be addressed as a priority between workers and supervisors in the first instance . When an employee, a group of employees or union claim OH&S issues are not being addressed, or an employer claims that safety issues are being misused, then the appellant should be able to call an urgent compulsory arbitration hearing.

It is recommended that :

The Arbitrator will require evidence that the parties have met and attempted to resolve the issue

The Arbitrator should be supported by experienced technical and OH&S knowledge

The Arbitrator be empowered to make binding orders on the parties.

**Addendum**

Ten associates have contributed to this work. All gave their time freely. Their extensive and varied experience has made an invaluable contribution to the submission.

All have extensive CV.s. These have been truncated to show just their current or last work.

Two wish to remain anonymous.

The others are listed below .

J Bayliss	Consulting Engineer
G Fountain	Earthmoving contractor
J Kelly	Consulting Engineer
B McMahon	Surveillance Auditor
R Shannon	Consulting Engineer
A Staples	Project manager
S Treharne	Mechanical Engineer
D Vincent	Project evaluator