

PRODUCTIVITY & THE AUSTRALIAN WORKPLACE RELATIONS SYSTEM

1. Executive Summary

Although the terms of reference for the Productivity Commission's review are wide, this submission is limited to matters directly relating to BlueScope's experience.

In the context of a strong "safety net" of industry by industry employment conditions the submission advocates the need to create a system that supports collective direct engagement between employers and their employees. This is necessary to align the collective system of employment regulation with the realities of modern Australia.

However, where a culture of "traditional" adversarial bargaining persists, the submission also advocates the need to retain strong statutory governance over the established adversarial bargaining process, and the need for reforms to the existing adversarial collective bargaining system. These are noted below:

- Additional (but restricted) circumstances where compulsory arbitration can be accessed.
- Re-introduction of the "matters pertaining" provisions.
- Removal of protected bargaining where abuse of process occurs.
- A "sunset" provision for expired enterprise agreements.
- Explicit recognition of the accountability of managers to manage with a "merit" pre requisite for Fair Work Commission (FWC) intervention in disputes.
- Tighter "majority support" requirements which would also enable an enterprise agreement to not be renewed.

To summarise, where a collective form of employment contract is the preferred legal means of employment arrangement in an enterprise, this submission advocates a transition from the existing adversarial model, to one based on direct engagement. This could be achieved through a dual collective system.

2. Introduction

Australia's workplace relations system warrants a thorough review and re-examination, to better reflect changes in the nation's workforce, economy and trading profile.¹

Outside of Australia & New Zealand, BlueScope has never experienced anything like the adversarial collective culture that intrudes into the employee relationship with production and maintenance employees in Australia (and to a lesser extent New Zealand) during the employment contract renewal process. The level of third party involvement in day to day operational decisions and business response to competitive changes is pervasive in Australia.

Past reviews of the industrial relations system have been largely conducted in the context of a focus on "rights and obligations", or have consolidated award provisions that reflect past paradigms, or have had only superficial regard to productivity concerns. The creation of the unitary federal industrial relations system utilising the Corporations power of the Australian Constitution provided a unique opportunity to develop a system of workplace relations that supports the contemporary aspirations and needs of employees and employers. To date, this opportunity has not been taken up.

This review by the Productivity Commission enables a different approach. In particular, while providing for appropriate protections over employee rights and obligations, the opportunity exists to develop a system that is based on the principal intention of facilitating fair workplace culture that supports international competitive workplace productivity, as distinct from the past principal focus of the "prevention and settlement of industrial disputes" and fixation with collective bargaining through unions.

¹ Refer to a paper "Shifting Paradigms in Industrial Relations" by Justice Walton, President NSWIRC

3. Context

"BlueScope", formerly BHP Steel, de-merged from BHP Billiton on 1 July 2002, as a "stand-alone" public company.

At the time of the de-merger, world steel production stood at around 905 million tonnes. BlueScope manufactured about 5.2 million tonnes of steel per year in Australia. The company's Port Kembla Steelworks was a low-cost producer, operating in the lowest quartile of the world steel production cost curve. The average Australian dollar (AUD) – US dollar (USD) exchange rate was AUD\$0.54 cents.

Since then, world steel production has grown to 1,662 million tonnes in 2014, with China accounting for, by far, the largest share of production (49.5 per cent), followed by Japan (6.7 per cent), the United States (5.3 per cent), India (5 per cent) and South Korea (4.3 per cent).

In contrast, BlueScope's Australian steel manufacturing capacity has halved to approximately 2.6 million tonnes per annum, after the company closed one of two blast furnaces in 2011 as a result of financial losses, particularly in export markets. The majority of the company's Australian production is now sold in the domestic market, with approximately 480,000 tonnes (down from 2.6 million) of exports in FY2014 or about 20 per cent of Australian production and despatches. Import competition has risen steeply in the domestic market. There has been a significant rationalisation of businesses in the Australian steel industry. BlueScope acquired Fielders (roll-forming) and Orrcon (pipe and tube) from Hills Industries and Arrium's sheet and coil distribution business in 2014.

Today, BlueScope Steel employs around 16,500 people across 17 countries. Our main employment regions are:

- Australia – 7,400
- N.Z. – 1,700
- North America – 3,000
- ASEAN – 2,800
- China – 1,600

We operate around 100 manufacturing sites.

There are many reasons that support a significant shift in the perspective needed in the review of Australia's industrial relation's system:

- Australia has now signed ten free trade agreements (including with China – the world's second largest economy and largest steel producer) with a further seven actively under negotiation.
- There has been significant change in the profile of the Australian workforce – from a heavy reliance on post-war migrant unskilled production labour to a skilled, educated and typically domestically sourced workforce.
- This more informed and self-reliant workforce has shifted away from the statutory industrial relations system, towards the common law system of employment contracts (built on a safety net of modern awards and the NES).
- The introduction of the unitary Federal system, which effectively replaced state based "common rule" award systems, has provided a national "safety net" protection for the whole workforce.
- A significant reduction in the number of employees opting for union membership – according to the latest ABS data, around 88 per cent of the private sector workforce have chosen not to become members of unions.

The aim of the Productivity Commission's review should be to foster workplace cultures that have shared management/workforce objectives which drive productive initiatives to enable businesses to succeed against

global competition. Where adversarial workplace cultures persist, a balance of rights between the parties and governance over those rights and obligations focussed on productivity outcomes rather than rights associated with the pursuit of collective bargaining, should be engendered.

4. The Present System of Employment Regulation

The present system of regulating employee relations in the private sector can be discussed under five headings.

- First, the National Employment Standards (NES) and minimum Awards under the Fair Work Act (the Act).
- Second, statutory collective enterprise agreements under the Act.
- Third, common law individual employment contracts.
- Fourth, unregistered (and legally unprotected) collective arrangements.
- Finally, a little utilized collective common law arrangement under a Deed Poll.

4.1 NES & Minimum Awards

The introduction of the unitary Federal system in 2005 enabled a common suite of “safety net” employment standards to be introduced for all employees. In reality, these National Employment Standard (NES) safety-net protections already existed pre NES, but under a combination of instruments such as State legislation and Federal awards. The introduction of the NES harmonised these minimum standards in a way that could be more readily understood by the people they were designed for – the Australian employee and employer.

The Federal NES is working well. In combination with industry based minimum Federal Awards, it maintains Australia’s ethic of a fair baseline across all industry sectors. This is an important cultural trait that helps to maintain basic social cohesion, which is an important part of the national productivity challenge.

4.2 Statutory Collective Agreements

Employers and employees wanting to negotiate more attractive and legally enforceable *collective* terms and conditions of employment over the minimum safety net of the NES and Awards typically do so under the collective agreement provisions of the Act. Operations employees at BlueScope’s major production sites, and many others in Australia, are employed under these formal collective arrangements.

The statutory system provides processes for dispute resolution and penalties that assist to manage potentially damaging disputes and breaches of agreements. However, the Act “tars all with the same brush” in regard to collective agreement making - whether or not the agreement emerged from genuine collective bargaining, or was created by mutual consent to reflect market conditions or other factors such as flexible workforce needs. It defacto assumes that workplaces that opt for a collective agreement need to be represented by unions (unless difficult processes for obtaining a “non-union” vote with potential union challenges in FWC - are satisfied). Consequently, the number of employees covered by non-union agreement is very low.

The current Act effectively enshrines union participation in the statutory collective agreement making process, and enables union negotiating objectives to go beyond the interests of the direct employer/employee relationship. The current system (and its predecessors) also enables ready access for individual members of the FWC to interpose in employer/employee relationships, in circumstances that erode the accountability of managers to manage – such as employee performance management and productivity improvement initiatives.

The powers of the FWC provide highly important protections over employment rights and responsibilities in general and particularly in governing potentially destructive disputes. But the pervasive scope of the I.R. system distracts from, and occasionally undermines, the energies of the direct workplace parties to develop and maintain a relationship that should serve the most productive and competitive interests of that work place. Suggestions for positive reform are covered later in this submission.

4.3 Common Law Individual Employment Contracts

The alternative means of negotiating more beneficial and legally enforceable terms and conditions of employment above the minimum safety net is through an *individual* employment contract, enforceable under common law (generally referred to as “staff contracts”). Around half of BlueScope’s Australian workforce is employed under these arrangements.

Although individuals covered by these arrangements also have the protection of the minimum safety net, the legal regime involved in protecting rights and responsibilities outside of the minimum standards is very different from the statutory collective system. There is no right to strike under the common law regime, changes to employment contracts need to be mutually agreed, and the parties can sue for damages in the event of a breach of contract.

This form of direct, individual engagement generally reflects a principle of self-reliance, where the parties have more confidence in their relationship with their employer, or more confidence in their own ability to secure a fair market based outcome for themselves. This is a more positive basis upon which businesses and their workforce can actively adapt to change and drive competitive productivity improvements. There is little need for collective bargaining agents by those who are satisfied with an individual contract.

In BlueScope’s experience, common law individual contracts are the most productive of form of employment arrangement.

4.4 Unregistered Collective Arrangements

Although also protected by the minimum safety net of the NES and Awards, a fourth form of employment “contract” is a collective agreement reached directly with non-union employees, or negotiated with employees with the assistance of their union, but not registered with the FWC (and therefore with rights or responsibilities unprotected by either the statutory or common law systems). These arrangements are generally found in smaller work sites where collective arrangements are favoured, but the appetite for intrusion by the formal I.R. system is low. Employers and employees are comfortable to accept the lack of formal legal protection over their arrangements, generally because the relationships that have developed continue to reflect trust and mutual respect. If circumstances change, the option of entering the complex formal statutory system remains open to both parties.

This type of employment arrangement also reflects a principle of self-reliance, where the parties have more confidence in their relationship with each other and more confidence in their own ability to secure a fair market based outcome for themselves, albeit on a collective basis and sometimes with the advice and support of their union. Compared to the statutory collective system, this is a more positive basis upon which businesses and their workforce can actively adapt to change and drive competitive productivity improvements.

4.5 Deed Poll

A Deed Poll can be structured to provide common law protection over collective arrangements, on top of the minimum safety net of NES and Awards. It can form an important alternative to use of statutory collective agreements under the Act. It effectively “confers” in favour of employees, legally enforceable rights offered by the employer. In conjunction with a letter of offer, employees have an obligation to observe common law implied terms in relation to their employment. Employers also have those obligations, as well as the additional employee rights included in the Deed Poll that the employer believes will attract and motivate the workforce. As employee trade-offs are not required for these additional declared rights, the formal collective bargaining process under the Act is not relevant.

The advantage of a Deed Poll over an unregistered collective agreement is that it provides legal protection for all parties, similar to employees covered by individual staff employment contracts.

Deed Polls have been used in isolated instances, for specific issues. The use of this legal instrument to provide a comprehensive coverage of an employment arrangement is rare. Nevertheless, the BlueScope experience with Deed Polls has been extremely positive.

5. A New Collective Bargaining Stream

Direct workplace employment arrangements can encourage the principle of productive self-reliance where the parties have the confidence of protection through minimum standards. Instead of being distracted, and occasionally damaged by protected industrial action through involvement of outside stakeholders, workplaces should be encouraged to develop productive and fair self-reliance as the cornerstone of future national productivity improvement.

This paper advocates that the current system neither encourages, nor supports the most productive collective model of employment. The foundation of the current system is anchored in an indirect model of collective employee relations, whereby unions and the FWC are often positioned as the “brokers” of the relationship between employers and their employees with unions holding power to engage in protected industrial action or create the circumstances to initiate arbitration of disputes. This system should be changed to encourage and provide for fair and legally enforceable **direct** collective employment arrangements, secured by protected minimum standards.

The Australian workplace relations system can be modernised by establishing two separate collective employment streams. The first would be a “Direct Engagement” stream recognised under the Act, but be mainly governed under the auspices of common law. The second would be the “FWC Bargaining” stream under the Act. The following provides more explanation.

5.1 Direct Engagement Stream

Where a majority of employees choose and the employer agrees, collective arrangements in the form of a common law Deed Poll would be recognised under the statutory system, but only to the extent that it contains sufficient elements to permit it to exclude the FWC Bargaining Stream. This would enable employers and employees to develop collective arrangements, by agreement, based on direct mutual interest. For the purposes of this submission, such agreements are referred to as “Direct Employment Compacts” (DEC). If a workplace is covered by a valid DEC the statutory bargaining and dispute resolution processes would not apply. Instead, the jurisdiction would be common law.

To satisfy the FWC “exclusion” test it is proposed a DEC must:

- have a “Fair Treatment Process” to deal with employee grievances, including a process for employee access to legal services and advice,
- contain a periodic (e.g. 12 months) process for review of future wage and salary movements,
- have a process that enables employee involvement in, and contribution to, the process of productivity improvement,
- be “no less favourable overall” than the relevant award and not undermine the NES,
- contain a provision that enables either the employer or the workforce to give minimum notice (e.g. three months) that the DEC will be discontinued (and presumably be replaced by voluntary individual contracts or an FWC collective agreement).

The parties to a DEC would be the employer and the employees covered by it and the DEC could be drafted in such a way that new hires will also gain protection under the DEC. The existence of a DEC would have no effect on the right of an employee to be, or choose not be, a member of a union.

5.2 FWC Bargaining Stream

The FWC Bargaining Stream would continue under generally similar arrangements as presently apply, except for the adoption of changes discussed in section 6 of this paper.

5.3 Differences between the Streams

There would not be any difference in relation to minimum legislated Fair Work conditions of employment - the NES would apply to both the Direct Engagement and FWC Bargaining streams and awards would continue to provide the base-line safety net (utilising the "better off overall test"). Individual common law employment contracts would not be affected, nor would unregistered collective agreements if they continue to be preferred and their operation is not impacted by the DEC. The differences between the streams are discussed below.

- Bargaining and dispute resolution provisions of the Act would only apply to the FWC Bargaining Stream. Disputes would be prevented by merit-based settlement of issues about the application or operation of the collective agreement. Protected industrial action would continue to be available after the nominal expiry of the collective agreement. This stream maintains the involvement of external stakeholders in the management of issues in the workplace relationship.
- The civil law jurisdiction would apply to the Direct Engagement Stream, similar to the way it applies to individual common law employment contracts. All collective DEC's will be required to have a number of minimum provisions governing the review of wages and employment conditions and the management of grievances and disputes. Any enforcement of alleged breaches of a DEC (which would contain dispute resolution provisions) could be resolved through the common law jurisdiction. Industrial action in any form, by either party, would be unprotected in this stream and damages could be sought in the event of a breach by either party.

5.4 Advantages of Dual Collective Streams

The proposal provides for an enforceable direct collective option primarily underpinned by a context of trust and mutual interest instead of one that is based on adversarial bargaining. It enables employees to be collectively aligned with the interests of their business, with full "safety net" confidence.

Alternatively, where the parties are involved in a genuinely adversarial bargaining process, the FWC Bargaining Stream would continue to apply.

The proposal provides incentive for employers to directly engage with their employees on a fair and market competitive footing. It allows for recourse to the FWC system if employees or the employer choose, which would be likely if the workplace culture of mutually constructive interest breaks down.

The complexity of the current system would be simplified. Presently the statutory I.R. system provides for union collective arrangements, with a raft of procedures and hurdles required to be cleared to reach a legally enforceable non-union collective agreement, acting as a strong disincentive. On the other hand, the dual collective system provides an effective, legally enforceable alternative for much of Australia's workforce who have developed the confidence to deal directly with their employer. Consideration of a mechanism to make a DEC when a new business or venture is created will require further consideration. The establishment of such a mechanism would be an important alternative to the current union monopoly over greenfields agreements under the Act.

The dual collective system would not have any effect on employees or employers who opt for individual "staff" arrangements, or any other form of employment outside of the existing FWC system.

Access to alternative streams is more likely to reduce instances of union "monopolist" behaviour during an enterprise agreement bargaining period, or during the operation of a DEC. The removal of monopolist behaviour by any party is conducive to national productivity growth.

Appendix 1 illustrates the process to determine the stream and the governance of industrial issues.

Recommendation 1: A new collective “direct engagement” stream to be introduced as an alternative to the present statutory collective system.

6. Other Changes to the FWC System

Whether or not the recommendation above is accepted, there remains a need to improve the existing statutory system to remove barriers to workplace productivity improvement. These are discussed below.

6.1 Merit based governance over adversarial disputes

The present statutory system provides an important means of regulating the bargaining process in adversarial situations, and in protecting the economy and the safety of people from harm arising from industrial action. The main problem is that the system can create a workplace culture that results in collective adversarial negotiations and disputes, instead of facilitating a culture of flexibility, adaptability, and mutual productive interest. This needs to be the future hallmark of the Australian workplace.

Individual members of the FWC (and the institution's predecessors) in their conciliation role have been used as a means of extracting concessions in matters that ought to be fully within the decision making authority of management. Appendix 2 is a list of BlueScope matters (excluding those related to the process of negotiating an award or collective agreement, or the actual termination of employment) at our major site in Wollongong requiring appearances in FWC. There have been about forty of these matters before the FWC over the past 2 years.

The dispute resolution procedures in collective agreements and in the Act have been used too broadly and in circumstances where there has not been legitimate grounds for a genuine industrial dispute in the first place. Going forward, the Act needs to more clearly define the circumstances that warrant legitimate recourse to the FWC for those within the statutory system. The parties to a genuine dispute should be required to demonstrate the merit of their position, as a pre-requisite. This should take into account the responsibility and authority of management to make fair and lawful decisions about productivity and competitiveness. Where FWC involvement is warranted, members should also be required to determine matters on the merits of the arguments presented, taking into account productivity impacts rather than merely focussing on “resolution of the dispute”.

Recommendation 2: A merit test which recognises management’s responsibility to manage be introduced as a pre-requisite for FWC referral.

6.2 Majority support determination:

The current provisions of the Act require a union to demonstrate employee support via Majority Support Determination (MSD) if the employer objects to a process of collective bargaining. The evidence accepted by the FWC for an MSD has been extremely broad, including the acceptance of union petitions. An Australian Electoral Commission secret ballot should be the only acceptable evidence.

Recommendation 3: A secret ballot should be the only method of determining majority employee support.

6.3 Compulsory dispute arbitration

The current provisions of the Act effectively reserve the compulsory arbitration of bargaining disputes to highly limited circumstances involving the threat of harm to the economy, or safety, or community welfare. In the past 5 years only 3 employers (5 disputes) have had FWC Workplace Determinations (arbitration) issued.

The question of access to the compulsory arbitration avenue is vexed.

On the one hand, if the hurdle for compulsory arbitration is reduced too far it is likely that the incentive for parties to a dispute to reach a settlement in an adversarial situation will also diminish. This will have the effect of increasing the potential for third party management of industrial relations, which would be contrary to the more productive aim of facilitating a transition to a workplace relations culture based on direct mutual interest.

On the other hand, businesses needing significant change face the prospect of intractable disputes that might permanently harm their commercial viability, but not an "important" part of the economy. These businesses have a powerful incentive to settle, avoiding the potential damage associated with protracted protected action. This reduces the incentive for businesses to seek significant change to meet the pressures of global competition and in aggregate, reduces the nation's ability and resilience to compete internationally.

In the absence of a voluntary consent to arbitration being reached between the disputing parties, BlueScope proposes the addition of two new grounds that ought to qualify for the termination of protected industrial action and subsequent compulsory arbitration. Where disputes are compulsorily arbitrated, differences between the parties should be argued on their merits, without the status quo being used as the defending standard.

Firstly, where an intractable dispute threatens the future viability of a business. In these circumstances, evidence that negotiations have been exhausted and the future commercial viability of the business is threatened, should be sufficient to trigger compulsory arbitration, without the need for an important part of the nation's economy to be threatened. This would also serve the interests of employees to ensure a business does not fail resulting in their loss of employment or loss of competitiveness and with it, a reduction in future investment.

Secondly, where an intractable dispute occurs in the context of significant structural change arising from external forces that affects the national productivity of an industry as a whole; and where it can be demonstrated that change to the productivity of an enterprise within that industry is necessary to enable the enterprise involved in the dispute to successfully compete – then compulsory dispute arbitration should be accessible. The criterion of "national productivity of an industry as a whole" is not intended to provide access to compulsory arbitration for an enterprise that is unsuccessfully competing with others in the same industry within Australia.

These changes to the compulsory dispute arbitration provisions should enable industries to respond more rapidly to necessary shifts created by the promotion of global trade policies and create more incentive for all parties to constructively address new realities, before lasting damage is caused by the parties continuing to "live in the past".

Recommendation 4: The termination of protected bargaining and compulsory dispute arbitration provisions of the Act be amended to allow other limited circumstances to qualify.

6.4 Transfer of business

Presently, if a business, or just its assets, are acquired and this involves the transfer of associated employees covered by a registered enterprise agreement, the terms of the agreement transmit to the acquiring company in relation to those employees. In relation to the acquisition of an incorporated business entity, the present approach to transmission of collective agreements under the Act is consistent with the legal position in respect to all other aspects of the sale of a business (the enterprise agreement continues to bind the company that is acquired). But in situations where only assets of a business are acquired the provisions of the Act are not consistent with the broader legal approach.

In many instances, the reasons behind the decision to sell a business or its assets are unrelated to the terms of the collective agreement, and the acquiring company's interests coincide with the interests of employees in maintaining the inherited collective employment arrangements. However, there are circumstances where provisions in an enterprise agreement have contributed to poor business performance, and the present provisions of the Act that preserve the agreement, combined with the fact that it would remain in force after its nominal term (if not replaced by agreement) are a major disincentive to a prospective buyer. The outcome can

be business failure and the loss of jobs, instead of the possibility of an acquisition and turnaround and maintenance of jobs.

The provisions of the Act relating to transmission of enterprise agreements need to be revised for circumstances where only assets are changing hands. The employer making the acquisition should have the ability to decline the FWC collective agreement that had been negotiated by the seller, as long as the sale transaction is not between related parties for the purposes of circumventing the terms of a collective agreement.

It is appropriate that employees should be provided with the security of the arrangements that pre-dated the transaction for a transitional period, but the Act should not prevent the renegotiation or replacement of unproductive, inflexible or uncompetitive employment arrangements from being addressed.

Any reform should align the treatment of an FWC collective agreement with the standing of a Deed Poll in similar situations. Presently, a Deed Poll would transmit (by operation of the general law rather than by virtue of the Act) only if the business entity is acquired. If only assets are acquired, associated employees would need to voluntarily accept any offer of employment (and a new Deed Poll would be required). In the event of an asset sale the interests of employees with rights under a Deed Poll could be strengthened by a requirement to include, in the new Deed Poll, transitional security over employment terms.

Recommendation 5: The provisions of the Act relating to the transmission of collective agreements where the assets of a business are acquired involving the transfer of employees, be reformed to enable the introduction of new employment arrangements and workplace productivity improvements.

6.5 Sunset provisions for expired collective agreements

There has been a significant imbalance in the incentive to engage in genuine good faith collective bargaining. Presently, if an agreement is not reached in the statutory system an existing "out of time" collective agreement remains in force until it is replaced by a new agreement (the ability of FWC to terminate a collective agreement is highly constrained). This prolongs the bargaining process, often in relation to matters that do not have a material effect on wages or conditions. Also, redundant enterprise agreements continue to have legal effect where the parties have "moved on".

The Act should have agreement "sunset" provisions, allowing collective agreements not renewed after their nominal term for 6 months to lapse. A majority support determination could possibly enable the expired enterprise agreement to be reinstated.

This reform would provide incentive for more efficient and effective bargaining, and protect employees if they genuinely wish to maintain enterprise agreement coverage.

Recommendation 6: A "sunset provision" be introduced for expired collective agreements.

6.6 Protected bargaining

Protected bargaining should be limited to matters pertaining to the direct employment relationship. An example of the impact that relatively basic changes to the Act can have can be found in the aftermath of the High Court's decision in *Electrolux v The Australian Workers' Union (2004)*. It was determined that industrial action would be unprotected if it involved matters not pertaining to the employment relationship. This principle was subsequently clearly codified under changes to the Fair Work Act in 2005. Industrial dispute fell and the efficiency of the bargaining process improved significantly².

The relative ease of gaining access to protected action during bargaining (merely needing to demonstrate that a union bargaining representative is "genuinely trying to reach an agreement") period is symptomatic of a system

² Though this "improvement" has been undermined by the recent Full Bench of FWC decision in *Esso v AMWU* [2015] FWCFB 210

predicated on an adversarial bargaining model. The bar needs to be set higher to reinforce the necessary transition to a more productive workplace culture based on constructive mutual interest (such as requiring proof that bargaining has reached an impasse). Consistent with this principle, where protected action orders are issued, an employer should also be able to seek “no work as directed – no pay” orders. Presently, a company might have no option other than the extremely adversarial response of locking out a workforce as its only response to industrial tactics that have minimal effect on union members but are designed to significantly disrupt operations.

Wherever granted, protected action orders should be rescinded where there is evidence of the abuse of processes that are intended to protect the safety of employees. For example, where the authority granted to union and workplace representatives under safety legislation is abused for industrial bargaining purposes. Orders should also be capable of being rescinded where industrial action threatens the safety of people or the security of equipment. The current legislative provisions on this subject are too “grey”.

Recommendation 7: The principles of the High Court’s Electrolux decision need to be reinstated in the Act.

Recommendation 8: The remedy of rescinding protected action orders should be readily available in the event of an abuse of process.

7. Conclusion

Subject to the continued operation of minimum standards, the adoption of individual arrangements (which is the clearest form of direct employee engagement) is preferred as the most productive model by most employers and employees in the Australian workforce, as evidenced by the prevalence of voluntary common law employment contracts.

Nevertheless, where collective arrangements are preferred, the current statutory FWC system promotes collective agreements negotiated through unions under the guidance and authority of the FWC, with employees being subjugated as indirect parties. The system is geared towards the management of adversarial collective negotiations. Where there is, in fact, an environment of adversarial collective workforce negotiation, the current system has a significant and important role. However, there are changes that are necessary to introduce a bargaining balance, and to support a transition to collective mutual interest facilitating better productivity outcomes. “Opt-out” direct workforce engagement arrangements governed under common law would enable the present statutory system to be streamlined to deal with adversarial disputes. Also, a form of direct collective employment arrangements would underpin a more productive, modern employment relationship based on mutual interest, with appropriate legal protection.

Whether this reform is adopted or not, there needs to be a number of changes to the existing Act to reduce the access to FWC involvement in the normal and legitimate management of business operations. However, there also needs to be recognition of other circumstances that warrant FWC intervention in damaging disputes. One of these relates to businesses (typically small to medium sized businesses, but also large businesses facing intense international competition) that can face the threat of being seriously harmed during the statutory collective bargaining process. The other is where past agreed restrictive work arrangements cannot be sustained in light of significant external competitive changes affecting the productive capacity of an industry as a whole, and genuine attempts to address these issues have resulted in an intractable industrial dispute.

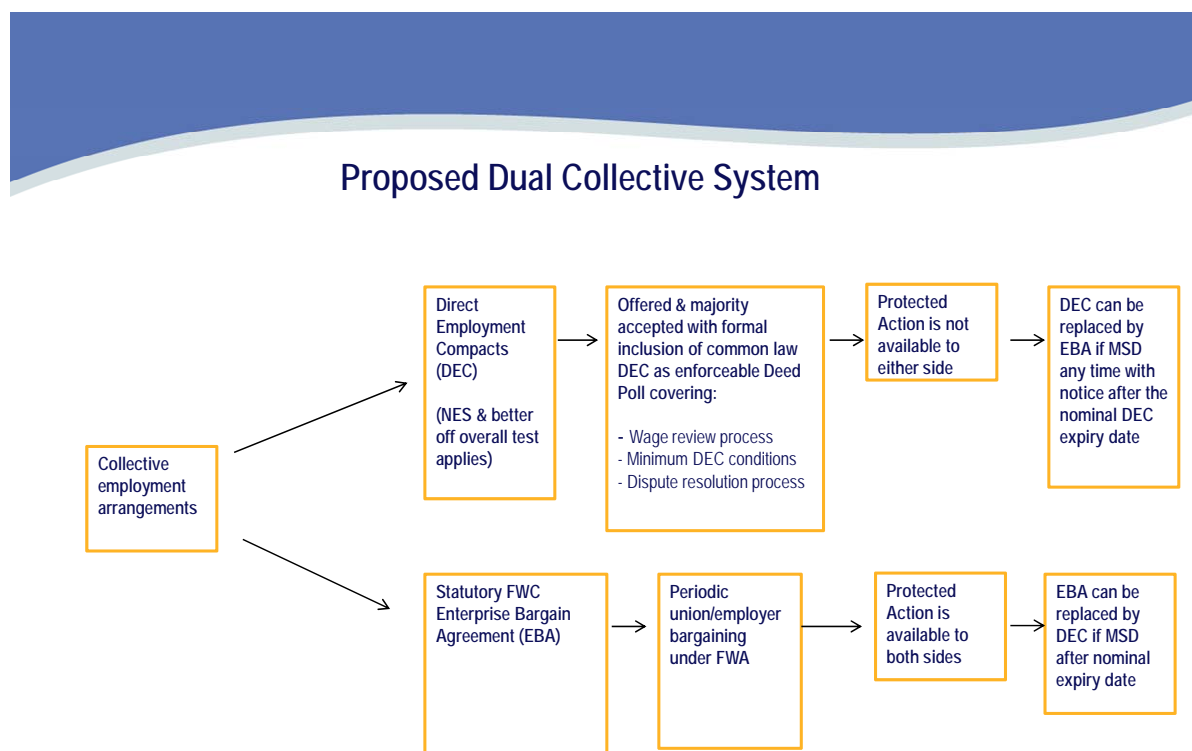
Ian Cummin
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BlueScope
11 March, 2015

Appendix 1

Process to Determine Collective Employment Streams

The following illustrates the process to determine the appropriate stream.

- Subject to a DEC satisfying standards of fair treatment and the “better off overall” test, it would need to be supported by a majority of those covered.
- Where a DEC has majority employee support at the beginning of its term it could not be replaced by a statutory FWC collective agreement within three years of the start of the DEC.
- A DEC would not be valid if the workforce is already covered by an “in-time” FWC collective agreement.
- A union seeking to negotiate a collective agreement under the auspices of the Fair Work system would need to show that a fair and functioning DEC is not in place before a Fair Work Commissioner could deal with the matter.
- Likewise, an employer could not establish a DEC if an “in-time” union collective agreement is in place, and would need a majority support ballot of employees to replace it with a DEC.
- A process summary is illustrated below.



Governance of Industrial Issues

The following summarises the governance process for the respective streams.

- Under a DEC, with the exception of NES and minimum Award standards (other than those amended under a “no less favourable overall” DEC provision), all other arrangements would be enforceable under the civil legal system.
- As protected action is not an available option under a DEC, the only principle to be applied during the mediation and arbitration process is based on the workplace principles contained in the DEC, and the merit of the evidence provided by the parties.
- In the FWC Bargaining Stream, historically the governance of industrial issues arising under the Fair Work Act by an FWC Commissioner is guided by the general aim of resolving the industrial disputes. The addition of a clear requirement to determine matters based on merit and whether or not a matter pertains directly to the employment relationship would also apply.

Appendix 2

List of BlueScope Fair Work Commission Matters (Port Kembla) 2012 - to date

- AWU v BlueScope 1198 of 2015 – Dispute under DSP (manning during company's decision to operate two HSM furnaces)
- AWU & ors v BlueScope 5675 and 1378 of 2014 - Workplace change (Raw Materials Handling area)
- AWU & ors v BlueScope 5383, 1256 & 7763 of 2014 – Workplace change (Hot Strip Mill)
- AWU & ors v BlueScope 5994, 1528 & 1556 of 2014 – Workplace change (Plate Mill)
- AWU v BlueScope 5556 of 2014 – Workplace change (HCPD)
- AWU v BlueScope 5764 of 2014 – Workplace change (Welded Products)
- AWU v BlueScope 6019 of 2014 – Workplace Change (Springhill CPCM)
- AWU v BlueScope 4364 of 2014 – Dispute under DSP (relevant departmental agreement)
- AWU v BlueScope 4690 of 2014 – Workplace change (IDC Roster Pattern)
- AWU v BlueScope 5494 of 2014 – Dispute under DSP (warning for inappropriate behaviour)
- AWU v BlueScope 4193 of 2014 – Dispute under DSP (driving machinery)

- AWU v BlueScope 6584 of 2014 - Personal/Carer's leave change under the EA
- AWU v BlueScope 2872 of 2014 – Interpretation of Personal/Carer's leave clause in EA
- BlueScope v AWU 6019 and 3013 of 2014 - CPCM Unlawful Industrial Action
- AWU v BlueScope 6935 of 2014 – Dispute under DSP (counselling to employee)
- AMWU v BlueScope 223 of 2014 – Dispute under DSP (warning letter to employee for safety breach)
- AWU v BlueScope 6338 of 2013 – Workplace change (Lime Kiln)
- AWU v BlueScope 6385 of 2013 – Dispute under DSP (challenge of de-selection criteria used during restructure)
- AWU v BlueScope 1234 of 2013 – Dispute under DSP (warning letter for safety incident)
- AWU v BlueScope 5431 of 2013 – Dispute under DSP (final warning letter for safety incident)
- AWU v BlueScope 2692 of 2013 – Workplace change (Coke Making 1 role eliminated due to technology introduction)
- AWU v BlueScope 7228 of 2013 – Workplace Change (Caster water treatment plant)
- AWU v BlueScope 6505 of 2013 – Dispute under DSP (interpretation of meal allowance clause)
- AMWU v BlueScope 1286 of 2013 – Dispute under DSP (maintenance numbers of direct and contractor engagement)

- **AWU v BlueScope 6547 and 6552 of 2013** – Application to stop unprotected industrial action and dispute under DSP (operation of crane in Bulk Berth department)
- **BlueScope v AWU 3878 of 2013** – Application for orders to stop unprotected industrial action (Springhill)
- **AWU v BlueScope 5833 of 2013** – Dispute under DSP (warning letter for pattern of absenteeism)
- **AWU v BlueScope 5450 of 2013** – Dispute under DSP (warning letter for pattern of absenteeism)
- **AMWU v BlueScope 1285 of 2013** - Dispute under DSP (warning letter for safety breach)
- **AWU v BlueScope 6079 of 2013** – Dispute under DSP (cessation of training for employee)
- **AWU v BlueScope 6337 of 2013** – Dispute under DSP (staff using crib and bathroom facilities)
- **AWU v BlueScope 4594 of 2013** – Dispute under DSP (coverage arrangements during meal breaks)
- **AWU v BlueScope 3470 of 2013** – Dispute under DSP (manning dispute)
- **AWU v BlueScope 6663 of 2013** – Dispute under DSP (meal breaks)
- **AWU v BlueScope 2509 of 2013** – Dispute under DSP (refusal of duty by employees)