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Submission to the Productivity Commission on Workplace Reforms by Walk Industrial Services Pty Ltd

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Walk Industrial Services Pty Ltd

Walk Industrial Services Pty Ltd is an industrial relations consultancy company / practice based in Queensland. It has been operating in this format since 2009.

This practice involves itself in the following matters, but not limited to;

- Unfair dismissal applications
- Enterprise bargaining agreements
- Variations to agreements
- Industrial disputation
- Provision of industrial advice
- Anti-discrimination and sexual harassment matters
- Workplace bullying matter
- Industrial Advocacy.

For more information of Walk Industrial Services Pty Ltd please visit www.walkindustrialservices.com .

Introduction

I like to commence this submission by stating that for a review like this to be successful, the aim is make enterprises more competitive, sustain and create jobs. It is vital that the workplace relations system encourages innovation and productivity. Lifting productivity is not about making people work harder. It is about making people work smarter. It is about unleashing the innovation potential of our people and working more intelligently to succeed in a global economy.

A change to the workplace relations system should not always be perceived as a threat to worker rights.

This submission is based on purely an industrial relations perspective from an industrial relations practitioner. These experiences are based on matters that come to this practice.

In the headings I have set out below, it is not the intention to suggest a reduction in conditions of employment, only to make these conditions work better.

The workplace relations system is talked of in terms of complexity. This review should be looking at the complexity of the system and the *Fair Work Act 2009* and it Regulations (the Act).

The role of the Fair Work Commission (FWC) must also be looked at in its entirety.

Productivity and Profits

More importance needs to be given to how the profits from that productivity are shared. Recent commentary has focused on the aging population. The age of the worker is irrelevant as long as they are employed and productive. The ageing populations is not the problem, the issue we face is related to the distribution of the productivity gains, (from *Intergenerational Report*).

Our current rate of around 1.5% productivity growth is simply not going to be enough to generate the income growth that we have come to expect, and that the future generations may wish for, (quote from AI Group chief executive).

The Award System

The award system requires further review. Reviews every four (4) years are not enough. Being able to make variations to the awards need to given greater emphasis. The FWC needs to have further and better guidelines from the federal government to vary awards.

At the moment there are far too many restrictions.

To get this greater emphasis, changes will need to be made to the *Fair Work Act 2009* and its *Regulations*.

Reducing awards to the number we have at this time has not worked as well as some might have expected. Probably having a few extra awards is something worth considering. If asked to put a number on this I would say about a further 20 more awards.

Penalty Rates

Firstly I would like to say that I am not arguing for the removal of penalty rates. I am arguing for a better system in the use of penalty rates.

Small business, in particular industries, this needs to happen. When small business gets this wrong they can incur massive penalties from the Fair Work Ombudsman (FWO), the FWC and the Federal Circuit Courts (FCC).

For those who do not practice in industrial/workplace relations, the workplace relations system is by far too complex. The complexity for small business is mainly around compliance.

We must re-design our system to take into account the 24/7 economy particularly in hospitality and retail.

My idea of a penalty rates system means that days Monday to Sunday be replaced with the re-naming of days to numbers, 1-7. Making days 1-7 and employers and employees deciding what are the first

five (5) days and then let the penalty rates apply to the 6th and 7th day is a suitable suggestion. I believe this would be an approach that should be given further investigation.

I am aware in the cases mentioned below a number of options have been canvassed before the FWC.

To achieve an amendment like this to the relevant awards will face considerable opposition from some of the interested parties, including unions.

Also the powers of the FWC need be reviewed as to implementing such a process. With their current application and that of 8 other industries joining including retail and pharmacy, this can be achieved.

What this application gets down to is the makeup of the Full Bench of the FWC. In 2013 a Full Bench knocked back an application by the restaurant industry, but a different Full Bench in 2014 made changes to the *Restaurant Industry Award 2010,* that is, the Sunday loading for casual workers.

The current penalty rate provisions, in particular, retail and hospitality are unworkable.

I recently read in a newspaper article where there federal government will not be changing penalty rates and minimum wages regardless of what, if any, recommendations come from the Productivity Commission (PC). This is far too short sighted.

For the sake of the two effected industries, the PC must make strong recommendations on penalty rates. The economy can only benefit from a change. Sunday trading is not only important for the restaurant industry but the populace as a whole.

The PC should also recommended the powers of the FWC be also reviewed.

Casual Employment

There is no specific definition of what casual employment is. Common law interprets this as a ".....person employed by each and every engagement".

It also says it is one where employment is irregular and each engagement between the employer and the employee is a "separate contract of employment".

With the unfair dismissals laws of the *Fair Work Act 2009* there are terms introduced such as long term casual employment; responsible expectation of continued employment etc.

The definition of casual employment should be included in the *Fair Work Act 2009.*

We need to seek more clarity in this definition.

Full-time and Part-time Employment

I would like to see additional clarity of the terms full-time employment and part-time employment. I would like to see these terms inserted into the *Fair Work Act 2009.*

Employee v Independent Contractor

The degree of difficulty in determining the difference between an employee and an independent contractor needs to be simplified to assist small business in particular. There has been so much case law in the legislative scheme that confusion reigns with some businesses that do not have professional advisors.

There is a need for "relaxation" of the workplace laws governing this situation, in particular, the issue of "sham contracting." Sham contracting has earned employers record fines from the Federal Circuit Courts in recent times with one employer receiving a fine of $313,500.00 (*Director, Fair Work Building Inspectorate v Linkhill Pty Ltd* [2014] FCCA 1124).

Employers need to have an opportunity to use contractors where possible when employing employees is not suitable to their requirements.

Clarity and certainty is a requirement as is the need to avoid further "red tape".

As we should know employees are employed on "contracts of service" and independent contractors are "contracts for service."

I would go as far as suggesting that the majority of companies have little or no ideas of the pitfalls and consequences of non-compliant contractor engagement, let alone streamline their systems to cater for all the variables involved in at least seven (7) pieces of legislation.

Those seven (7) pieces of legislation are;

1. The Tax Act
2. The Independent Contractors Act
3. The Personal Services Income legislation
4. The Fair Work Act
5. The Superannuation Guarantee Charge Act
6. The Payroll Tax Act (State based)
7. Work Cover Act (State based)

Flexibility in Employment

Enterprise Flexibility Agreements are a start, but there are too many restrictions, in particular, the application of the "safety net."

Taking up an offer of flexibility, whether it be child friendly hours, working from home, avoiding long commutes or taking care of elderly family members requires reasonably consideration from both the employer and the employee. One needs to understand why they would take up this flexibility arrangement. Working from home could lead to a sense of isolation and working in a busy office could see a loss of a sense of community. The decision for a trade-off for self-determined working conditions requires considerable thought.

A flexible workplace relations system could assist with this process if constructed properly. The legislators should be put to this task.

When times get tough for employers, which will happen from time to time, this flexibility in an EBA is important.

Hours of Work

The 38 hour week was introduced in 1983. There are employers and others still talking about the 40 hour week.

This commentary is in addition to the commentary on flexibility of employment above.

Productivity in Enterprise Bargaining Agreements

All terms and conditions should be up for grabs in the process of enterprise bargaining. Employers and employees in each work place decide what is important and what is not. Following the negotiations, the safety net award is put aside.

This sounds like a simplistic view, but the current process is very complex even for the experienced.

This could also alleviate the role on the FWC in this area.

This process should help enterprises to be more competitive, sustain and create rewarding jobs.

There are those out in the wider community who believe that the age of enterprise bargaining is over. Its current format is not that helpful with in particular the application of the "safety net".

I refute this view. Enterprise bargaining can lead to savings in a wages bill when managed correctly and managers stick to the rules, for example, the rostering in an effective manner will assist in a business remaining viable.

To lift productivity there must be a better format in how to negotiate and enterprise bargain. We do not want to see enterprise bargaining agreements reducing the commercial value of the business.

In the late 1980's the Hawke/Keating government established the wages accord. If the parties could prove a 4% productivity gain then the Australian Industrial Relations Commission could approve an enterprise agreement. This period in time should be looked at again, not necessarily copied, to assist the development of an improved and better workplace relations system. We need more collaboration and co-operation to better justify changes to wages.

More common ground needs to be found.

Role of Unions in Enterprise Bargaining

Unions I believe can still have a role in this process. But there roles should clearly be defined even more so than it is now. Unions have considerable expertise and this should not be lost sight of. Clear guidelines on their involvement and along with any other bargaining agent should be agreed to between the parties before the process is started. If breached parties can institute whatever action they so choose up to the stage of ceasing all negotiations. Once we start going down this path other elements come into immediate consideration, that is, general protections, adverse action, industrial disputation and the role of the industrial umpire.

The better off overall test

This test along with previous tests in the EB area have always been difficult to apply with in terms of their complexity.

This test will be abolished if a system like that described above can be implemented.

Minimum Wages

In my time there has only been one occasion when a Commission has not handed down a pay increase and that was in July 2009. The Australian Fair Pay Commission as it was called then decided to keep

minimum wages at their current level. In making the decision, the Commission focused on protecting jobs and supporting a stronger recovery in employment as the economy improves.

This does not need to be a regular occasion, but the FWC must consider this approach when the economy is struggling.

Businesses must have the ability to freeze wages or reduce wages back to the 2012 levels.

At the moment Australia has a low level Australian dollar as opposed to the US dollar and some other major currencies. We also have highish unemployment levels, that is, 6.4%, our highest in 12 years, if we accept what is being provide to us through agencies like the Reserve Bank, Treasury, the Australian Bureau of Statistics, Centrelink and others.

The Abbott government has also confirmed that minimum wages in not on the table for consideration from the PC into the workplace relations system. They see this as work of the FWC.

By making this statement we are simply travelling in circles with this type of argument in terms of the PC review of the workplace relations system.

I am not advocating a view that these yearly reviews be cut, only how future reviews go about the process of bettering the economy and economic circumstances.

Productivity does need to improve and this means a role to be played by employers, unions and government to agree on what success looks like and work together towards a common goal.

National Employment Standards (NES)

The NES are a set of ten (10) terms and conditions as set out in the *Fair Work Act 2009.*

In terms of achieving productivity improvements, the NES is a hindrance.

The NES gives employers no room to negotiate collective or individual agreements with employees using the enterprise bargaining arrangements prescribed in the *Fair Work Act 2009.*

The Safety Net

The question for consideration is what would be the best safety net, if any, at all is required in Australia.

My own view is that the safety net for wages as conditions is more of a hindrance than a help.

Unfair Dismissals

The system by which the FWC uses for determining an application in arbitration is very sound.

The system the employer and the employee has to deal with when an application is filed and heads to the conciliation stage needs to be reviewed.

The Industrial Registrar need to play a greater role in this process, not just act as an administrative body for processing an application.

When there is a clear and without question jurisdictional argument, the industrial registrar should be able to deal with it immediately.

Complexity of Workplace Relations System

Red tape - employers and employees should have the ability to negotiate all terms and conditions of employment between themselves. This raises further questions like the minimum safety net of conditions as the National Employment Standards (NES) refers to; the role of unions and their diversity for their future options; minimum wage hearings each year and so on

In more recent times the role of the union in seeking majority support determinations; the FWC deciding what is fair; the designated group; coverage; etc. have involved this practice.

Being a full-time practitioner in IR the list goes on.

But saying all of that Australia still requires a statute to set standards.

The Role of the Fair Work Commission

A review of this type must bring into question some of the roles of the Fair Wok Commission. I am not for a complete abolishment of the FWC only a curtailing and refining of some of its roles.

The central umpire is still important in the overall context in industrial relations within Australia.

Management Prerogative and Decisions

This is important in the workings of the workplace relations system. Managers must have the ability to manage their business

KENNETH J LAW
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