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Workplace Relations Inquiry  
Productivity Commission  
GPO Box 1428  
CANBERRA CITY ACT 2601

Dear Sir

**Productivity Commission Inquiry - Workplace Relations Framework**

K&L Gates is a global law firm comprising of more than 2,000 lawyers across 5 continents.

In Australia the firm has a leading Workplace Relations Practice which is involved in all aspects of both State and Federal Workplace Relations and Safety Law. The firm is a leading practice in this area in Australia in significant industries such as electricity distribution, construction, mining and the public sector.

Attached to this correspondence is the K&L Gates submission to the Workplace Relations Framework Inquiry. We would be pleased to respond to any questions that the Commission might have in response to this submission.

Yours faithfully

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## K&L Gates Submission with respect to the Workplace Relations Framework

### 1. Overview

- 1.1 The Productivity Commission in Issues Paper dated 1 January 2015 describes the historical context and development of the workplace relations laws in Australia. The system which has developed over time had, until the passage of the *Workplace Relations Amendment (WorkChoices) Act 2005* (WorkChoices), been split between State and Commonwealth Legislative Regimes and separate Industrial Commissions. Since the High Court Decision in the Work Choices challenge (*State of New South Wales and ors v Commonwealth of Australia* [2006] HCA 52) the Commonwealth Workplace Relations System has assumed far greater prominence in defining workplace relations laws for much of the nation's workforce.
- 1.2 Whilst workplace relations has a jurisprudence of its own, history has seen regular argument between both side of politics as well as employers and unions as to how this important area of law ought be regulated. This has lead in the recent past to constant and in some cases revolutionary change to the Workplace Relations Laws, which in the case of Work Choices and the *Fair Work Act 2009* (FWA) represented a "winner take all" approach with respect to this subject.
- 1.3 However the last 2 major legislative changes in terms of the Work Choices Legislation and the FWA have created an atmosphere of uncertainty in terms of Workplace Relations law in this country. What history has shown is that wholesale change which does not have the support of both sides of politics or the employers and the unions is unlikely to endure. Meaning that any significant legislative change is likely to remain controversial and subject to further change. This is not in the nation's interest.
- 1.4 In this submission K&L Gates (Firm) has chosen to address Issues Paper 3, The Bargaining Framework. The Firms' partners and lawyers in its Labour, Employment and Workplace Safety Practice Area are regularly involved in all aspects of the bargaining process including not only the preparation and drafting of agreements but the litigation associated with Protected Action Ballots and Protected Industrial Action. Whilst this is a legal submission, we set out not only issues arising from the current legislative framework contained in the FWA, but also examples which serve to highlight some of the deficiencies with the current system.
- 1.5 The Productivity Commission should also examine the following phenomena arising from the FWA. It is apparent that the FWA gives pre-eminence to collective arrangements reflected in enterprise agreements above all other arrangements. Individual Flexibility Agreements (IFA) are of limited utility and the effect of section 194(ba) FWA is to effectively exclude parties from agreeing not to be covered by an enterprise agreement or perhaps even terms of such an agreement. It is unclear that having regard to the history of enterprise bargaining in this country that it was ever intended that of all instruments that could potentially exist to cover terms and conditions at the workplace (modern awards, statutory contracts, common law contracts or enterprise agreements) that enterprise agreements should be the preeminent instrument. Given the difficulties with respect to the amending enterprise agreements whilst they are in term, the question arises as to whether or not such a situation produces inflexibility in the workplace and hence a poor productivity result. This Commission should therefore examine why it is that the FWA apparently favours enterprise agreements over all other types of arrangements at the workplace. The Commission should also examine whether greater choice as to the type of instrument to be used ought be a feature of the FWA.

## **2. Issues Paper 3 – The Bargaining Framework**

- 2.1 The current Federal Workplace Relations System sets out minimum terms and conditions in a number of modern awards and in the National Employment Standards (NES). Over and above these minimum conditions, employees and their representatives are able to bargain for an enterprise agreement, which provides for terms and conditions greater than are specified in a modern award.
- 2.2 Once an enterprise agreement is agreed and approved by the Fair Work Commission (FWC) no industrial action is able to be taken whilst that agreement is in term. However once the enterprise agreement is out of term, the employees and their representatives may apply for a protected action ballot to take lawful strike action which may include a wide range of action including strikes, bans and limitations in support of their claims for new agreement.
- 2.3 It is important to understand exactly what an enterprise agreement contains for the purposes of this submission. The enterprise agreement will contain a number of terms dealing with who is covered by the agreement, how disputes are resolved and, how consultation is to take place amongst other things. But principally such agreements comprise 2 types of provisions. They are:
- (a) Monetary Terms – these clauses define the price that will be paid for labour. Namely wages, allowances, overtime, superannuation and leave entitlements. Basically all matters pertaining to the unit price for labour.
  - (b) Non-Monetary Terms – these terms deal with a range of issues affecting how work may be performed and by whom. These terms can import significant costs into an enterprise because they can create a number of restraints upon management in terms of the running of the enterprise. These can include restrictions upon the use of contract labour (so called "contractors clauses"), limitations on variation of hours or shift patterns, specification of manning levels and the imposition of detailed, overly cumbersome consultation requirements. Such clauses can introduce a union veto or fetter upon management decisions. This Commission ought closely examine the types of non-monetary terms within enterprise agreements and their adverse affect upon productivity. These are the types of clauses that ought be the subject of detailed consideration for proscription as prohibited content. See Section 6 of this paper for more detail.
- 2.4 There are a number of problems associated with the bargaining framework. The Firm submits that the FWA's architecture creates the circumstances for conflict with respect to protected industrial action, but then singularly fails to provide any mechanism for that conflict to be resolved. Perhaps most importantly for this Commission's Inquiry, there is no requirement that productivity be addressed either during bargaining or at the stage when the FWC is called upon to approve an agreement.

We shall expand upon these submissions below.

## **3. Productivity**

### **Part 2-4 FWA ENTERPRISE AGREEMENTS**

- 3.1 Part 2-4 of the FWA deals with Enterprise Agreements. This Part, like other parts of the FWA, has its own set of objects. The objects of this Part are found in Section 171 FWA:

#### **Section 171 – Objects of this Part**

*The objects of this Part are:*

- (a) *to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreement that deliver productivity benefits; and*
- (b) *to enable the FWC to facilitate good faith bargaining and the making of enterprises agreements, including through:*
  - (i) *making bargaining orders; and*
  - (ii) *dealing with disputes where the bargaining representatives request assistance; and*
  - (iii) *ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay. (emphasis added)*

3.2 Whilst it is true that Section 171(a) FWA states that productivity is an object of the Part, when one proceeds to Part 2-4 Division 4, which deals with approval of enterprise agreements, at no stage during the approval process is the FWC required, as a matter of law, to consider whether the objects in section 171(a) FWA regarding productivity are in fact met or enhanced by the proposed agreement. Section 186 FWA sets out the requirements that the FWC must be satisfied of prior to the approval of any enterprise agreement. It is noteworthy that notwithstanding the contents of section 171(a) FWA (set out above) nowhere within section 186 FWA is there any requirement that productivity be considered at the point of approval.

3.3 In the Firm's submission, this is a significant omission and has the effect of rendering the objects of Part 2-4 as set out in section 171(a) FWA to be of negligible effect. For all intents and purposes, section 171(a) FWA is a motherhood statement. Productivity is also referred to in the objects of the FWA (section 3(a) FWA) but then provides no mechanism by which this object is to be achieved. Indeed the individual and collective rights created by the FWA overwhelm this object. The FWA is indeed a curious piece of legislation in this regard. It proposes productivity as an object in 2 places (see section 3(a) and section 171(a) FWA) and then does nothing in the furtherance of these objects. Productivity in the FWA thus has a certain, elusive Alice in Wonderland quality.

3.4 The concept of productivity forming part of the approval process by industrial commissions is not new. The Productivity Commission may recall that during the 1980's under the Hawke Labor Government the then the Australian Industrial Relations Commission was required to have parties prove how proposed awards would enhance productivity as a pre-condition to obtaining what was then known as the second tier pay increase. It is to be noted that this system was a part of the Accord which had been reached between the Federal Government, Trade Unions and employers and was one of the levers, though not the only one, utilised by the then Federal Government in order to enhance productivity. It is to be noted that this approach did have the support of all the industrial parties. This is a matter that the Productivity Commission ought review and examine as to whether or not the objects contained in the present section 171(a) FWA ought actually form part of the approval requirements under section 186 FWA.

3.5 Another matter worthy of consideration for this Commission is the role of trade unions in bargaining. It is of interest that nowhere within Part 2-4 FWA is the role of trade unions addressed. Rather the Part talks about agreement making between employers and employees, noting that bargaining agents can be appointed by both. The appointment of union bargaining agents is the mechanism by which a union becomes involved in this process. The union bargaining representative may have a preponderance of membership at the particular employers worksite, or it may be in the minority. Its mere appointment as a bargaining representative by one member at that workplace (or by default because if one person is a member of an eligible union the employer must recognise the union's bargaining

rights) means that there is a very low bar for any union's entry into enterprise agreement negotiations. Practical experience has shown that a union once brought into enterprise agreement negotiations is loath to make productivity concessions for a number of reasons.

3.6 Firstly the union itself will usually have a view about its position in the industry and terms that it will or will not abide by in enterprise agreements. For example in the construction industry it is very common for the CFMEU to require terms which severely limit both the capacity and the attractiveness of utilising contract labour. In broad terms the CFMEU contractors clause, which many employers agree to, requires that if contract labour is used it must be on terms and conditions no less favourable than the employers enterprise agreement. This is a significant restrictive trade practice and has the following effects:

- Such clauses may effectively lock certain contractors out of an industry because their enterprise agreements (if they have one) are different to the enterprise agreement of the industry principals.
- Such clauses severely restricts the business utilising the cost benefits that contract labour may provide; and
- Such clauses may lead to arguments from contractors that they have not been retained because they do not have a union enterprise agreement.
- Finally in the case of a public sector employer, they have the effect of imposing a requirement that the public sector conditions, generally thought to be more burdensome, apply to private sector contractors who wish to work in the public sector.

None of these results are in the greater public interest.

3.7 These submissions are not designed to advance an argument that union participation in enterprise bargaining is in itself a bad thing. Rather, it highlights how the introduction of a third party such as a trade union into enterprise bargaining processes can have a tendency to operate contrary to the objects set out in Section 171 FWA. We would submit that the stated objects as defined in section 171(a) FWA are to provide for simple, flexible and fair agreement making at an enterprise level. By making these objects a requirement of approval of an enterprise agreement, the capacity for the imposition of an industry view on a particular subject matter, such as contractors clauses, ought become less of an impediment to agreement making at the enterprise level. We would submit that this approach which has been taken by trade unions to bargaining is in fact a hangover from the old federal award system. Federally when industrial laws were governed by the conciliation and arbitration power, unions would serve a log of claims upon as many employers as possible across state boundaries in order to create the dispute which would ultimately lead to the making of an award. Thus for many decades the trade union movement was able to pursue industry wide views across Australia. It is submitted that notwithstanding the prohibition upon pattern bargaining, this is precisely the approach which has been adopted with respect to enterprise bargaining. This is a matter worthy of this Commission's consideration because such industry wide views have little to do with the productivity of the particular enterprise where agreement bargaining is taking place. This is another reason why the necessity to make the consideration of productivity both during bargaining and at the approval stage an important and required development with respect to the FWA. That is the parties during bargaining and at approval must show how in relation to that enterprise the new agreement will enhance productivity. It would be a relatively easy thing for the Parliament to give the FWC directions as to how it is to exercise its powers on approval with respect to this important issue.

#### 4. Protected Industrial Action

- 4.1 The next issue which impacts upon bargaining and the agreement making is the whole question of protected industrial action. At law, strike action is prima facie a breach of individual employees contracts of employment. The FWA sets out the circumstances where employees can take protected industrial action which means that the industrial action is both lawful and does not constitute a breach of their individual contracts. The rules regarding protected industrial action are found in Part 3-3 FWA. Protected industrial action is action taken by employees in support of their claim for an enterprise agreement and may only be taken when the enterprise agreement is out of term. The process is that employees apply for a protected action ballot order from the FWC and when granted a protected action ballot takes place. If that ballot approves the action, protected industrial action may then commence. It is to be noted that when the protected action ballot order is sought, wide ranging industrial action is usually sought and approved. This will include action from lengthy strikes and stoppages to bans and limitations. If there is more than one union at that workplace, typically all unions will apply at the same time for protected action ballot orders and thus the employer could be facing a plethora of wide ranging and different industrial actions either concurrently or successively.
- 4.2 The circumstances where either the FWC or indeed the Federal Minister can intervene to bring an end to protected industrial action are very circumscribed. These circumstances are set out in section 424 to 426 FWA. The Federal Workplace Relations Minister has the power in section 431 FWA to make a declaration terminating protected action. As described these powers have been used sparingly simply because the type of adverse effects contemplated within particularly in sections 424, 426, or section 431 will not arise as a matter of common place. Examples of where such powers have been exercised include the high profile Qantas dispute in 2011 (see *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) FWA FB 7444) and more recently *Ausgrid, Endeavour Energy, Minister for Industrial Relations (NSW) v CEPU and Ors* (2015) FWC 1600).
- 4.3 A typical employer, in the context of protected industrial action will never be able to make out the grounds contained in these sections and is therefore left with the continuation of the protected industrial action which would cause ongoing damage to that enterprise. The purpose of protected industrial action is to make the employer more compliant in terms of the agreement negotiations. It is to be noted that in the Qantas dispute (*op cit*), the fact that Qantas was losing significant money as a result of the industrial action in and of itself would not have constituted grounds for the FWC to terminate the dispute. But for Qantas' extraordinary response action of grounding its fleet, that dispute could not have been resolved absent Qantas' capitulation. Employers who are not in that position and cannot take that action will frequently find themselves in the position where they will simply accede to previously unacceptable demands in order to end the protected action. The scenario is therefore this. An organised group of employees take protected industrial action causing economic harm to their employer. The employer unable to bear or resist the potential or actual economic loss flowing from this action concedes to what doubtless had previously been claims which were unacceptable during negotiations. This agreement obtained under force of protected industrial action is then presented for approval to the FWC in circumstances where, as we have described above, the proving of productivity benefits form no part of the approval process.
- 4.4 The perfidy with protected action is that it can go on for significant period of time. The employers response action provided by the FWA is completely asymmetric to the suite of actions which can be taken against it. The FWA limits employer response to lock outs (see section 19-1(d) FWA). Indeed a reading of section 19 FWA is of benefit as it can be readily seen that subsections (a) (b) (c) contemplate a wide range of different types of industrial action by employees and a very singular, potentially catastrophic lockout action on behalf of employers found in subsection (d). A lock out is defined in section 19(3) FWA. Very few employers can choose a lock out.

- 4.5 A significant problem with protected industrial action is that absent the circumstances existing where the FWC can intervene to suspend or terminate that action, there is no court or tribunal where the underlying dispute regarding the enterprise agreement can be brought. While it is possible for a bargaining representative to make an application to the FWC to deal with a bargaining dispute (s240 FWA), the FWC may only arbitrate the dispute with the consent of the bargaining representatives (s240(4) FWA). Consequently, when an employer suffering protected industrial action could have recourse to a s240 FWA Application, the FWC effectively has no power to deal with the matter absent consent of all involved. A union and a group of employees taking protected industrial action is unlikely to surrender the leverage that protected industrial action creates by consenting to an arbitration. In any event such an arbitration would not have the enterprises' productivity at the heart of the hearing because the statute does not require it. Rather such arbitration would take place on a traditional industrial basis of a party proposing change to existing terms actually having to prove those matters on the balance of probabilities. Experience has shown that once terms are within an enterprise agreement, it becomes very hard, if not impossible, to remove them absent agreement. Bear in mind the way agreement negotiations are approached usually involve a union claim that these be "no trade-offs" or that any gain be offset by an equal advance elsewhere in the agreement. Reform is thus made very difficult.
- 4.6 In the Firm's submission, the Productivity Commission ought consider these circumstances, which are common place in Australia in terms of bargaining and protected industrial action, and consider whether or not if an enterprise agreement cannot be agreed by parties within a defined period of time, that such a dispute should then be the subject of compulsory conciliation and arbitration. This circumstance is one of the very few areas of disputation in the Australian legal system where currently the legislation creates the architecture for disputation and then does not provide the capacity for any court or tribunal to intervene to end that dispute. We would submit that if such a power to arbitrate is considered necessary or desirable, it should be coupled with further directions to the FWC by the Parliament as to how that power is to be exercised. Namely, the parties ought be required to prove how the disputed terms of the proposed enterprise agreement operate to enhance the productivity of the enterprise.
- 4.7 In short, as we have submitted above, the FWA ought direct the parties and the FWC's attention to productivity at the approval stage and if no agreement can be reached, during any arbitration being conducted to resolve that dispute productivity ought be central to those considerations. The Productivity Commission might consider the detail of such a direction so as to ensure that the productivity benefits that are to be proven in such circumstances are both measureable and quantifiable.
- 4.8 In the Firm's submission, the options currently available to employees and employees in the context of industrial action are exceedingly blunt instruments redolent of an earlier more barbaric age of industrial relations. Strikes and lock outs as contemplated within s19 FWA do not easily sit with the objects of agreement making set out in s171(a) FWA. One would question how genuine any agreement reached is after a process of protected industrial action and potentially employer response action. Nowhere in this process is the good of the enterprise, its staff or the public interest addressed.

## 5. Greenfields Agreements

- 5.1 The original intention behind greenfields agreements, when the concept of enterprise bargaining was first introduced in the early 1990s, was to establish a basis for making agreements through an enterprise bargaining stream which did not require a vote of employees. This was because, by definition, an agreement made to apply to employees who were not yet employed on a new project, enterprise or undertaking could not be the subject of a vote by those employees before they were employed. Because of the lack of employee involvement, the legislation required employers making such agreements to do so with unions that had the ability to represent the employees who would ultimately be covered by the agreement.
- 5.2 The most logical place for this type of agreement to occur was on construction projects as project based work fell neatly within the concept of a "genuine new enterprise" to which greenfields agreements could apply. Unions were the gatekeepers of these agreements but this was in an environment when employers had other agreement options such as non-union collective agreements and Australian Workplace Agreements.
- 5.3 Employer agreement options for new projects were radically improved when Workchoices introduced employer greenfields agreements. These agreements required no union involvement so employers could set their own terms provided they passed the no disadvantage test against the applicable award. These agreements lasted for only a year, but most construction work could be packaged so that unions were locked out of construction unless they agreed to sign up to union greenfields agreements in similar terms. These agreements removed the gatekeeper status from the unions but swung the pendulum wildly towards employers.
- 5.4 The attraction of the employer greenfields agreement environment was that terms could be set in advance with little, or no, union involvement and were combined with a guarantee of no protected industrial action for the term of the agreement. Of course this was very attractive to project owners, investors and financiers because there was absolute certainty for the project. In this environment, greenfields agreements became like a narcotic to project owners, investors and financiers because they ensured certainty of employment terms and guaranteed there would be no protected industrial action for the life of the project.<sup>1</sup>
- 5.5 With the onset of the FWA and the repealing of the employer greenfields agreement option employers, project owners, investors and financiers had become addicted to the certainty created by greenfields agreements but once again, unions were the only gatekeepers. Arguably this produced some extremely uncompetitive agreements at the height of the resources boom.
- 5.6 Ultimately, the FWA created a 2 stream agreement making process, one for existing workforces which necessarily required the agreement to be made with employees and one for new pieces of work which had not commenced and to which no employees were currently engaged, but required union involvement. All concerned parties (whether employers, unions or employees) now had to operate in this framework.
- 5.7 These 2 streams of agreement making left a practical question which has created uncertainty in the interaction of these two types of agreements from an employer's perspective, namely, *"How do I organise my workforce between existing enterprises and projects and those which I wish to tender for and work on in the future?"*

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<sup>1</sup> Duncan Fletcher, 'Project greenfields agreements: Are they the crack cocaine of enterprise bargaining?' (2014) 5 *Workplace Review* 41.



- 5.8 The simple solution to this appeared to be project carve out clauses. Theoretically, an employer could make an enterprise agreement which covered large aspects of its existing workforce and carve out those projects and employees who would be engaged to work on new enterprises as greenfields agreements were made when the need arose.
- 5.9 This created a tension between the fairly chosen requirements of the FWA, the need for flexibility in employer workforce organisation to effectively mobilise to new projects and the need to uphold the objects of the FWA.
- 5.10 This tension was exploited by the unions who regularly opposed agreements which carved out greenfields agreements on the basis that the agreement up for consideration had an uncertain scope of coverage and the prevailing question of who may or will come within the scope of the agreement, during its nominal life, became a reason to oppose an agreement's approval. This confirmed their gatekeeper status for agreement making.
- 5.11 The FWC in a number of key decisions<sup>2</sup> has endorsed the unions' arguments and a number of agreements were denied approval on this basis.
- 5.12 Unfortunately, the lack of employer greenfields agreements and the uncertainty created by *John Holland* and *MI&E* litigation (notwithstanding the recent resolution of these issues by the Full Federal Court<sup>3</sup>) means that unions have significant power to use the fears of owners, investors and financiers to lock in deals that are above market. Deals done in the boom times are making new projects unviable.
- 5.13 The present maximum 4 year term for greenfields agreements also creates an issue on mega projects, such as a number of current LNG projects in WA, Queensland and the Northern Territory. For a number of these projects, expiry of greenfields agreements has occurred, or will occur, mid-project and the result is a damaging process of bargaining with extra claims underpinned by a threat of protected industrial action. This means that greenfields agreements do not even guarantee the certainty that project owners, investors and financiers are looking for because agreements expire mid project. Ironically, expiry mid-project actually creates the productivity and certainty issues that project owners, investors and financiers were trying to avoid by using greenfields agreements in the first place. The ensuing arguments around bargaining have been a significant drag on productivity and a created a huge disincentive for investors.
- 5.14 There are a range of solutions which could be adopted into the framework of the FWA to deal with the productivity issues created by the impact of history and the current regime for greenfields agreements.
- (a) Introduce provisions that allow for ministerial power to declare that there can be no protected industrial action during the life of certain projects of significant national economic impact where terms and conditions are consistent with prevailing market conditions and better off overall than the underlying award. This still allows unions to be involved in the making of greenfields agreements but shifts the power balance back to the centre by removing the threat of protected industrial action.

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<sup>2</sup> See for instance *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2012] FWAFB 7866; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and others v MI&E Holdings Pty Ltd* [2013] FWCFB 2142.

<sup>3</sup> *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16; *MI&E Holdings Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2015] FCAFC 15.

- (b) Introduce a requirement that union greenfields agreements must run at least for the full project term on construction projects and not expire after 4 years as is currently the case. This ensures that unions are still involved in the agreement making process, removes the threat of protected industrial action during the life of a major construction project and ensures that major works can be completed on time and appropriately resourced to complete project milestones which satisfies the objective of certainty for project owners, investors and financiers.
- (c) Expand the regime for individual flexibility agreements so that they can operate for the term of a construction project, without early termination and without the ability to take protected industrial action during the construction project's life. This ensures that employees are still involved in the agreement making process, removes the threat of industrial action during a major construction project and gives security of employment for the life of a project to those employees who are willing to make an agreement directly with their employer. It also restores the options that are available to employers for the making of agreements on projects.
- (d) Introduce the ability for a group of self-represented employees (ie not union members) to enter into greenfields agreement negotiations with an employer directly before employment commences. This option allows for the greenfields agreement regime to be more aligned to the single or multi enterprise agreement regime in that employees are able to have direct involvement in the agreement making process for genuine new enterprises, whilst still maintaining the existing FWA protections, the FWC supervision of agreements and the FWC's approval process.

## 6. Restrictions on agreement content

6.1 Section 172(1) FWA sets out what can be contained in an Enterprise Agreement, namely:

- matters pertaining to the relationship between an employer and its employees covered by the agreement;
- matters pertaining to the relationship between employers and unions that will be covered by the agreement; and
- deductions from wages for any purpose authorised by an employee.

As the *Fair Work Bill 2008 Explanatory Memorandum* acknowledges, this last point is not a matter that relates to the relationship between employers and employees but for policy reasons it was included in the FWA. Therefore the FWA permits content of an Enterprise Agreement even if it strays beyond the employer/employee relationship.

6.2 Section 194 of FWA also sets out restrictions on what can be contained in an Enterprise Agreement, being terms which are discriminatory or objectionable. These include terms which:

- provide a method by which employees or employers may elect to opt out of an agreement;
- a term that extends the unfair dismissal regime beyond Part 3-2.
- a term that provides for the exercise of a state/territory OHS right other than those in accordance with Part 3-4.

6.3 While Section 172 1(a) is not intended to permit terms that contain a general prohibition on the employer engaging labour hire employees or contractors, many enterprise agreements which are approved by FWC skirts round the prohibition by setting out impediments upon or

requirements on employers before contractors can be engaged. These requirements do not deal, of course, with productivity benefits, notwithstanding the objects of Part 2-4. They may require that contractors must not be engaged on conditions that would undercut the enterprise agreement and/or only be pursued where all other options have been considered.

- 6.4 In *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309, the High Court set out the test to determine whether a matter pertains to the relationship between employers and employees. In an earlier High Court case, *R v Commonwealth Industrial Court: Cocks; ex parte* (1968) 121 CLR 313, the Court held that a claim prohibiting employers from having work done by independent contractors outside the workplace did not relate to the relationship of employers and employees but in a later High Court case *R v Moore ex parte Miscellaneous Worker's Union of Australia* (1978) 140 CLR 470, the Court held that a claim that placed limits on the engagement of contractors, rather than prohibiting their engagement, did pertain to that relationship.
- 6.5 In *Wesfarmers Premier Coal Limited v Automotive, Food Metals, Engineering, Printing & Kindred Industries Union (No. 2)* 2004 [FCA 1737], French, J. as he then was, considered a contractor clause in a proposed enterprise agreement. It required the employer to consult with employees and unions if it wished to use staff other than the existing workforce, set minimum terms for contractor's employees and before contractors could be used, existing staff were to be given a reasonable opportunity to inspect machinery or equipment before the contractor could carry out any warranty work. His Honour considered that this clause strayed too far and was not a matter pertaining to the employer/employee relationship.
- 6.6 The use of contracting or 'job security' clauses in enterprise agreements place unreasonable limitations on employers using contractors, particularly in the construction industry. These clauses give no consideration to productivity and the legitimate use of contractors where considered appropriate by an employer. Each engagement can be the source of disputation and inevitably result in a dispute process that holds up any engagement action. Such provisions often compel third party contractors to provide terms and conditions in line with enterprise agreement, even if the contractor has its own industrial arrangements in place. These provisions also seek to drive out or seriously impair competition.
- 6.7 In these circumstances limits should be placed on the content of clauses contained in enterprise agreements dealing with contractors. For instance, such clauses should only permit:
  - informing employees/unions of the employer's intentions to use contractors where ordinarily the existing workforce would have been engaged; and
  - requiring employers to ensure that conditions of employment of contractors or their employees are lawful.

In the firm's submission, the restrictions on the use of contractors are anti-competitive and stray close to effectively prohibiting the use of contractors in a practical way: to that extent the clauses should be prohibited under enterprise agreements.

Dated 18 March 2015

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