



Cement Industry Federation
Submission to the
Productivity Commission
Workplace Relations Issues Papers

March 2015



1. Background

The Cement Industry Federation (CIF) is the national body representing the Australian cement industry. Our membership is made up of the three major Australian cement producers - Adelaide Brighton Ltd, Boral Cement Ltd and Cement Australia Pty Ltd. Together these companies account for 100 per cent of the integrated production of clinker and cement in Australia.

The Australian cement industry plays a key role in contributing to Gross Domestic Product (GDP) growth and employment opportunities throughout the Australian economy.

CIF member operations are located in every Australian state and territory that include integrated clinker and cement manufacturing sites, standalone cement mills, limestone mines and a national distribution network to move raw materials, as well as our intermediary and finished products. Sales of cementitious materials were 9.4 million tonnes in 2013-14, with an annual industry turnover in excess of \$2.3 billion.

2. Workplace Relations

The Australian cement manufacturing industry is a strong contributor to the Australian economy as part of its manufacturing sector. The continued future success of our industry is dependent on remaining competitive against key international producers (namely in Asia) and continued strong local demand for cement based products.

This submission provides comment on specific areas of the Productivity Commission's issues papers 1-5 on Workplace Relations of interest to our members:

2.1 Workplace Relations System Objectives and Framework

The Cement Industry Federation supports a workplace relations scheme that is fair to both employers and employees and clearly promotes productivity, flexibility and cooperation in the workplace.

It is important the scheme recognises that all parties share substantial common interests and is underpinned by a framework of fair and economically responsible standards and behaviours.

The multiple objectives of the Fair Work Act are diverse and appear reasonable. However, achieving coherence across these multiple objectives is confusing when they can promote different and possibly conflicting outcomes. The CIF therefore supports amendment to the current objectives to promote productivity, flexibility and cooperation in all Australian workplaces that is consistently applied across all awards.

The institutions that underpin the scheme should be promoted to be efficient and effective and ensure any regulatory imposts are necessary, simple to understand and avoid undue administrative or compliance costs.

2.2 Enterprise Agreements and Productivity

It is important to note that many enterprise agreements do not include clauses that recognise the linkage to wage rates and enterprise productivity – it is critical that this be addressed in any reform of the workplace relations framework.

The President of the Fair Work Commission recently noted that Paul Krugman, the Nobel Prize winning economist stated:

‘Productivity isn’t everything, but in the long run it is almost everything. A country’s ability to improve its standard of living over time depends almost entirely on its ability to raise its output per worker.’

The Australian Government recently introduced the Fair Work Amendment (Bargaining Processes) Bill 2014, which seeks to amend provisions of the Fair Work Act to include a requirement that, in approving an enterprise agreement, the Commission is to be satisfied that productivity was discussed during the bargaining process. The CIF recommends that this provision should also be reflected clearly in the overall objects of the Act.

The contents of Enterprise Agreements need to specifically limit their terms and conditions to those issues that directly relate to the employer - employee relationship. Such issues as restrictions on the use of contract labour, or mandated activity of union officials or delegates, should not be allowable. This would be best achieved by the re-introduction of non-allowable matters in awards and agreements, from the previous legislation. Unions should not be deemed as bargaining agents and the compulsion for employers to bargain should be removed.

Further, our member companies are concerned of the current inability to diffuse a standoff when Enterprise Bargaining Agreement (EBA) negotiations stall. It is important that there is a ‘trigger process’ for employers and employees when this situation occurs – currently employees can commence proceedings for a strike ballot, however, employers can only respond to such action at the current time.

2.3 Flexibility in Conditions

Promoting a cooperative environment in the Fair Work Act can forge a strong positive relationship between employers and employees. All parties appreciate flexibility in the workplace – to balance work and personal responsibilities and for business to balance changing conditions and requirements.

The modern awards framework rightly binds the employer and its employees to minimum conditions and creates a safety net to protect critical needs of the parties.

The recent concentration of awards in Australia has been a positive step to reduce confusion and increase consistency.

However, over prescriptive awards have the opportunity to promote adversity between interests – including between workers. Individual workers have different needs in terms of flexibility requirements that may not be able to be captured in an award or enterprise agreement. This issue must be addressed to ensure Australian businesses and workers can be flexible, innovative and productive. In our view, the existing non-union agreements stream is very restrictive and impractical and the system requires the freeing up and use of common law contracts, individual agreements and genuine non-union agreements.

2.4 Building and Construction Industry (Improving Productivity) Bill

This Bill would restore similar arrangements to those which were successfully in place between 2005 and 2009, when a strong regulator (the Australian Building and Construction Commissioner), a strong Code and appropriate penalties for non-compliance were in place. The recent abolition of the Victorian code increases the need to have a Federal regulator.

Reducing the powers of the federal construction industry regulator, the absence of an effective federal construction code and a huge reduction in penalties has led to the unacceptable practices of the past returning to construction sites.

The maintenance of strong construction industry codes was a key recommendation of the Cole Royal Commission into the Building and Construction Industry, the Gyles Royal Commission in New South Wales, and the recent Productivity Commission inquiry into Public Infrastructure.

Following the recent secondary boycott activity impacting on the Australian cement industry in Victoria, the CIF clearly does not believe that current enforcement capability in Australia is sufficient.

2.5 Secondary Boycott

One of our member companies has been unlawfully targeted for over two years by secondary boycott action which has resulted in the company suffering losses exceeding \$10 million. The company, Boral Ltd, has been actively pursuing its rights through all available legal channels and has found existing laws to be inadequate in many respects to facilitate enforcement that swiftly brings secondary boycott behaviour to a halt.

In its interim report tabled in the Federal Parliament on 19 December the Royal Commission into Trade Union Governance and Corruption devoted 114 pages to a chapter on the CFMEU's black ban of Boral, and concluded that:

“A legal system which does not provide swift protection against the type of conduct which Boral alleges it has suffered at the hands of the CFMEU, and which does not have a mechanism for swift enforcement of court orders, is fundamentally defective. The defects are so great as to make it easy for those whose goal is to defy the rule of law. The defects reveal a huge problem for the Australian state and numerous federal, State and Territory emanations. The defying of the Victorian Supreme Court's injunctions for nearly two years, and the procedural history outlined above, will make the Australian legal system an international laughing stock” (p. 260).

It is critical that effective legislation is in place as not all companies or sole traders may have the resources to ‘stand up for justice’ if they are victimised through secondary boycott action.

A key reform that is required includes the reintroduction of the Australian Building and Construction Commission (ABCC) with appropriate powers and civil penalties to address the misuse of union power and potential unlawful activities on building and construction sites.

Further, the CIF refers the Productivity Commission to the Boral submissions to the (1) Heydon Royal Commission and the (2) Competition Policy Review Draft Report for further key recommendations.

It should be noted that the ACCC has only recently commenced civil penalty proceedings against the CFMEU and its officials for conduct relating to the ‘black ban’ of Boral and

judgement is unlikely to occur until 2016. Few companies can endure this delay – while the ban continues each day.

2.6 Unlawful Action

The CIF is concerned that if unlawful action is taken, there is currently no effective penalty imposed on unions for organising such action and no effective support from Fair Work Australia to quickly have employees quickly returned to work.

It is proposed that a reverse burden of proof should be in place to ensure that employee groups can demonstrate that unlawful action has not occurred. This would allow a quicker response time to resolve unlawful action. The current system encourages 'rogue' behaviour and requires employers to take Federal Court action that takes a long time to resolve and at a great expense to all parties.

2.7 Fair Work Amendment Bill 2014

The CIF supports the *Fair Work Amendment Bill 2014*. In particular:

Leave provision

CIF members support having clarification in the Fair Work Act that clearly states an employer is not required to pay annual leave loading on termination of employment under the National Employment Standards (NES). It is understood that an award or enterprise agreement could still require this.

Unfair Dismissals

The CIF supports the amendment to the Fair Work Commission whereby it may dismiss an unfair dismissal application without a hearing where the application has no reasonable prospects of success or the former employee has unreasonably failed to attend, comply with directions or discontinued the application which has been settled.

Protected Action

The CIF supports the amendment that ensures employees cannot take protected industrial action to force an employer to bargain.

Right of Entry

The CIF agrees that a union official should only enter premises for discussions with employees if the union is party to an applicable EBA, or if there is no EBA, where an employee has invited them.

To avoid disputes a union official should apply for an anonymous 'invitation certificate' from the Fair Work Commission. Further, a union official should comply to conduct interviews or discussions in an area designated by the employer - it is too prescriptive to nominate the lunch room as the only place that meetings be held.

In some cases 'Right of Entry' provisions have been misused by union officials, who have gained access under the guise of safety issues to inappropriately pursue other industrial purposes. In these cases an employer or the regulator should be able to apply to FWA to have that officials Right of Entry permit revoked. The onus of proof in these cases should be

reversed, that is, it is up to the union official to establish the bona fides of the entry and compliance with it, whilst on site.

Transmission of Business

The existing 'Transmission of Business' rules are confusing and can lead to inconsistent terms and conditions in cases of business and employee transfer. The rules should be re-instated from the prior legislation where the emphasis is on the business, rather than employees transferring.

Individual Flexibility Arrangements (IFAs)

The CIF notes that an IFA provision in an enterprise agreement must permit variations to:

- arrangements when work is performed;
- overtime;
- penalty rates;
- allowances; and
- leave loading.

2.8 Coastal Shipping

The Cement Industry Federation remains concerned over the existing coastal trading legislation – *Coastal Trading (Revitalising Australian Shipping) Act 2012* – and the anti-competitive behaviour that has since resulted.

The legislation as it currently stands promotes protectionism of Australian shipping without concern for the negative impacts of the legislation on Australia's manufacturing sector – and in particular those industries, such as cement manufacturing, that have limited options for moving product around the country.

This should also include the rescindment of relevant parts of the *Fair Work Regulations 2009* that have been amended and coupled to the Coastal Trading Act 2012 – specifically to enable 'persons insufficiently connected with Australia' to be excluded from the Act.

Further information can be found in the CIF submission to the Australian Government's April 2014 'Options paper: Approaches to regulating coastal shipping in Australia'.

Key References

CIF (2014) submission to the Australian Government's April 2014 '*Options paper: Approaches to regulating coastal shipping in Australia*', June – can be accessed at https://www.infrastructure.gov.au/maritime/business/coastal_trading/review/submissions.aspx

Boral Ltd (2014) Law Reform submission to the Heydon Royal Commission Royal Commission into Trade Union Governance and Corruption, October – can be accessed at <http://www.tradeunionroyalcommission.gov.au/Submissions/Documents/ResponsesToIssuesPaper/Boral%20Limited.pdf>

Boral (2014) response to the Competition Policy Review Draft Report, November – can be accessed at <http://competitionpolicyreview.gov.au/draft-report/non-confidential-submissions/>