

Productivity Commission review of the Workplace Relations Framework

Submission of Toll Holdings Limited

Introduction

This submission is made on behalf of Toll Holdings Limited (**Toll**), in response to the Productivity Commission's draft report dated 4 August 2015 (**Draft Report**).

Toll is the largest supply chain company in Australia, employing approximately 40,000 people over a network of about 1,200 sites in more than 50 countries. In Australia, Toll employs approximately 25,000 employees but also engages other labour through sub-contracting arrangements. Toll engages in a wide range of operations in the transportation and logistics industry, and is structured into five operating divisions: Toll Global Express, Toll Global Forwarding, Toll Global Logistics, Toll Resources & Government Logistics, and Toll Domestic Forwarding. Toll's principal activities include domestic and international freight and distribution, freight forwarding by rail, road, sea and air, warehousing, storage and distribution, end-to-end supply chain management and business logistics solutions.

In relation to the road transport industry, and the significance of Toll's position in it, Deloitte Access Economics in 2013 noted that:

"Over the last decade, interstate road freight transport increased at an average annual growth rate of 5.2%. The industry generates annual revenue of around \$48 billion, with a freight task of almost 200 million tonne-kilometres travelled by road transport operators each year..."

The market concentration of the road freight sector in Australia is relatively low, with the four largest businesses – Toll Holdings, Linfox, K&S and Scott Corporation - accounting for approximately 14% of the market with respect to revenue. Toll Holdings is the largest player, with over 8% market share...

*While a diverse mix of road transport operators serve the primary freight segment the larger integrated logistics businesses – Toll and Linfox – hold a significant share of the secondary freight market."*¹

Set out below, for the Productivity Commission's consideration, are Toll's submissions regarding the Draft Report. Our submissions are confined to the areas in which we wish to expand on, or take issue with, the matters noted in the Draft Report. It can be assumed that Toll generally agrees with the Productivity Commission's views on any topic not addressed in these submissions.

About this submission

A key theme underlying Toll's suggestions is that a system which is heavily reliant on collective bargaining for the setting of terms and conditions ought to be less reliant on conflict to secure its outcomes. That the system is so reliant on conflict to achieve outcomes, is reflected in the following observation from a Full Bench of the Australian Industrial Relations Commission dating back to 1999

"That such battles will occur is contemplated by the legislation since the 1994 and 1996 amendments to the Act. We do not criticise or blame one side or the other for its actions. These actions were, with perhaps a few exceptions, within the law. The two long strikes in 1997 were protected action. Actions taken by the company that have been challenged in the Federal Court have been held not to be unlawful. We do not, however, think that actions of

¹ Deloitte Access Economics, "Market analysis of the Australian road freight transport sector", 22 April 2013, P1.

any party during the battle can be categorised as unfair. The adage ‘all is fair in love and war’ is, we think, as much applicable to industrial warfare as to any other type.”²

Whilst data relating to lost time through industrial action may appear favourable by historical standards, they mask an undercurrent which is clearly at play: the potential to take industrial action is enough for an employer to compromise its negotiating position beyond that which is otherwise reasonable. The modern Australian economy demands more of and deserves better than the current system which is driven by conflict. It demands and deserves a system which provides for more balance between the parties and which is therefore fairer.

1. Enterprise bargaining

Toll has approximately 18,000 employees in Australia whose employment is regulated by a collective agreement, 11,000 of which are employed in road transport. Toll is party to some 73 formal agreements and 135 “local” (expired) agreements which still apply in varying degrees. Unsurprisingly, much of Toll’s submissions relate to the bargaining framework.

As will be apparent from the analysis below, Toll believes that there is currently a power imbalance inherent in the bargaining regime. Toll’s suggestions are aimed at providing a greater degree of balance between the interests of employers, unions and employees.

Inherent in this submission is the objective of reducing the level of conflict, or potential conflict, which the current system encourages. The current system relies on the capacity of either party to take industrial action with ease and with impunity. The damage such action can cause is beyond the financial loss. It can severely impact the relationship between the employer and employees well beyond the conclusion of the bargaining. It fosters an ‘us’ and ‘them’ approach to workplace relations which permeates the workplace. The modern Australian workplace demands and deserves better.

In this context, Toll agrees absolutely with the following “key point” in the Draft Report:

The challenge for the AWR framework is to develop a system that provides balanced bargaining power between the parties, that encourages employment, and that enhances economic efficiency. It is easy to over or under regulate.

Toll contends that the bargaining provisions need more attention than the Draft Report gives them. The following matters are submitted for consideration.

Voluntary bargaining

Background

To some extent, the requirement to bargain is an artifice. In many cases, it is dominated by an argument about claims of interest to unions only (as distinct from the interests of employees). The bargaining process, which encourages the use of ambit, sees additional claims added some of which are traded away as part of a compromise on pay.

For an employer such as Toll, managing a large number of enterprise agreements, the bargaining process is a constant in the business. Accordingly, significant resources are applied to enterprise bargaining. However, in the vast majority of cases, little more than a pay increase for employees is realised. In this respect, the market is asked for more that it can bear with little or no return by way of productivity offset.

² *Construction, Forestry, Mining and Energy Union v Coal & Allied Operations Pty Ltd* Print R9735 at [23].

Current law

Current law effectively mandates bargaining at least where a majority of employees so wish to bargain. In an environment where enterprise agreements are already in place, the renewal of agreements makes enterprise bargaining inevitable.

Toll suggests:

- in the absence of productivity/efficiency offsets being offered an employer should be able to choose whether or not to bargain. Where the option not to bargain is chosen, future pay increases could be as determined by the FWC in minimum wage cases.

The effect of Toll's suggestions

The effect here would be to avoid an otherwise unnecessary and time consuming negotiation where there are no productivity/efficiency offsets available. If a union is prepared to negotiate such offsets, the negotiation will proceed. As a result, there will be greater propensity for a negotiation to be built on mutual gain.

Should the negotiation not proceed, then the agreement will remain in its current form but with a pay increase being the minimum determined by the FWC as part of its minimum wage function. In other words, the agreement will simply “adopt” the minimum wage outcome.

Restrictions on enterprise agreement content

Background

The content that is permitted in enterprise bargaining negotiations and in-turn enterprise agreements significantly enhance the prospect that parties will engage in protected industrial action due to the potential scope of claims, which in many cases have little or no relevance to the employer employee relationship.

These clauses can:

- limit the ability of transport operators to sub-contract work and negotiate related rates and conditions;³
- require the employer to pay union delegates for performing certain duties as if they were working during that time;⁴
- facilitate union official rights of entry,⁵ provide additional paid leave for union delegates and give unions the right to induct new employees (which all impact the efficient running of a business);⁶

³ CEVA Logistics & Transport Workers Union Fair Work Agreement 2013 - 2017, clause 28; Linfox Victoria (Mars Petcare - NUW & TWU) Agreement 2012, clause 3.1.6; Toll Group - TWU Enterprise Agreement 2013 - 2017, clauses 17 and 45;

⁴ Star Track Express Pty Limited & Startrack Retail Pty Limited - Transport Workers' Union Fair Work Agreement 2014 - 2017, clause 21; CEVA Logistics & Transport Workers' Union Fair Work Agreement 2013 - 2017 clause 58; clause 50; Star Track Express Pty Limited & Startrack Retail Pty Limited - Transport Workers' Union Fair Work Agreement 2014 - 2017, clause 21.

⁵ CEVA Logistics & Transport Workers' Union Fair Work Agreement 2013 - 2017, clause 82; clause 81; Linfox Victoria (Mars Petcare - NUW & TWU) Agreement 2012, clause 7.5.2; Toll Group - TWU Enterprise Agreement 2013 - 2017, clause 39; Linfox South Australia (Pooraka Tobacco) Agreement 2012, clause 48; Star Track

- require an employer to audit sub-contractors in certain respects and provide the results to the union;⁷
- preserve the rights and role of the union in relation to past custom and practice⁸;
- dictate superannuation contributions to specific superannuation funds irrespective of employee choice.

The presence of clauses which fetter the ability to subcontract work thereby directly impacting the market for such work is wide spread. Such clauses can extend to an obligation on the transport operator to audit the activities of subcontractors.⁹

To the extent that contractor control clauses effectively dictate a rate of pay applicable for subcontractors equal to that of employees under a transport operator's enterprise agreement, the impact on competition is obvious. The setting of contractor rates of pay (or rather the setting of a labour component as part of any haulage contract ought to be set elsewhere (see Part 3 below).

The current law

Under the *Fair Work Act 2009* (Cth) (**Act**), enterprise bargaining and agreements must relate to "matters pertaining to the relationship between an employer... and that employer's employees" (s.172(1)(a)) and "matters pertaining to the relationship between the employer... and the employee organisation..." (s.172(1)(b)).

The "matters pertaining to" provision has led to significant contention, even disregarding the extension of matters to an employer and union (which is a function of the Act).

This has been most apparent in relation to clauses that have the effect of impacting the employer's right to engage contractors or labour hire workers. Although clauses containing a general restriction on an employer engaging third party labour is not permitted, clauses that "sufficiently relate to employees' job security", are permitted. This distinction is difficult to navigate and open to controversy.¹⁰

Toll suggests:

- the phrase "matters pertaining to" be amended to "directly related to" the relationship between an employer and employees;
- the removal of matters pertaining to a relationship between an employer and a union;
- the inability to take protected industrial action in the event of bargaining over matters not "directly related" (irrespective of the "reasonable belief" of the union); and
- the power of the FWC to sanction a party who knowingly bargains over matters not

Express Pty Limited & Startrack Retail Pty Limited - Transport Workers' Union Fair Work Agreement 2014 - 2017, clause 24.

⁶ *Toll Group - TWU Enterprise Agreement 2013 - 2017*, clause 33; *Scott's Bulk Tanker Adelaide Operation Enterprise Agreement 2014*; *CEVA Logistics & Transport Workers' Union Fair Work Agreement 2013 - 2017*, clause 58; *Linfox and Transport Workers Union Road Transport and Distribution Centres Agreement 2014*, clause 82; *Star Track Express Pty Limited & Startrack Retail Pty Limited - Transport Workers' Union Fair Work Agreement 2014 - 2017*, clause 22.

⁷ *Toll 2013 - 2017 EA* clause 45.3

⁸ *K&S Freighters Pty Ltd Transport Employers (Melbourne Full Load) Union Collective Agreement 2014*.

⁹ *Toll Group - TWU Enterprise Agreement 2013 - 2017*, clause 45.

¹⁰ See *Airport Fuel Services Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 4457.

“directly related” to the relationship between an employer and employees.

The effect of Toll's suggestions

The effect here would be twofold.

Firstly, negotiations will be less likely to be stifled by claims which are otherwise not directly related to the employer-employee relationship. Such claims are by definition usually of interest to unions only. As a result, agreements will have fewer terms and conditions which directly or indirectly negatively impact productivity and/or efficiency.

Second, because there are fewer matters which are capable of impacting the bargaining process, the potential for industrial action is less (all other things being equal).

The outcome here is fairer because it restores the balance between the interest of employers and employees and reduces the potential for union specific provisions to dominate the bargaining with claims which are a function of its own agenda.

Increased ability to terminate or partially terminate expired enterprise agreements

Background

Even after enterprise agreements expire, they continue to operate until they are replaced or terminated.¹¹

However, enterprise agreements cannot easily be terminated. Accordingly, an employer is frequently stuck with binding historical obligations that may have little or no relevance to current (and future) circumstances. These obligations are often multi-layered owing to a desire by unions to ‘lock-in’ old award arrangements and previous agreement terms. Complexity and confusion often follows.

This reality directly impacts bargaining behaviour. There is no incentive to compromise for a union because the worst case scenario for the union is the status quo.

The current law

Under the Act, an enterprise agreement can be terminated if (once it has passed its nominal expiry date) it is not contrary to the public interest, and taking into account the effect on the parties’ and the parties’ views and circumstances.¹²

In practice, the FWC is reluctant to terminate agreements where this is contrary to the views of employees. Invariably employees through their union resist such a course.¹³

Furthermore, the FWC has expressed the view that it would generally be inappropriate for it to interfere in the bargaining process by terminating an existing agreement.¹⁴ It has only been in extenuating circumstances that the courts have intervened to terminate an existing agreement.¹⁵

Toll believes the ability to terminate an enterprise agreement (or part thereof) should be extended to situations where bargaining for a new agreement has been exhausted and it can be demonstrated

¹¹ See *Fair Work Act 2009* (Cth), sections 58(2)(e) and 225.

¹² See *Fair Work Act 2009* (Cth), section 226.

¹³ See *Tahmoor Coal Pty Ltd v CFMEU* [2010] FWA 6468 at [59] and [60] and *Metropolitan Fire & Emergency Services Board v United Firefighters’ Union of Australia* [2014] FWC 7776 at [310].

¹⁴ See *SDV (Australia) Pty Ltd re SDV Australia Pty Ltd - Warehouse Collective Agreement 2008 - NSW* [2013] FWC 5385 at [40], agreeing with Lawler VP in *Tahmoor Coal Pty Ltd v CFMEU* [2010] FWA 6468.

¹⁵ *CFMEU v Aurizon Operations Limited* [2015] FCAFC 126.

that the employer will suffer an unreasonable impact on its operations. Ultimately, the mechanism should serve as an incentive to bargain for mutual gain.

Toll suggests:

- the right to terminate an enterprise agreement (or part thereof) after it passes its nominal expiry date where the employer can show that:
 - bargaining has reached an impasse;
 - the clause(s) sought to be terminated unreasonably impact an employer's operations; and
 - it is not otherwise unreasonable to remove the clause(s) (which might take into account steps taken or to be taken by the employer to ameliorate any adverse pay consequences for employees);
- the termination may extend to all or part of the agreement, i.e. particular clauses that are having the required detrimental impact; and
- the right to terminate an enterprise agreement not be available where the union can show that:
 - it has offered a genuine compromise that reasonably meets the employer's interests; or
 - the employer failed to bargain in good faith.

The effect of Toll's suggestions

An enterprise agreement can have an enormous impact on the running of a business. For an employer like Toll, the origins of many of its enterprise agreements are a product of negotiations of yester-year. The inability to remove restrictive clauses can be crippling. It is unfair to, on the one hand, expose an employer to protected industrial action and yet have that same employer bound to an agreement which is sub-optimal, if not damaging, in perpetuity.

The capacity to terminate expired agreements should be more readily available. The process can be balanced by a consideration of whether the union has offered a genuine compromise which meets the relevant issue(s). Thus, once again, the system is better geared towards compromise and the interests of the parties are better balanced.

Individual flexibility arrangements and opt-outs

Background

The ability for a collective agreement to effectively prevent individual arrangements is unfair for individuals who so seek them.

For an employer such as Toll, the capacity to make individual agreements is unlikely to result in a dramatic shift away from collective bargaining. In Toll's experience, there are parts of the workforce in parts of the business for which an individual flexibility agreement may be appropriate. This has arisen, for instance, in respect of a parent for whom the ordinary hours construct under the collective agreement is unhelpful.

The impact of not being able to reach individual arrangements is highlighted by the following examples:

- An employer and an employee want to enter into an individual flexibility agreement varying the hours of work but are restricted by the inability to do so under the enterprise agreement.
- An employer and an employee wish to enter into an individual flexibility agreement varying the location of work (e.g. working from home or interstate) but are restricted from doing so under the enterprise agreement.
- Members of a working group are happy to change their rostering arrangements but are unable to do so because of restrictions in the enterprise agreement.

The current restrictions on the availability and content of individual flexibility agreements (**IFAs**) do not lend much assistance to the above issues. In particular:

- in relation to award covered employees:
 - the model flexibility clause only permits variations regarding working time, overtime and penalty rates, allowances and leave loading; and
 - IFAs can be cancelled unilaterally with 13 weeks' notice; and
- in relation to agreement covered employees, the scope of an IFA is dictated by the nature of the flexibility clause in the agreement (which is at the mercy of, and is often frustrated by, collective veto through enterprise bargaining). In Toll's case IFA's are limited to the single issue of blood donor leave.¹⁶
- IFA's can be terminated unilaterally upon up to 28 days' notice for enterprise agreement covered employees leaving any agreed arrangements (around which rosters may be based for instance) vulnerable to change.

Toll does not see any difficulty with an IFA that, when viewed as a whole, and taking into account monetary and non-monetary benefits, leaves an employee (whether or not award or agreement covered) no worse off over all. Ultimately, employees need to be attracted to the IFA offered. It is not in the employer's interest to offer inferior arrangements (when viewed as a whole) because to do so limits the capacity to recruit and retain the best employees.

Toll suggests:

- in respect of award covered employees, IFAs be made available as a condition of employment on terms no less favourable when viewed as a whole against the award;
- in respect of agreement covered employees, the capacity to genuinely agree to make an IFA on terms no less favourable when viewed as a whole against the enterprise agreement;
- a robust enforcement system to ensure compliance with such opt-out measures; and
- in respect of each, a longer nominal life (say 1 year) or less by agreement.

¹⁶ Toll Group – TWU Enterprise Agreement 2013-2017 clause 13.

The effect of Toll's suggestions

These suggestions would provide employees with a degree of choice which is not currently available. To the extent that the interests of “the collective” can often be at odds with individuals, greater balance is restored by providing more flexibility for individual arrangements.

Employees are protected by a strong safety net such that it is not open for employers to undercut the award (for new employees) or the existing enterprise agreement (for enterprise agreement covered employees).

For employers, there's an additional option which can provide for mutually beneficial outcomes and potentially promote greater workplace flexibility. This will assist in reducing the current rigidities of a system which caters only for collective bargaining.

Response to Draft Report

Having regard to these matters, Toll makes the following submissions in response to the Draft Report:

Recommendation	Toll Comment
15.2	This is one of the most important recommendations in the report. Toll strongly supports this recommendation.
15.4	<p>Toll supports the replacement of the better off overall test with a no-disadvantage test.</p> <p>Toll submits that the appropriate form of the no-disadvantage test is that the proposed enterprise agreement does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under any applicable Award. In applying the no-disadvantage test the FWC should be able to have regard to both the monetary and non-monetary terms of the enterprise agreement.</p>
15.7	Toll supports this recommendation, but queries why the principles need to be confined to <i>greenfields</i> agreements.
15.1, 15.3, 15.5, 15.6, 16.1, 16.2 and 16.3	Toll supports these recommendations.
Enterprise Contract	<p>Toll can see some utility in the implementation of options such as this. We are still considering the detail that the Productivity Commission has called for.</p> <p>Our preliminary views are that the Enterprise Contract would need to have a term in the order of 2 to 3 years so as to ensure that administrative process does not become a disincentive; and that an Enterprise Contract would need to be subject to a no-disadvantage test (applied against the otherwise-applicable enterprise agreement/award). The no-disadvantage test would need to be applied rigorously by the FWC to avoid employer misuse.</p>

2. Industrial Action

Taking protected industrial action: a more balanced approach

Background

In the Draft Report the Productivity Commission asserts on several occasions that industrial action is at “low levels” and that as a consequence only “*minor tweaks are required*”.

Toll submits that only *reported* industrial action is at low levels. ABS data and similar sources only reflect action that has come to light, such as through an employer lodging with the FWC an application under section 418 of the Act. The data does not include industrial action which an employer has endured but for which a section 418 application was not feasible – such as a short but unscheduled stop work meeting.

Further, reported industrial action is only at low levels because employers, especially in highly competitive and unionised service sector industries, have very few weapons in their armoury to defend against industrial action. In reality, disruption of supply to customers is not something that those customers will tolerate and major contracts can and are lost as a result. As a result concessions may be made in the face of the threat (or ever-present risk) of industrial action, even if no action is ultimately taken.

When enterprise bargaining first originated in Australia, employers and employees were presented with an opportunity to bargain for mutual gain with the shift away from central wage fixation and the rigidities of the award system. Indeed, the genesis of enterprise bargaining saw the flow-on of National Wage case outcomes dependant on productivity outcomes.¹⁷

Today, the reality for an employer like Toll is that collective bargaining represents little opportunity for mutual gain. Whilst the potential is there, the ready recourse to protected industrial action that a union has or can have provides it with a degree of leverage which makes for an uneven “playing field”. Thus, the system is once again rigid. Bargaining occurs with an existing agreement in place (whose origins may be many years earlier) and which is near impossible to vary or terminate.

In relation to Toll, a day’s interruption to its transport supply chain could cost in excess of \$10 million. This has a profound impact on Toll’s negotiating position. Further, in a highly competitive market, customer dissatisfaction associated with interruption to supply sees industrial action pose a threat to long-term goodwill and in turn business and job security.

Employers will often necessarily make an economic and rational choice to “agree” rather than “not agree”. This choice is based on a view that the short-term consequences of action outweigh the long term cost of agreement. However, to take Toll as an example, industrial action impacting its road transport network would be highly damaging in the short and medium term. However, the agreement is made with a view to managing the long term adverse impact.

That said, the reality is that each agreement contributes to an ever increasing level of margin erosion in circumstances where the capacity to pass cost onto the customer is illusory. Managing the adverse impact often leads to outcomes which compromise job security and job growth. Such as investment in alternative geographies where such inflexible fixed cost is not a feature of the business environment.

The current law

¹⁷ The history is set out in *Rediscovering Collective Bargaining*: Creighton and Forsyth (Eds.), pp 29-32.

Under the Act, certain administrative steps must be satisfied before taking protected industrial action. The requirement to be “genuinely trying to reach an agreement” (s.443(1)(b)) as a prerequisite to a protected action ballot is easily met such that the vast majority of applications are successful.¹⁸

Another requirement relates to the nature of action. Although the industrial action to be taken must be specified in the notice, it is frequently not sufficient to identify what will occur.

Although the legal test for whether or not the notice is precise enough should offer sufficient information for an employer to put in place contingency plans and assess its bargaining risk, it does not necessarily allow the employer to know precisely what will occur. There are commonly a variety of possible circumstances that can arise from the notice.

There is no requirement of bargaining in good faith prior to taking any industrial action, nor is there any real incentive to bargain for mutual gain. To be clear, Toll does not criticise unions for taking full advantage of the legal system. It is the system after all which drives the behaviour.

Toll suggests:

- as a prerequisite to taking protected industrial action, the following must be demonstrated:
 - the employer wishes to bargain (see Part 1.1 above);
 - bargaining has occurred in good faith; and
 - solutions have been offered that are aimed at genuinely meeting the needs of the enterprise (or some similar mechanism);
- a reasonableness test should be attached to bargaining claims (to prohibit “manifestly unreasonable claims” as in the current *Fair Work Amendment (Bargaining Processes) Bill 2014* (Cth));
- notices of protected action should be more specific than what is currently allowed; and
- an employer should have the right to seek FWC intervention when faced with protected industrial action.

The effect of Toll's suggestions

These suggestions are aimed at reducing the ease with which industrial action can be taken whilst at the same time, placing a greater onus on unions to bargain and bargain reasonably. Introducing a test which requires “solutions being offered that are aimed at genuinely meeting the needs of an enterprise” (or some similar mechanism) is directed to the negotiation itself. It reduces the potential for the “take it or leave it approach” in a one-sided way which is a manifestation of the current framework.

More specific notices provides a greater balance by ensuring that the employer is truly aware of the industrial action that it may face. Enough “guess work” is involved in estimating who might take the action. An employer should not have to face the compounding problem of understanding what action will take place and when.

¹⁸ See *Esso Australia Pty Ltd v AMWU, CEPU and AWU* [2015] FWC 210.

Finally, in order to reduce the conflict which is inherent in the current system, an employer ought to have the right to seek arbitration where industrial action is potentially or actually damaging to the business. Whatever definition is given to the term “damaging” it ought to be less onerous than the present “significant” definition, which has been interpreted as “exceptional” in respect of third party harm¹⁹. It will necessarily consider the particular circumstances of the business with the assessment made on a case-by-case basis.

Reduced restrictions on ending protected industrial action

Background

The power imbalance in the current enterprise bargaining framework not only arises because of the ease of which industrial action can be taken with immunity, but also because of the very limited circumstances in which protected industrial action can be terminated by the Fair Work Commission (**FWC**). Those circumstances are set out below.

The current law

The FWC may suspend or terminate industrial action where it is or is threatening to:

- cause significant economic harm to both the employer and employees involved, but only where the dispute and industrial action are already protracted and there is no prospect of resolution in the reasonably foreseeable future (s.423); or
- endanger the life, personal safety or health or welfare of a part of the population, or else cause significant damage to the Australian economy or an important part of it (s.424).

The FWC can also suspend (but not terminate) industrial action where:

- it considers that it would be beneficial for the parties to have a ‘cooling off’ period (s.425); or
- the action is both adversely affecting the employer or employees involved, *and* causing significant harm to a third party (s.426).²⁰

In the case of suspending industrial action that is causing significant harm to a third party, the FWC’s interpretation of ‘significant’ as amounting to ‘exceptional circumstances’ makes the resort to the provision extremely rare. The leading case on point bears this out:²¹

“...substantial harm to third parties is a common consequence of effective industrial action...

...the word “significant” indicates harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context. In this way, an order will only be available under section 426 in very rare cases...”

Whilst the capacity to terminate bargaining is currently grounded in rare public interest cases, the potential for bargaining disputes to be resolved in a one sided fashion and divorced from the interests of the enterprise means the long term public interest of inflated wage outcomes and restrictions in the capacity to compete are ignored.

¹⁹ *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360.

²⁰ *ibid*

²¹ *ibid*

Toll suggests:

- the option of the employer upon notification of protected industrial action to apply to the FWC to deal with the outstanding matters in dispute;
- the Act specify the matters to which the FWC must have regard in the event of an arbitration, placing particular emphasis on the commercial interests of the business.

The effect of Toll's suggestions

The greater balance provided by enabling an employer to seek arbitration has been dealt with above. However, the system ought to be directed to encouraging agreement-making on mutually beneficial terms.

A mechanism to encourage or require “final-offer” arbitrations would reduce the degree of ambit in claims. Agreement between the parties is then more likely because the ‘gap’ is closed.

Greater balance is also achieved by more specific references to the interest of the enterprise when it comes to arbitration. Again, the goal here is to encourage unions to negotiate having regard to the interests of the enterprise knowing that this is what it will confront should an arbitration ultimately arise. Thus, the very prospect of arbitration ought to encourage more mutually beneficial negotiated outcomes.

Imposition of penalties for unprotected industrial action*Background*

A system which limits the taking of protected industrial action needs to ensure that there is limited ‘leakage’ into unlawful industrial action.

Toll often faces instances of unprotected industrial action. Such action can be taken in the knowledge that an employer is unlikely to pursue expensive and time consuming litigation for common law damages. In any event, the damages may be marginal but the inconvenience associated with say, a half-day stoppage, is high.

The current law

Unlawful industrial action is only capable of remedy via damages in common law courts where a tort is proved. In practice, a damages claim is expensive and time consuming, and is regularly ‘traded away’ as part of a compromise to a deal.

The most effective deterrent against unlawful industrial action is the threat of a meaningful pecuniary penalty against parties who organise such action and those who take it (as was the case under the *Building and Construction Industry Improvement Act 2005* (Cth)²²).

Whilst currently there is scope for a penalty in the event of industrial action taken during the nominal life of an agreement, it serves little by way of a deterrent in practice and the cost of litigating the matter for an employer is prohibitive.

Recourse to the Fair Work Commission for orders to stop the action, whilst relatively quick, nonetheless sees time lost before any order is made²³.

²² Which provided the maximum civil penalty of \$100,000 per contravention for unlawful industrial action.

²³ s.418 of the FWA.

Toll suggests:

- the imposition of a pecuniary penalty (together with the capacity to seek injunctive relief) for unlawful industrial action; and
- the capacity of a regulator (e.g. the Fair Work Ombudsman) to prosecute cases of unlawful industrial action.

The effect of Toll's suggestions

Toll's suggestions here will serve as a greater disincentive to the taking of unlawful industrial action. Thus, they are directed towards better compliance with the current law. This will see a reduction in cost and time associated with seeking Fair Work Commission intervention. It will also ensure greater vigilance by unions in the organising of protected industrial action. Ultimately, it is the potential to face a penalty which will serve as an effective deterrent.

Improved anti-picketing and secondary boycott laws*Background*

Toll has no objection to lawful protesting. However, a protest must to be distinguished from unlawful picketing - being conduct which results in interference in contractual relations (say between a supplier and customer) or some other common-law tort.

Unlawful picketing and secondary boycotts can be used to intimidate businesses into compromise including in respect of enterprise bargaining. The law has effectively enabled unlawful picketing to cause significant damage to an employer in a relatively short period of time. Toll has recent direct experience in this regard.

Toll Somerton 2012 dispute

In the first calendar quarter of 2012, Toll was in negotiations with the NUW for the renewal of an enterprise agreement covering Toll's warehousing employees at Somerton, Victoria. The Somerton distribution centre is one dedicated to servicing Coles Supermarkets. Accordingly, Coles relies upon Toll for the uninterrupted supply to and from the distribution centre for its supermarket stock in Victoria.

In or around June 2012, the negotiations reached something of an impasse. By July, a picket had formed at the site and had become obstructive. Deliveries to and from the distribution centre were impacted. The NUW had a presence at the picket and in the view of Toll, was behind its organisation. An NUW official spoke to the media in the vicinity of the picket. (The picket disappeared once the bargaining deadlock had been resolved).

The picket represented an unlawful interference with Toll's operations. In the interest of speed, Toll sought intervention of the Fair Work Commission and argued that the resort to unlawful conduct was in breach of the good faith bargaining requirements of the Act.

In a hearing on 13 July 2012, Cribb C. dismissed Toll's application. The rationale for this is set out below.

On the afternoon of 13 July 2012, Toll sought the intervention of the Supreme Court of Victoria presenting much affidavit evidence pointing to involvement of the NUW in the organisation of the picket. In the absence of the NUW's presence at the hearing, the Court was reluctant to make any orders, rescheduling the hearing for the next day, Saturday 14 July 2012. Again, in the absence of the NUW attending the hearing, the Court was reluctant to make any orders. The matter was stood

over until the following week when orders were finally made. However, the practical impact was undermined by the presence of many protestors who could not be identified and hence against whom order could not be made. In respect of those individuals who could be identified, extensive resources and cost was applied to meeting the “personal service” requirements.

Several hundreds of thousands of dollars was spent by Toll seeking the Court’s assistance and despite what were flagrant breaches of the law, the utility of the Court processes were marginal. At no time did the NUW attend any hearing.

The current law

In the case of picketing, Toll’s attempts to have the FWC find that the NUW organised the picket were denied. This was because

“the application and the orders sought are beyond the bargaining process and the scope of bargaining orders which are available if problems develop with the bargaining process as set out in section 228(1) of the Act and which result in impeding bargaining. If there is alleged illegal action involved there are other avenues available for relief...”²⁴

This conclusion was reached despite the inescapable link between the picket and the bargaining dispute at the time.

The avenues needed to stop unlawful picketing and secondary boycotts are too time-consuming and burdensome.

Toll suggests:

- anti-picketing laws prescribing penalties for direct and indirect involvement by unions, their officials, and other individuals;
- the FWC be given the power to make orders prohibiting unlawful picketing relating to employment matters;
- in the event of picketing conduct, the right of an employer to apply to the FWC to terminate the bargaining process (or to terminate the agreement); and
- a review of the secondary boycott laws to ensure they can be more readily enforced.

The effect of Toll’s suggestions

Given the resort to unlawful picketing as a tactic in bargaining, it makes sense for the likes of the Fair Work Commission to be able to sanction it, for example by way of: order for the termination of the bargaining; or perhaps the termination of the prevailing agreement. If there are consequences associated with such action which are linked to bargaining, this will serve as a disincentive to take it.

Similarly, greater ease of sanction in respect of secondary boycotts will serve as a disincentive for such action.

Such measures, whilst only serving to ensure compliance with the current law, will provide better balance. It is patently unfair for the law to be otherwise disregarded with impunity.

²⁴ See transcript of proceedings in *Toll Transport Pty Ltd T/A Toll Customised Solutions v National Union of Workers* (BC2012/1126; BC2012/1128), 13 July 2012, per Commissioner Cribb at PN663.

Response to Draft Report

Having regard to these matters, Toll makes the following submissions in response to the Draft Report:

Recommendation	Toll Comment
19.1	<p>Toll supports this recommendation.</p> <p>Toll does not support the removal of the requirement that the ballot specify the types of actions to be voted on by employees. To do so effectively gives the bargaining representative (usually a union) complete discretion regarding the action to be taken, potentially without regard to the implications for the employees. As a matter of fairness employees should be able to sanction the action that their representative can call on their behalf.</p> <p>Further, the requirement that the ballot specify the action provides the employer with at least some indication of the action it may face (and needs to prepare for). This process is a significant diversion for businesses. It should not be made even worse through uncertainty.</p> <p>The Productivity Commission should also give consideration to the following:</p> <ol style="list-style-type: none">1. requiring that any ballot be subject to the applicant outlining to the employees the matters in negotiation over which there is still disagreement; and2. increasing the notice period required before protected industrial action is taken from 3 to 7 days.
19.2	<p>Toll supports this recommendation. However, given that the consequence of terminating the industrial action might be an arbitrated outcome, there should be a prohibition on unions applying to terminate industrial action because of the fact that protected action that it is taking is causing harm to its members. In other words, self-inflicted harm should not be rewarded with an arbitrated result. Arbitration should be an avenue open to bargaining parties but a party that initiates protected industrial action should not have access to it.</p>
19.5	<p>Toll believes that where protected industrial action is taken the employee should forfeit at least 4 hours pay, as is currently the case under the Act. The taking of protected action in a way that looks like small amounts of time can have very significant downstream consequences for a business as the knock on effects of the supply chain are felt. For example a mere 10 minutes stoppage at a certain distribution hub might delay the delivery of time sensitive freight. Some of the consequences of this include spoiling of fresh produce and major additional costs where the freight concerned includes a key component of a construction project for example. As a result customer relationships are damaged and the costs potentially large and permanent.</p>
19.7	<p>Toll agrees with the intent of this recommendation but would prefer a limit on right of entry of up to 2 occasions in a 90 day period and 6 occasions in a calendar year.</p>

19.3, 19.4, 19.6	Toll agrees with these recommendations.
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3. Uniform contract labour laws

Background

One of the key points in the Draft Report is in these terms:

It seems to be too easy under the current test for an employer to escape prosecution for sham contracting. Recalibrating the test may be justified.

While the pursuit of clarity in these matters is always desirable, the focus in the Draft Report is too narrow. There is a clear need for streamlining regulation in respect of independent contractors that would require much more than a better definition or, as the Productivity Commission puts it, “recalibrating the test”.

There is currently a mix of duplication and inconsistency amongst Commonwealth and State contract labour laws, particularly in relation to minimum rates of pay. This web of regulation is unnecessary and counter-productive.

Related to this is the broad jurisdiction of the Road Safety Remuneration Tribunal (**RSR Tribunal**). The RSR Tribunal has powers under the *Road Safety Remuneration Act 2012* (Cth) (**RSR Act**) to make Road Safety Remuneration Orders that impose legal requirements on the road transportation industry supply chain (i.e. including contractors). The RSR Tribunal is currently inquiring into areas which include safe driving plans, training, drug and alcohol policy, clothing provision or reimbursement, payment time, adverse conduct protection and written contracts for road transport drivers.²⁵

Toll believes a single national jurisdiction ought to be responsible for determining a minimum rate for the labour component of contracts of carriage. Consistency across states is crucial as is a more effective enforcement regime to ensure compliance.

The current law

The following legislation regulates unfair contracts of independent contractors in Australia:

- the *Independent Contractors Act 2006* (Cth);
- chapter 6 of the *Industrial Relations Act 1996* (NSW);
- section 276 of the *Industrial Relations Act 1999* (QLD); and
- the *Owner Drivers and Forestry Contractors Act 2005* (VIC).

Independent contractors are afforded additional protections under the Fair Work Act, anti-discrimination laws and workplace health and safety laws.

²⁵ See *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014* (PR350280), and associated decision ([2013] RSRTFB 7) and statement ([2013] RSRTFB 3).

The RSR Act also regulates independent contractors. Under the RSR Act, the RSR Tribunal may make Road Safety Remuneration Orders consistent with the object of the RSR Act (s.19(1)). The object of the RSR Act is to promote safety and fairness in the road transportation industry (s.3).

While the apparent focus of the RSR Act was remuneration as it relates to safety, it seemingly has powers that go beyond remuneration.²⁶ Whilst this may be laudable in isolation, it serves to add another layer of regulation in relation to safety, additional to existing general occupational health and safety laws across the States and Territories, chain of responsibility legislation and National Heavy Vehicle Laws.

Toll suggests:

- contract labour laws be harmonised across Australia;
- the jurisdiction of the Road Safety Remuneration Tribunal be better focussed on determination of appropriate rates of remuneration for services, and any unfair/unsafe practice as it relates to those rates ; and
- the provision of improved resourcing for compliance purposes.

The effect of Toll's suggestions

A harmonised jurisdiction will improve efficiency owing to reduced costs associated with ensuring compliance. The jurisdiction deserves a well-resourced tribunal devoted to the question of the labour component. A jurisdiction devoted to this cause avoids the need for such matters to be dealt with in enterprise bargaining. Currently, such activity is of course often directed at employers (see Part 1.2 above).

Response to Draft Report

Having regard to these matters, Toll makes the following submissions in response to the Draft Report:

Recommendation	Toll Comment
20.1	<p>Toll strongly supports this recommendation.</p> <p>As stated above, Toll encourages the Productivity Commission to go further by recommending an amendment to the Act which would have the effect of disallowing any matter which is not directly related to the relationship between the employer and its employees.</p>

4. Fair Work Commission

The Draft Report makes this key point:

While the Fair Work Commission (FWC) undertakes many of its functions well, the legalistic approach it adopts for award determination gives too much weight to history, precedent and judgements on the merits of the case put to it by partisan lobbyists. A preferred approach to

²⁶ RSR Act, section 3(d).

award determination would give greatest weight to a clear analytical framework supported by evidence collected by FWC itself.

The first key point made in the Draft Report is that labour is not just an ordinary input. The fact is that all parties need to be assured that their perspectives are taken into account and understood in the process of fixing minimum terms and conditions of employment across the community. A simple black and white economic analysis will not properly ventilate the issues that the industrial parties seek to have assessed.

As a matter of fact and history, Australia has developed legal system based upon the adversarial framework that we inherited from our UK forefathers. The industrial lexicon is no exception. It is not at all clear that the process described in the Draft Report would satisfy the test of fairness in respect of the social and community norms, which are the product of the history that the Productivity Commission regards as a problem to be addressed. If indeed it is a problem under this head then it is a problem under all heads and the system should be reconstructed and not be simply repaired.

Determination of rights and obligations is not and can never effectively be only an economic exercise.

The Draft Report goes on to make the following further key point:

There is also a concern that the appointment process for FWC members can lead to inconsistencies in some of its decisions, a problem that a new “fit for purpose” governance model involving all Australian jurisdictions could resolve.

The public discourse on appointments will vary wildly depending upon who is involved in the conversation. The operations of the FWC are not bound by legal form for a reason. The problem is that the system has become more legalistic and does not focus on the needs of the parties, which is the prevention and settlement of disputes.

As mentioned earlier, those on all sides need to be satisfied that their point of view has standing in the process. In Toll’s submission the Act should prescribe that potential members should be filtered through a body established by the government of the day, comprising employer, union and government representatives, who would then make a recommendation to the minister.

In this way a balance would be reinstituted and the current practice of governments stacking the institution with appointees that it feels best represents its view, and the reciprocation of that politicisation of the institution upon a change of government, would be removed.

It is not the lack of consistency that is the main issue. As far as it goes inconsistent decisions can be dealt with under appeal machinery if the nature of the inconsistency is such as to warrant that course.

If it is appropriate to maintain the system and repair it then it should be the case that the process for appointments should also be repaired and not rebuilt.

Response to Draft Report

Having regard to these matters, Toll makes the following submissions in response to the Draft Report:

Recommendation	Toll Comment
3.1	This proposal seems to be at odds with the statement of the PC that “Minimum wages are justified, and the view that existing levels are highly prejudicial to employment is not well founded”. Accordingly, the proposal seeks to remedy a problem that does not exist.

	<p>That said, the establishment of such a division would allow the government of the day to appoint members to the division on a fixed term basis, with a view to ensuring that minimum rates are set at sustainable levels.</p> <p>The Tribunal division should also have the capacity to do more in terms of the prevention and settlement of industrial disputes. The use of alternative dispute resolution (ADR) techniques in bargaining disputes would be a good development. While some members have done some basic ADR training, others appear resistant and even hostile to the process. It should be an option for parties to nominate individual members by agreement to undertake ADR training.</p>
3.2	<p>Toll opposes term appointments to the FWC.</p> <p>The issue that is most likely to create an apprehension of bias in decision making is perceived self-interest. Where a member is approaching the end of a term, parties could reasonably be apprehensive that the member may be influenced in their decision making by the fact that their ongoing tenure may be affected. Members should be making decisions without fear or favour and the imposition of fixed terms creates a distraction that parties would be concerned about.</p> <p>That said there is room for greater oversight of member performance by the President. There should reasonably be standards set by the President to which all members should be held, and a breach of those standards should be subject of sanction including termination of the appointment in serious circumstances.</p>
3.3	<p>Toll does not support the recommendation in its current form. The minister should make appointments according to an obligation that requires the minister in selecting individuals for appointment to have regard to the balance of representation of views within the institution, as well as the skills and competence of the individual.</p>
3.5	<p>This recommendation if implemented would adversely impact upon the capacity of the FWC to undertake conciliation processes if the Act required such disclosure. Often conciliation can involve matters of commercial-in-confidence material, the disclosure of which could be harmful to a party. Precedent is a powerful force and parties may wish to settle issues between them on a “without precedent” basis. This would be compromised with such publication.</p> <p>Certainly the numbers and types of matters subject to conciliation should be made available generally so that analysis of the efficacy of the institution and trends in disputes can be identified, but the detail should continue to be regarded as confidential, as is presently the case.</p>

5. Other matters

In response to other matters in the Draft Report, Toll makes the following submissions:

Recommendation	Toll Comment
4.3	<p>Toll disagrees with this recommendation.</p> <p>The quantum of statutory leave entitlements in general in Australia is well above international standards and is certainly well above those of our major trading partners. As noted by the Productivity Commission, such entitlements as long service leave are peculiar to Australia and New Zealand and represent a major additional cost impost on Australian businesses when compared to their international competitors. More leave would simply compound the problem, regardless of whether it were to occur now or in the distant future.</p>
Casual Loading	<p>The Productivity Commission has sought additional information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carers' leave) if they so wish and whether such a mechanism would be worthwhile.</p> <p>In Toll's view this is a matter that is prime for consideration under individual flexibility agreements or the new form of enterprise contract proposed by the Productivity Commission, were it to come about.</p> <p>The question for employers will be whether their payroll systems will be sophisticated enough to disaggregate all or part of the casual loading.</p>
14.1	<p>The Australian economy, like all economies, is evolving. In times past there was very little commercial activity undertaken on weekends. That is no longer the case, with many employees in many industries being required to work Saturdays and Sundays.</p> <p>It follows that there seems nothing inherently logical in identifying those industries that the Productivity Commission has nominated for alignment as between Saturday and Sunday rates, and not others. Toll suggests that all weekend and public holiday penalties be set at 1.5 times the ordinary hourly rate of pay, for all industries.</p> <p>Toll supports the recommendation regarding the setting of rates so as to provide a neutral incentive to employ casuals over permanent employees.</p>
Preferred hours clauses in awards	<p>There are situations where individual employees may prefer to have their hours of work organised in such a way that their family, social and volunteer arrangements could be better accommodated. Clearly, with penalties payable for work undertaken outside the award-based spread of "ordinary hours" the cost constraint placed on employers in that situation make it difficult to accommodate the needs of the employee. If the IFA provisions in enterprise agreements and awards are amended to allow agreements about when "ordinary hours" are worked and when penalty rates would apply, there would be far greater access for employees to work the hours that suit them, with a consequential cost benefit for the employer.</p> <p>Most importantly, employees, in particular older employees who might have daytime interests or family responsibilities that require them to be at home</p>

	during the “normal” spread of ordinary hours, would have greater access to paid employment at ordinary time rates during hours that suit them.
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