

## **There's No Turning Back**

### **Submission to the Productivity Commission Inquiry from John Linney, Director of Linney Strategies**

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#### **Background**

My consulting business was established following a career both with the Australian Workers' Union and Monier Limited, a national roof tile and concrete products business, as their Employee Relations Manager. I have seen a great deal of change in our industrial relations system over the last four decades. I have been in my own business since 1987 and have provided strategic industrial relations advice to large corporates in Australia and New Zealand for the last 28 years. A central focus of that advice has been to assist companies to plan where they want to be over the next 3 to 5 years and to examine and implement initiatives to foster innovation and improve productivity. I have given a lot of thought to our enterprise bargaining framework and our system.

#### **Introduction**

There is no turning back. Traditional frameworks and assumptions surrounding workplace relations are being rendered obsolete by the seismic forces that are changing and reshaping our world of work. It is not possible to view our industrial relations system in a bubble. It has to be examined in the context of this changing world of work characterized by the ongoing effects from globalization, dramatic impacts from technological change, a significant reshaping of the nature and composition of the workforce and the recognition that for businesses to maintain profitable growth and deliver value to shareholders, they need to be fit for Asia, fast to market and flexible in responding to customer needs.

The Fair Work Act and legislative regimes that have preceded it are enabling mechanisms. By themselves they do not deliver harmonious workplace relations built on trust and co-operation, nor engaged employees that are seeking ways to be more productive and innovative. Innovation is the key to unlocking productivity which in turn generates funds for investment and stimulates business growth and job creation. Any workplace relations regulatory regime that is put in place should not retard or dilute these objectives.

### **Productivity as a cornerstone of good faith bargaining**

The fundamental objective of the Fair Work Act, relevant to this submission, is s. 3(f): “achieving productivity and fairness through an emphasis on enterprise level collective bargaining, underpinned by simple good faith bargaining obligations”. If we therefore extrapolate that the two essential pillars of the Fair Work Act are fairness and productivity, then in relation to the linkage between productivity and an enterprise bargaining system, enterprise bargaining has failed to deliver.

There are a number of reasons for that. The first is a lack of maturity as exhibited in both employers and unions. I have had first-hand experience not only as a frontline negotiator but as a behind-the-scenes strategist, of how ideology often gets in the way in the boardroom and how enterprise bargaining is perceived more as an attack on unions, ideologically driven rather than a disciplined business activity which has business growth and productivity at its core. Businesses do not spend enough energy or focused direction on being better at what they do in terms of employee communications, collaboration with employees and the state of employee relations. This becomes particularly significant in the sensitive interchanges between a company and its employees as part of the enterprise bargaining process.

Ideology in the union movement is also a fundamental problem, which impacts on behavior, impacts on the inability to see the big picture, and impacts on the inability of companies and unions to forge partnerships

where partnerships are needed because of the parlous state of the industry. The car industry is a good example. Because of the demands on Australian businesses to be competitive and to be innovative, it demands a more sophisticated, mature level of partnership and sadly that has been often lacking.

The second problem with enterprise bargaining in terms of its fundamental link to productivity is that bargaining fatigue has been in our system for much of the last two decades. When you look at enterprise bargaining and the hopes that were attached to it and the clamoring by employers for the introduction of enterprise bargaining in 1991, one could argue that a lot of the rigidity was removed in the first years of enterprise bargaining through demarcation problems and workplace restrictions being addressed. You might call some of it the low hanging fruit.

The complexity of issues that impact on the capacity of individual businesses to effectively compete in the dynamic, changing environment of today demands a more imaginative examination of what is needed to ensure greater agility and adaptability. Bargaining fatigue can be equated with a lack of imagination on all sides of industrial relations in terms of taking a fresh look at how enterprise bargaining can represent an opportunity to bolster a company's competitiveness and create new jobs. So fatigue, limited thinking, and a rollover mentality, can contribute to enterprise bargaining being a less than satisfactory vehicle for genuine change.

The third problem is a lack of a coherent strategy in some businesses on how to maximize enterprise bargaining as a business activity designed to produce measurable productivity outcomes. The better businesses will spend a lot of time researching and building a business case. They will train the negotiating team, and they will put a great deal of work into preparation for bargaining. The extent to which companies have fostered high levels of engagement with their employees is another telling factor. In those companies where effective workplace communications is part of their DNA, employees are more likely to understand and may have helped

shape the business direction. They have an enhanced appreciation of not only the issues and challenges the business faces but are more likely to be prepared to articulate innovative solutions to those issues and challenges. They are capable of independent thought and often find the direction taken by an ideologically driven union official as abhorrent. In some businesses a failure to maximize existing flexibility that is found in awards or is found in current enterprise agreements is an influencing factor. Many companies do not realize or have failed to capitalize on the flexibility that is inherent in their current agreement.

Another related problem is a lack of experience in industrial relations at the middle management level particularly in respect to the skills of effective negotiation. That is a legacy of the long period of Liberal government under Prime Minister John Howard in the sense that a lot of the so-called hostile elements of the *Fair Work Act* were not present and when a more robust bargaining regime was implemented under the Fair Work Act it exposed a lack of professional know-how in both bargaining procedure and style. As a consequence, it has bred a whole generation of managers who are inexperienced and unskilled in knowing how to move parties forward and to change positions and to use persuasive arguments. I see that directly in my work dealing with many managers who have little idea as to how to approach a collaborative bargaining process and to master its fundamentals.

The inherent deficiencies as part of our current bargaining regime suggest that we need to embrace mutual gains or interest based bargaining. Such a process requires maturity and requires a higher level of conduct and commitment. Interest based bargaining is the antithesis to an ambit log of claims. It builds agreement from interests that bind both the company and its employees. The widening of permitted matters under the Fair Work Act has also meant excessive focus on issues that could be reasonably deemed peripheral to the advancement of the interests of a business and its employees. Many companies that I have had involvement with have got bogged down on union rights issues such as union

noticeboards and union training, which really have fundamentally very little to do with business growth and productivity.

So in a broader sense, the *Fair Work Act* has regulated or re-regulated our industrial relations environment through an emphasis on greater prescription at the very time that we needed the embedding of greater facilitation, through direct workplace outcomes that promote flexibility and productivity growth. It has been well said by John Denton, a prominent lawyer, and I will quote him as this would be my view:

"The architecture of the old system still shapes our workplace laws and how we think about workplace regulation. There are many examples of bargaining participants from both sides falling back to adversarial bargaining rather than embracing new thinking that sees a given business in its broader global context. The rapid pace of technological advancement dictates new ways of working."

Unions in Australia have fundamental challenges. The plunge in union membership levels as a percentage of the total workforce over a period of time calls into question their entitlement to a pivotal central role in our workplace relations system. The default bargaining provisions that were put in to the *Fair Work Act* which dictate that the union has only to have one member in a work place to have a seat at the table has caused significant problems for my clients. Lack of professional union leadership and the embroiling of unions in scandals have not helped young people and women entering the workforce making a conscious decision to join a union. The old fashioned ideology that it is a worker class struggle is no longer appropriate. Similarly, ideology that it is all about managerial prerogative and that unions and employees have no rights to argue around the fringes of that or to put forward their own issues is just as hostile to fair and balanced bargaining in good faith.

### **The Good Faith Bargaining Framework**

The good faith bargaining requirements when considered as a framework have been beneficial to the bargaining process. As a set of requirements, procedurally they have had benefit.

The bargaining provisions can have utility in bringing the parties to the table. There is no doubt about that. The bargaining provisions can have benefit in limiting the requirement to provide certain sensitive information. In that sense they are a benefit to employers, who have some protection on what information they are required to give.

As to agreement on protocols for bargaining, I don't think the framework goes far enough. There should be a code of conduct and a set of bargaining protocols in draft form that companies and employees can adhere to. The framework places a higher obligation on parties to consider proposals that have been put and to come back with reasoned responses. The enshrining of such obligations in the good faith bargaining requirements has produced the potential at least for a higher level of considered bargaining. It would also be beneficial to have an expanded good faith bargaining code that incorporated the interpretations the Fair Work Commission has made about themes like surface bargaining.

Taking into account those factors, the framework operates well. It helps to focus the attention and raises the stakes because of the capacity for the Fair Work Commission to issue bargaining orders. The balance is right in the sense that there is protection there about not being required to make concessions. So parties are freely entering into negotiations without the necessity of being told by the Fair Work Commission what should actually be in the settlement.

When the barriers are emphasized over the opportunities for enterprise bargaining, it can become a mechanism to buy industrial peace and to follow the path of least resistance. I see a lot of that. It breeds a tendency to just roll over agreements as if they are fundamentally unworthy of being changed or the resistance, real or imagined, nullifies the desire to make the effort. Enterprise bargaining has become tarnished for these

sorts of reasons. But it remains an important mechanism to achieve productivity gains, to achieve business growth and to achieve higher levels of trust if executed well between a company and its employees. The report of the Fair Work Review Panel concluded that the bargaining framework operates as a procedural mechanism that assists parties in focusing on enterprise bargaining as a disciplined activity.

Collective bargaining is important because there is an imbalance in bargaining power in many businesses between a company and its employees. Many employees are not in a position to be able, in any equitable sense, to negotiate individually. So, collective bargaining definitely has its place in terms of giving protection to people through a collective approach.

There needs to be more options for agreement-making in our system. It doesn't seem balanced to me that if we have reinvigorated the power of unions through certain provisions in the *Fair Work Act*, if we've tilted the system to more of an adversarial system than a collaborative system, then the evidence of the marked decline in union membership in Australia tells me that there are a lot of employees disenfranchised out there. There are a lot of employees that want to have collective bargaining retained, but may prefer to have that through an in house body, like a consultative committee or a productivity committee, which is seen by employees as a potentially valid negotiating mechanism for their rights to be argued and protected. The decline in union membership and union relevance, at least in certain business sectors, along with changes in the character and composition of our workforce, demonstrate that it is anachronistic to maintain Unions at the center of our workplace relations system. From that point of view, there needs to be more options that allow employees to have a direct say and the direct capacity to negotiate at the workplace level.

## **Proposed changes**

Recommendation 1 on the Fair Work Act Review Panel final report was that the role of the Fair Work Institutions be extended to include the active encouragement of more productive workplaces. One of the eras I've worked through was the period from 1991 to 1996 under the Keating government which was characterized by best practice initiatives and the setting up of productivity centres of excellence. There was a great deal of energy at that time about benchmarking yourself against best practices.

There is an interesting survey I wish to refer to. There is a body called the Conference Board which is one of the world's most respected business research organizations. They produced their 2014 Global CEO Survey, with a section pertaining to survey results broken down to the Pacific Rim and to Australia in particular. It demonstrated the following things. The CEO's of some 88 companies in Australia that were surveyed listed labour relations or workplace relations as the number one thing that keeps them awake at night. So that suggests that there's still a fundamental issue in that regard. But when it came to listing things that they were working on as being most important, you would expect customer relations and improvement of operational processes... But number six on the list was innovation. Innovation and a global external orientation (looking outwards to learn best practices from other companies) were not considered high priorities. We could definitely learn some lessons from the Best Practice era and apply a strong and undiluted focus on encouraging innovative outcomes that are mutually beneficial to a company and its employees through the enterprise bargaining process.

This Inquiry by the Productivity Commission provides a vital opportunity to imaginatively look at the formidable challenges being faced by Australian businesses whether they operate in mature or dynamic markets. It requires the maintenance of a fair and equitable workplace relations system that provides enhanced flexibility for the parties operating within that system.



The Fair Work Act Review Panel talked about the encouragement of more productive workplaces as their number one recommendation of 53 in total. This is happening to some extent in that the Fair Work Commission has set up, in addition to other measures, a database of model clauses that enhance productivity and innovation. There is momentum there. How dramatic that momentum is, only time will tell.

In 2012 I was interviewed by a journalist from The CEO Magazine (April edition) in respect to my views on the effectiveness or otherwise of the Fair Work Act. There were three proposals for reform that I specifically highlighted in that article.

The first proposal for reform that I put forward back in 2012 is that the parties to an enterprise agreement should be required to identify the proposed productivity improvements that arise from the agreement as part of the certification process before the Fair Work Commission. This is a very logical and sensible thing to do. It would be beneficial for it to be mandated that productivity is going to be questioned and is going to be analyzed in the certification process. It might involve a full time member of the Productivity Commission being appointed to the FWC to assist in that process or it might be that a bureau be set up in the Productivity Commission itself. But it's not just productivity. It is about the steps that companies are taking to improve innovation, to improve engagement of employees. The parties would be under an obligation to ensure that there was a mutuality of benefit arising from the process. I think some higher obligation on the parties to identify such productivity improvements or initiatives, not in a slapdash, artificial or meaningless way, but in a way that is transparent and subject to genuine analysis, will put the focus where it needs to be.

The second thing is that there should be a requirement that the bargaining representative advise the employer who they are actually representing in the negotiations and that employees should choose who should represent them. This has a lot to do with what I mentioned before

in relation to default bargaining and having some transparency about who is actually being represented.

The third point is that secret ballots should be mandatory in determining majority support of a workforce for entering into collective bargaining. This is an important point because by far the tendency of the Fair Work Commission has been to accept surveys done by the union, where the obligation of the Union is to get 50% plus one. Surveys aren't as effective as secret ballot processes. Such a process would remove the possibility of coercion or intimidation.

There is an additional observation I would add. Since enterprise agreement making is a reiterative cycle, parties should be required to compulsorily appear before the Fair Work Commission three months after the agreement has been approved to participate in a review of the bargaining process they have undertaken and to agree on ways on which the next round of bargaining can be improved. These undertakings would be formally recorded. There would be a regular history that the Fair Work Commission would keep on the file. Now I know the parties in a negotiation change and circumstances change, but we simply don't do anything like that at the moment. It would be a review after the agreement has been made and is in operation. Its effect would be to encourage parties to continually address the things that bedeviled their previous bargaining experience or limited mutually beneficial outcomes. This would be a constructive thing to do and is consistent with the need to establish ongoing and constructive relationships with negotiating parties.

I appreciate this opportunity to share my views.