

PRODUCTIVITY COMMISSION
INQUIRY INTO THE WORKPLACE
RELATIONS FRAMEWORK
SUBMISSION

MARCH 2015



**CIVIL CONTRACTORS
FEDERATION**

INTRODUCTION

The Civil Contractors Federation (CCF) welcomes the opportunity to provide a submission to the Productivity Commission's Inquiry into Workplace Relations.

CCF supports a workplace relations system that places primacy on the relationship between an employer and an employee, with those parties free to bargain directly with each other to:

- Achieve flexible and efficient outcomes for that workplace;
- Negotiate agreements on an individual or non-collective basis free from the interference of third parties; and
- Negotiate agreements which reflect and are tied to productivity in that workplace.

The comments below address subjects raised in the Productivity Commission's issues papers.

2. SAFETY NETS

2.1 The Award system

The Modern Award covering the civil construction industry, the Building and Construction General On-site Award 2010 (BCGOA), is overly complex and lacking in flexibility. There is an urgent need to reduce and rationalise the current allowances and special rates in the BCGOA.

The Fair Work Commission's information sheet "Allowances – Building and Construction General On-Site Award 2010" (July 1, 2014) lists more than 80 weekly wage-related allowances. Many of these allowances relate to roles in the building construction sector and have little or no relevance to civil construction; however their presence in the Award means they must be considered by civil industry employers.

The complexity around wage-related allowances is a major red tape issue for all employers and especially smaller businesses with limited administrative resources.

The inflexible and complex nature of the BCGOIA acts as an incentive for employers to enter into an enterprise agreement. They may struggle, however, when attempting to draft and negotiate new enterprise agreements, because trying to ensure an agreement will satisfy the better-off-overall test (BOOT) is a difficult and time-consuming task.

This excessive complexity of the BCGOA also runs counter to the legislative requirement that modern awards should be simple, easy to understand, and should be constructed with regard to their impact on employment costs and regulatory burden (Sect. 134, Fair Work Act 2009).

Below are some specific concerns with the BCGOA.

2.2 Industry specific redundancy scheme

The definition of redundancy in Clause 17 of the BCGOA ("a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty") is unreasonably broad. Currently, only two of the 122 Modern Awards have this definition of redundant: the BCGOA and the Plumbing and Fire Sprinklers Award 2010. In contrast, the definition of redundant in s. 119 of the Fair Work Act 2009 as adopted in all other Modern Awards, provides that:

An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

- *at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or*
- *because of the insolvency or bankruptcy of the employer.*

The purpose of a redundancy payment is to compensate employees when either there is no work for them to do, or the company fails. Redundancy recognises an employee's service when their role unexpectedly disappears and provides them with support in seeking alternative employment.

The BCGOA definition, however, extends the meaning of redundancy well past what is reasonable or appropriate – for example, under the BCGOA definition an employee who resigns from their employment is entitled to a redundancy payment.

It is also unreasonable and inappropriate for construction industry employers to be expected to pay accrued redundancy over and above what is required by the National Employment Standards (NES).

The industry-specific redundancy scheme was conceived as a way to compensate construction industry employees for the transient nature of employment in the industry, compared to more 'stable' industries. However the scheme no longer reflects the realities of the modern, highly mobile workforce. Clause 17 of the BCGOA provides an inequitable level of compensation to construction workers compared to other project or contract-based industries such as hospitality and IT.

The definition of redundancy as contained in the Fair Work Act should be the standard definition and should not be able to be varied.

2.3 Cashing out of Leave

The NES allows for cashing out of leave when the relevant award or enterprise agreement for award covered employees provides for it. As the BCGOA does not mention cashing out of leave it is not permitted, even if the employee requests it.

This is an unnecessary restriction and may create a situation where employees at the same workplace have different rights, as a non-award covered employee faces no such restriction and can arrange for cashing out of leave through a formal request letter to their employer.

CCF believes there should be an overarching NES provision for the cashing out of leave with the safeguard that a request can only come from the employee seeking to cash out leave.

Additionally, the NES does not allow cashing out of leave which would result in an employee having less than four weeks accrued annual leave. This eliminates the discretion of employers to allow employees to access accrued entitlements through the cashing out of leave in cases of employee financial hardship.

2.4 Junior rates

The BCGOA does not allow for junior rates of pay. This omission acts as a significant disincentive for employers contemplating employing young people with limited skills and experience, and reduces employers' (and the industry's) ability to provide a career pathway into civil construction.

Many civil construction companies have mechanical workshops and employ apprentices at junior rates of pay. If junior rates were available under the BCGOA, feedback from our members suggests these companies would be more likely to employ young people in 'on-site' roles under civil construction traineeships.

2.5 Payment of wages

Another area where the BCGOA is overly prescriptive is in the payment of wages. While the Fair Work Act provides that employees must be paid at least monthly, the BCGOA specifies that wages must be paid "not

later than the end of ordinary hours of work on Thursday of each working week”. This provision is a significant administrative burden for employers in this industry, and limits the flexibility of employees to agree on payment timing.

3. THE BARGAINING FRAMEWORK

3.1 Enterprise agreements

As noted in the previous section, the complexity of the BCGOA has a knock-on effect for those employers who choose the relative simplicity of an enterprise agreement. The overly technical process to be followed in negotiating an agreement (and the technical approach sometimes taken by the Tribunal when refusing agreements) means that employers without dedicated HR/IR resources may have a flawed agreement, which becomes a ‘sleeping’ issue.

CCF supports the amendments before Parliament that would extend good faith bargaining to greenfields agreements and establish a three month negotiating timeframe. On application by an employer, Fair Work Australia should have the power to make a greenfield agreement within a reasonable timeframe, where an agreement cannot be reached with a union. The agreement would be measured in the usual way, i.e. against the Modern Award, National Employment Standards and BOOT.

Good faith bargaining principles should also apply to greenfield agreement negotiations.

3.2 Pattern bargaining and pattern agreements

CCF is opposed to pattern bargaining. We support negotiation of agreements at the enterprise level, with such agreements dealing with the specific matters that are important to employers and employees. Comments made by CCF nearly 15 years ago, in a submission on the Workplace Relations Amendment Bill 2000, are still pertinent:

“Pattern bargaining today is achieved by the relevant union taking the best enterprise agreement it can negotiate with a principal contractor and then moving to impose that agreement in its entirety across other principal contractors, who then assist the union in ensuring that all subcontractors will apply the terms and conditions of that agreement and in fact become signatories to the agreement. Such agreements apply to all workers on site and as far as the union’s influence or the principal contractor’s influence extends across the industry as possible. In this case the industry includes commercial building and the civil sector...Pattern bargaining is achieved by the union with coercion and industrial pressure applied to contractors and subcontractors but particularly to the principal contractors of major construction projects.”

3.3 Better off overall test

The better off overall test (BOOT) should be re-examined to clarify how ‘better off’ is measured in order to provide consistency, guidance, balance and ease of application. At present the test focuses on relying on the Award to the expense of the individual agreement or the National Employment Standards (NES).

The BOOT test and the bargaining process constrain the ability of employers to achieve productivity gains at an individual enterprise level.

3.4 Individual Flexibility Arrangements

CCF recommends that parties to individual flexibility arrangements (IFAs) should have the freedom to agree to any terms, the period of operation, notice of termination by either party, and review periods, while maintaining the provisions under the Fair Work Act that enable mutual termination of the IFA at any time.

An obstacle for civil construction industry employers wishing to access IFAs is the requirement that they must satisfy the BOOT as measured against the BCGOA, which as demonstrated above is by its nature complex and inflexible. As an example, mutually beneficial arrangements such as flexible working hours may not meet the BOOT.

True flexibility in IFAs would allow employers and employees to genuinely negotiate working arrangements that meet the needs of employees and enhance productivity.

3.5 Independent contractors

The CCF opposes enterprise agreements that contain “jump up clauses”, which seek to limit the use of contractors by requiring that contractors be engaged on terms no less favourable than employees at a workplace. These clauses are intended to create a disincentive for employers and unnecessarily restrict their ability to enter into contractual arrangements that will provide greater flexibility and productivity.

We recommend the Fair Work Act should forbid any clauses which seek to restrict an employer’s ability to engage independent contractors or labour hire workers.

4. EMPLOYEE PROTECTIONS

4.1 Unfair Dismissals

When an employment relationship breaks down, unfair dismissal laws should appropriately balance the rights of employers and employees.

The current provisions in the Fair Work Act are not constructed on the balance of probabilities, but rather on the obligations placed on employers to comply with certain processes. Conversely, an employee need only make an allegation and the employer has to prove otherwise.

The Fair Work Commission’s most recent statistics on unfair dismissals (Oct–Dec 2014) shows that 86% of applications that proceed to a decision are dismissed. However the vast majority of applications did not proceed to a decision, being settled by conciliation, suggesting that most employers would rather pay ‘go away’ money than undertake the time and expense of an application.

4.2 General protections and adverse action

The general protection provisions are so broad that they lend themselves to speculative and unmeritorious claims, and in fact this has been the experience of a number of our members. Small businesses have been especially vulnerable to frivolous claims.

CCF recommends that adverse action claims related to termination of employment should be abolished in their entirety. If the provisions are retained, the reverse onus of proof should be abolished.

4.3 Anti-bullying laws

CCF’s main concern with the introduction of anti-bullying laws into the Workplace Relations framework is that it inappropriately treats a work, health and safety (WHS) issue as an industrial matter.

WHS and industrial relations are covered by separate laws which work most effectively when they are clearly delineated. We believe this is an area best dealt with under state-based WHS legislation, which holds employers responsible for the health, safety and welfare of employees.

The introduction of Federal anti-bullying legislation has made this area unnecessarily complex for employers, who are forced to deal with multiple actions on the same issue involving varying standards of proof, different timing provisions on claims and complex jurisdictional questions.

5. OTHER WORKPLACE RELATIONS ISSUES

5.1 Right of entry provisions

Right of entry to any workplace should only be available to unions that have members employed at that workplace. It is unreasonable to expect employers to lose productivity during visits for recruitment purposes.

The use of right of entry powers under the guise of concern over WHS issues has been a long standing concern of the industry (the 2003 Royal Commission into the Building and Construction Industry found “widespread use of occupational health and safety as an industrial tool”).

The powers, activities and functions of WH&S and those of industrial relations, such as right of entry, should be clearly separated and enforced. The addition of anti-bullying laws into the Workplace Relations system (see 4.3 above) adds further confusion in this area.

Smaller employers are particularly vulnerable to intimidatory tactics by unions as they may be unsure about their rights and responsibilities. Members often contact our industrial advisers seeking support in relation to these issues.

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ABOUT THE CCF

The Civil Contractors Federation (CCF) is the peak industry body representing Australia's civil construction industry. It has branches in all states and territories and around 2000 contractor and associate members nationally.

CCF members are responsible for the construction and maintenance of Australia's infrastructure, including roads, bridges, pipelines, drainage, ports and utilities. Its members also play a vital role in the residential and commercial building construction industry by providing earthmoving and land development services including the provision of power, water, communications and gas.

CCF is an organisation registered under the Fair Work (Registered Organisations) Act 2009. It is governed by a National Board comprised of member-elected representatives from each state and territory.

A commitment to furthering its members' interests and helping them manage their businesses more effectively is at the core of CCF's operations. To that end, it offers effective business tools and management systems, as well as practical advice in areas such as taxation, industrial relations, workplace health and safety, human resources and environmental compliance.

CCF's mission is to be the voice of the industry and to provide a high level of benefit to its members. In particular, CCF is focused on ensuring the industry:

- **is professionally represented** - by representing and advocating for the views of the industry to all levels of government in a timely and effective manner.
- **is informed** - by delivering to members, effective and timely information about key issues.
- **has access to tools and resources that help businesses succeed** - by identifying, developing and delivering tools and resources that assist members in their day-to-day operations.
- **has access to high quality training** - by delivering best practice, training by the industry, for the industry.
- **has access to opportunities to network, learn and celebrate their achievements** - by delivering a range of events designed to provide members with opportunities to build relationships, be informed and have access to people of influence.
- **has access to supporting partners that extend the benefits of membership** - by developing networks and relationships with organisations that can provide additional services to members beyond those provided directly by CCF; delivering real cost savings to members.

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