

PURPOSE

This submission to the Productivity Commission's Workplace Relations Framework Inquiry sets out observations and opportunities to enable the Workplace Relations system to promote improvements in Australia's national productivity.

The submission focuses on a small number of key strategic issues and opportunities for improvements to the *Fair Work Act (FWA)*.

BACKGROUND

I have more than thirty years' experience as a Chief Executive of State and Commonwealth Government owned corporations including:

- Grain Handling Authority of NSW (CEO 1986-1988)
- National Rail Corporation (CEO 1992-2002)
- NSW RailCorp (CEO 2003-2008)
- Endeavour Energy (previously Integral Energy) (CEO 2008-2012)
- Ausgrid, Endeavour Energy, Essential Energy (CEO from 2012 to present)

All of the above organisations operated within the public sector, were heavily unionised and were subject to programs to safely improve productivity, service quality and affordability for the benefit of the community and consumers of the services of the organisation.

In each of these organisations labour costs were the largest component of operating expenditure and safely improving labour productivity was an essential ingredient for any successful cost reform agenda.

Enterprise agreements certified under the *FWA* can represent an enabler or a barrier to enterprise reform and productivity improvement. Enterprise agreements determine the unit costs of labour (wages, overtime, leave, superannuation, etc) and often also mandate the required number of units of labour (staffing levels, outsourcing restrictions, etc). When enterprise agreements deliver cost outcomes (unit or total labour costs) that are uncompetitive, those very agreements put jobs and the sustainability of that organisation at risk. Agreements that are intended by unions to deliver better conditions and job security thus frequently deliver the opposite result. The *FWA* itself can be a barrier to productivity reform because enterprise agreement outcomes are frequently the consequence of the relative power of the parties rather than being determined in the interest of improving national and organisational productivity and overall well-being of the community.

I have set out below three strategic issues for the Productivity Commission's consideration in their review of Australia's Workplace Relations Framework.

1. Enterprise Agreement Certification to be subject to a productivity test

An important driver of Australia's future prosperity will be the nation's ability to continually improve national productivity. Is the current Workplace Relations Framework sufficiently focussed on national productivity improvement?

Enterprise agreements do not align with the national interest when they result in a decline in that organisation's or industry's productivity, or prevent reform that would enable the organisation or industry to improve efficiency or compete successfully in the market.

In the publicly owned electricity network businesses in NSW, wage increases and other entitlements have resulted in cost increases above the rate of inflation without consideration of the impact on labour productivity and the community interest.

As the nation's monetary policy regulator the Reserve Bank of Australia assesses monetary policy options against an objective of maintaining inflation within a band of 2-3% p.a. As the nation's labour regulator the Fair Work Commission (FWC) has no policy objective to have regard to, let alone deliver, improvements in national labour productivity.

There is an opportunity for the *Fair Work Act* to require:

- Fair Work Members to consider the productivity implications of enterprise agreements proposed for certification against an objective productivity test;
- The FWC to review and report annually on their performance in delivering productivity outcomes, and to highlight individual decisions that did not support appropriate productivity improvement. The Fair Work Commission should be assessed against an objective standard similar to that adopted by the Reserve Bank. A productivity test is not new; it was part of the Accord Mark IV Agreement in 1988.

2. Workplace Safety and the Fair Work Act

State and Commonwealth Governments have introduced nationally harmonised Work Health and Safety legislation. That legislation appropriately imposes a primary duty of care on the directors and officers of organisations to do all that is reasonably practical to eliminate or minimise risk for employees and not expose others to a risk to their health and safety.

The FWC, generally through disputes procedures in enterprise agreements, becomes involved in conciliation and arbitration of workplace safety issues. The standards imposed on the FWC's deliberation are not the standards imposed on the employer under Work Health & Safety legislation. The FWC has developed a range of precedents to guide their considerations and arbitrated decisions in safety related issues. A judgement on whether a management proposal is "harsh, unreasonable or unjust" in its impact on employees has been used in many assessments of safety issues by the FWC. The subjective judgement of individual Fair Work Members has resulted in inconsistent judgements on the same matter in different industries. Thus different legal tests can be applied to the same factual circumstances. Drug testing is one such area, where urine testing has been rejected as "harsh, unreasonable or unjust" by one Member in one high risk industry (electricity distribution), and accepted by another Member in a different industry (the mining industry).

An employer may be forced into a position of implementing a FWC decision on a safety

related matter that does not represent the most “reasonably practical” risk mitigation of a workplace safety risk.

The Productivity Commission should consider harmonising the *FWA* with the obligations and standards of the *Work, Health & Safety Act*.

3. **Separate Appeals Jurisdiction [Issues Paper 5]**

The *FWA* provides opportunity for parties to appeal decisions of the FWC. The Appeal Panels are constructed of Members of the FWC and exclude the Member who made the decision that is being appealed. The nomination of the Members of an appeals bench is a decision of the President of the Commission.

While the Commission may endeavour to construct independent appeals benches, the reality is that those hearing an appeal against a fellow Member today could have that same Member hearing an appeal on one of their judgements in the future. In mainstream court structures the appeals courts are not comprised of sitting first instance members.

It is important for all parties that rely on the judgements and independence of the FWC that the appeals process itself is perceived to be and is in fact independent. The establishment of a separate Appeals Division and appointment of separate judges to deal with appeals against FWC decisions would achieve that objective. The establishment of an appeals tribunal within the Federal Court would provide a competent, respected and independent appeals process.

4. **Other Matters**

I have also set out below a number of observations on the operation of the current *FWA* from a non-legal practitioner’s perspective that may warrant consideration by the Productivity Commission.

a. **Legislation governing employee and employer protected industrial action is not symmetrical**

Under the current *FWA* a powerful union’s preferred strategy is to allow the nominal term of the current enterprise agreement to expire (it continues until replaced or terminated) and then seek to take legally protected industrial action aimed at damaging the employer until they have to concede to union demands.

The provisions of the *FWA* that control the employee protected industrial action and an employer response action are asymmetrical. In practice the union can gain legal approval (Section 437 *FWA*), using a protected action ballot, to set up a “menu” of protected industrial actions against an employer. While the *FWA* provides for the employer to take response action, in a practical sense such action is limited to a “lockout” of employees which can be both disproportionate and unnecessarily damaging to employees, employee relations, customers and the business. The QANTAS lockout is an obvious example of this limitation under the current *FWA*. In some industries such as health care and essential services an employer “lockout” is

never an option. The Productivity Commission should examine opportunities to provide symmetry in union and employer options for protected action to avoid disproportionate responses during periods of legally sanctioned industrial action.

b. *You can't act on what you don't know*

The current procedures set out within the *FWA* provide for the Australian Electoral Commission (AEC) to conduct a ballot of union members to support or not support the union's "menu" of proposed industrial action against the employer.

The AEC is provided by the employer with a list of names and addresses of all award employees and the union(s) provide the AEC with a list of their members. The AEC then constructs the role of voters for the union ballot from the names that are common on both union and employer lists. Once a ballot is approved by members, union members can commence industrial action once a notice period has been met. Employers are not provided with the name of employees on the AEC's roll of voters.

The practical difficulty for employers is they do not know the names of union members who are legally able to undertake protected industrial action. Under section 470 of the *FWA* it is an offence for an employer to pay an employee for taking protected strike action but the employer does not know who not to pay.

Without knowing in advance the names of employees who may take protected industrial action makes it impossible for an employer to mitigate the impacts of that action. As an example I have attached a copy of my letter to the Fair Work Ombudsman dated 9 March 2015. (Attachment 1)

c. *Award coverage of senior managers*

The coverage clause of an enterprise agreement sets out the classifications or wage details of employees who are legally bound by the terms and conditions of that award. Other employees, typically managers, may be employed under individual contracts of employment.

Employers have a strong and completely understandable preference to have their managers and supervisors employed outside of the enterprise agreement to avoid a "conflict of interest" that can arise between the organisation's objectives and their union's objectives. In reviewing the Workplace Relations Framework the Productivity Commission may wish to consider changes to the *FWA* that moderate this conflict of interest.

Currently, for other purposes, the *FWA* establishes a High Income Threshold (Section 333 *FWA*) of \$133,000 and defines what payments are included in this amount.

Enterprise agreements in the electricity distribution industry currently cover senior employees and managers whose incomes, excluding overtime, can in some cases be

in excess of \$200,000 p.a.

d. Public Sector and Labour Hire [Issues Paper 5]

In my experience, trade unions in the public sector organisations I have led all attempted to severely restrict the capacity to use labour hire or outsource functions required by the organisation. In the public sector, the effect of restrictive clauses on labour hire or outsourcing:

- represents a severe restrictive trade practice inhibiting the use of safe, efficient and competitive contractors;
- attempts to require a contractor to adopt public sector conditions as a pre-requisite to entry into public sector work;
- renders futile any benefit in terms of costs savings that may arise by the use of contract labour.

Whilst I am not legally qualified, my experience tells me that this sort of approach may attract the attention of Australia's Competition Laws. I can say without fear of contradiction that in every enterprise agreement negotiation I have been involved in over the last 5 years, that these types of clauses restricting the use of external contractors has always been pursued by the union bargaining representatives. The FWA should prevent any restraint of trade being incorporated into an enterprise agreement.

CONCLUSION

I would welcome the opportunity to discuss this submission with the Productivity Commission in the course of the deliberations on the Workplace Relations System in Australia.

(Signed – Vince Graham)

VINCE GRAHAM
Chief Executive Officer, Ausgrid
Chief Executive Officer, Endeavour Energy
Chief Executive Officer, Essential Energy

Attachments:

1. Letter to the Fair Work Ombudsman dated 9 March 2015.