

Friday 13th March 2015

Workplace Relations Framework Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Commissioners,

Re: Workplace Relations Framework Inquiry

Treasurer the Hon. Joe Hockey MP and Minister for Employment, Senator the Hon. Eric Abetz, representing the Abbott Government, are to be commended for requesting the Productivity Commission to undertake this Inquiry into the Workplace Relations Framework.

It is noted the establishment of this Inquiry is in honouring commitments the Coalition Parties gave to the Australian public in advance of the 2013 Federal election and that the election policy document, *The Coalition's Policy to Improve the Fair Work Laws* (May 2013), provides important context for the Inquiry. In drafting this submission, regard has been given to the following key elements of the Abbott Government's election policy:

- helping to create one million new jobs over the next five years;
- the pay and conditions of workers will be protected;
- help for small businesses, whose owners 'have many demands on their time and don't have the resources to be legal experts as well'; and
- ensure the Fair Work laws provide a strong and enforceable safety net for workers while helping business to grow, create new jobs and deliver higher real wage growth.

It is noted (PC Issues Paper 1, page 2) that beyond an assessment of the current Fair Work laws, "the Government has requested the Commission to go beyond evaluating the current system to consider the type of system that might best suit the Australian community over the longer term." This represents an important recognition by the Government that there exist real and serious structural flaws with the current heavily regulated system which are impacting the national economy, distorting regional economies (especially those regional areas based on servicing holiday and weekend trade via small business) and unnecessarily restricting the options available to workers and small business operators.

It is important that in making its recommendations as part of this Inquiry, the Commission does not feel constrained to justifying in a quantifiable way changes from the existing legal structure. Australia's workplace relations system is heavily regulated. It is complex and confusing for the lay person. Aspects of our workplace relations system have been described as 'arcane' and as the preserve of those who have trained and specialised in the field. This regulated system has been responsible for spawning and supporting a specialist industry of specialist advisers who make a lucrative living at the cost of workers, employers, taxpayers and the national economy.

The system does restrict consenting adults from making choices and forming agreements which they are eminently qualified to make with regards to their pay and working conditions, without the heavy-handed interference of the Commonwealth Government. It is a system which provides real disincentives to job creation, constricts the maximisation of opportunities for work and restricts managerial prerogative and innovation.

In this context, the Commission should evaluate whether there is indeed a genuine need for Government intervention in various aspects of the workplace relations system – especially with regard to small business – and make recommendations on that basis. Optimally, the default position – especially for small business – should be negligible government intervention unless absolutely necessary. As the average small business operator or employee is not a lawyer, the workplace relations system, obligations and responsibilities should be able to be simply understood. As a result, the requirements themselves should be simple, not complex. For the small business operator and employee at least, the workplace relations system should be taken out of the hands of lawyers and restored to the field of common sense.

Historical Context.

PC Issues Paper 1 makes brief reference to the historical context behind Australia's heavily regulated workplace relations system (page 8) however, in support of the case for restoring simplicity to the workplace relations system for small business, it is important to delve in a little more detail into the creation of the system.

There was initially great opposition and reluctance to provide a national government with the power to use state authority to interfere in the contract of labour between employer and worker. For many of the Federation Fathers, this power was considered appropriately the domain of the colonial parliaments or states.

At the 1891 Australasian Federation Conference Mr Charles Cameron Kingston from South Australia proposed adding to the draft federal Bill a sub-clause for 'the establishment of courts of conciliation and arbitration, having jurisdiction throughout the commonwealth, for the settlement of industrial disputes'. This proposal was soundly rejected by a vote of 25 delegates against, compared with only 12 in favour.

A further attempt was made at the Adelaide (first) session of the Australasian Federation Conference in April 1897, at which H.B. Higgins sought to add to the proposed constitution bill a sub-clause for powers in relation to 'industrial disputes extending beyond the limits of any one state'. The proposed justification for this power was to avoid the cost and disruption of the "evils" of strikes and lockouts. When put to the vote, this was again rejected, with 22 delegates against, only 12 in favour.

At the second session of the Federation Conference held in Sydney, September 1897, Mr Higgins again raised the issue of conciliation and arbitration of industrial disputes, foreshadowing that the matter would be formally proposed for debate at the third and final Conference, to be held in Melbourne in 1898. The matter was indeed raised at the Melbourne Conference, on 25 January 1898. Lengthy debate on this measure was dominated by the question as to whether it was appropriate to provide the Federal Parliament, if it wished, with power to confront the "great evils" of labour disputes and strikes and lockouts, which were considered 'barbarous modes of settling differences'. Eventually, the proposition was carried by a slim majority in a vote of 22 in favour, 19

against. Had only two delegates changed their mind, the new Commonwealth Parliament would not have had powers over the conciliation and arbitration of industrial disputes.

As Attorney-General in the first Parliament, Alfred Deakin introduced the *Conciliation and Arbitration Bill 1903* as a “novel” reform and a “new era” in the management of industrial disputes, of which the first “chief” object was to “prevent lock-outs and strikes in relation to industrial disputes”.

“Nor do I wish to conceal from honourable members that any proposals of this nature would not only be regarded as novel in many parts of the world ... Hitherto, individual has been pitted against individual, or numbers upon the one side against a class or classes upon the other, while the only means of arriving at a determination of the matters in dispute between the parties has been by recourse to force and strife. We now substitute a new regime for the reign of violence by endowing the State ... with power to impose within the limits of reason, justice, and constitutional government, its deliberate will upon the parties to industrial disputes. ... It marks the beginning of a new era in industrial matters, not only because of its main object, the prohibition of strikes and lock-outs, but because it brings into play a new force – the force of an impartial tribunal with the State behind it.”

...
“The object of this measure is to prevent strikes. ... Lockouts and strikes equally involve destruction – destruction of labour, of machinery, of capital, of social relations and of social peace. The Bill makes a gallant effort to cope with these great evils of modern industrialism.”

Alfred Deakin, second reading speech introducing the *Conciliation and Arbitration Bill 1903*, Cwth HoR Hansard, 30 July 1903.

In opening the response to Deakin’s second reading speech, the Opposition leader and leader of the Free Trade Party, George Reid gave support to the Bill, despite its infringements on individual liberties:

“No man is more sensible than I am of the multitude of points in which the provisions of this Bill seem to shock all one’s instincts of personal liberty, and all one’s desire to see a free Commonwealth composed of free and independent subjects. I cannot help feeling that this Bill, instead of marking, in one sense, an enlightened stage, is one of the most humiliating confessions that have to be made – that with all our civilisation and development, these great powers have not yet become sufficiently civilized to be able to settle their disputes as other men are generally able to do. In no sense is this a triumph for humanity. It is a confession that the ordinary rules have failed, and that we have to grope about for some method which is clumsy, and, perhaps, inequitable, with all the hardships which are incident to a state of civil war, or martial law. But, still we, in this young Commonwealth, viewing the history of the great nations where these giant interests fight to a point at which human life is ruthlessly sacrificed ... will, I hope, cheerfully pass this Bill, trusting that the time will come when, under a more rational and voluntary arrangement of intelligent men representing these great interests, a method will be found of settling their disputes without any recourse to legal machinery.”

- George Reid, Leader of the Opposition Free Trade Party during second reading debate on the *Conciliation and Arbitration Bill 1903*, Cwth HoR Hansard, 6 August 1903.

There were to be three changes of Prime Minister before the *Conciliation and Arbitration Act 1904* passed the Parliament. Deakin was to follow Edmund Barton as Prime Minister only to relinquish to Labor’s Christian Watson before George Reid would form a composite Free Trade-Protectionist administration (without Deakin) in August 1904. It was ultimately Reid’s responsibility as Prime Minister to shepherd the legislation through the Parliament, a hurdle at which two previous administrations had fallen.

The Federal workplace relations system has evolved from this legislation and is a testament to the belief of Australia’s two great Liberal founding fathers – Reid and Deakin – in the power of reason, negotiation and law to achieve just resolutions to labour disagreements in preference to the strife and discord of strikes and lockouts.

The workplace relations system is part of Australia's Liberal legacy and it was therefore appropriate that it was the Howard Government which made the break from the restrictions of the conciliation and arbitration power of the Constitution, to instead use the corporations power to regulate workplace relations under the WorkChoices reforms. The current Fair Work laws, while representing the first significant re-regulation of the country's economic framework in modern history, have been built off the base set by the Howard reforms.

It is also appropriate that an Abbott Liberal Government now looks to the Commission for recommendations on potential further reforms to modernise the workplace relations system for current and future generations in an ever increasingly open global economy.

The reason for recounting this history is to emphasise the context that the Federal workplace relations powers were fundamentally established to regulate (ban) the 'evils' of strikes and lockouts arising from industrial disputation with the aim of reducing the grave economic impacts and social disruption resulting from these. The 1890s maritime and shearers strikes were foremost in the minds of legislators at the time. It was originally envisaged the federal powers would need to be used infrequently. The federal workplace relations system of regulation now covers the vast majority of employees and employers across the nation. Industrial disputation is at historic lows. Is there the same need for government to interfere in the employment negotiations of informed and consenting adults.

Is the Workplace Relations system simple and relevant to small business

It is difficult to see the justification or necessity for applying a heavily regulated, rigid, complex and legalistic national workplace relations system to small business. One-size-fits-all modern awards set by a remote regulator (the Fair Work Commission) after hearing submissions from centralised industrial associations (of both employers and employees) are unlikely to meet all the needs of individual small businesses. Individual small business operators and employees are unlikely to be parties to the consultation, putting them at a disadvantage to the centralised and privileged members of the 'Industrial Relations Club'.

Indeed, modern awards are not intended to suit the individual needs of specific businesses or employees. They have been set and determined with national goals and aspirations in mind. There is no other way to justify the continued existence in modern awards of anachronisms such as 17.5 per cent holiday leave loadings.

Modern awards were meant to be a simple tool for small business to understand and use. They have become anything but. The sheer size and complexity of modern awards makes them unwieldy and with widely varying rules for overtime payments, challenging to translate accurately and efficiently into correct payments for employees. A brief survey of modern awards applicable to many small businesses demonstrates the paper warfare burden:

- Pastoral Award (i.e. the primary farming award, including dairy, livestock & mixed farming, broadacre cropping, piggery and poultry) – 104 pages, plus reference to separate allowance sheet
- General Retail Industry Award – 71 pages
- Hospitality Industry (General) Award – 95 pages
- Restaurant Industry Award – 59 pages
- Fast Food Industry Award – 52 pages
- Horticulture Award – 56 pages.

How can small business operators and their employees reasonably be expected to master the details of such documents, plus associated legislation (e.g. OH&S, taxation, etc) while managing the many other demands on their time?

To combat the problem of employers and their staff not knowing the contents of their Awards, the system ludicrously requires employers to “ensure that copies” (note the use of plural) – in the case of the Pastoral Award presumably all 104 pages of it - are to be posted on a convenient noticeboard at the workplace. A copy of the NES also. That would be one mighty large noticeboard! While it doesn’t stipulate in the Award, presumably the employer ought also provide a comfortable chair and reading lamp as these documents are not a two-minute read. In case the farmer doesn’t have a noticeboard suitable to display the 104 page Award (plus NES), the law does generously allow him to choose to purchase a computer and locate it conveniently near the dairy for the purpose of allowing the milking staff to log on and read the Award and associated documents electronically.

Confusion over legal coverage by modern awards remains. The Hospitality Industry (General) Award does not cover restaurants, which are separately covered by the Restaurant Industry Award, unless of course the restaurant in question provides fast food or is associated with a hotel, motel or club. The General Retail Industry Award applies to retail businesses that sell food packaged to take home and eat out of the store, unless of course it is fast food.

There are also a range of complex double standards and crippling costs built into the content of modern awards, which form the basis of ambit claims between employer and employee representatives during Fair Work Commission award reviews. To use but one example of award inconsistency as an illustration, a farm worker under the Pastoral Award is entitled to time and a half on Saturdays and double time on Sundays for overtime if they work on a dairy, beef or sheep farm. However, the same worker on a pig farm will receive double time for overtime on Saturdays after the first two hours and must be paid for a minimum of three hours at double time if called for overtime in on Sunday. A dairy worker doing overtime on a Sunday will receive double time for milking cows but only time and a half if feeding and watering the stock, despite the fact both tasks need to be undertaken daily. Faced with such costly requirements, a frugal farmer would likely seek to do the additional work him or herself (or have their children do it), rather than offer the additional shift and associated pay to their valued employees.

Is the Workplace Relations system fair for small business

If the intention of extending application of the workplace relations framework to small business is to ensure fairness for all workers, it is an abject failure.

To start with, there are a large number of workers for whom the workplace relations framework and its protections do not apply. Independent contractors have been mentioned in the Issues Papers as a category falling outside the system, but there is another category: the men and women who own and operate their own small family businesses and farms. For many of these Australians who form the very backbone of our nation, the industrial ‘safety nets’ that are seen to define this as a fair and egalitarian nation (the 38 hour week, the minimum ‘basic’ wage and generous entitlements) are a constant mocking reminder that their country has abandoned them.

There exists no overtime or weekend penalty rates, sick leave or holiday loadings on the family farm. The 38 hour, five day working week is a myth when cows have to be milked twice per day, seven days a week or the live-in corner shop is expected to open morning ‘til late 364 days a year.

Security of fortnightly wages for the small business owner is subject to the market commodity price of goods sold, frequency of contracted work or number of customers walking through the door.

Unfair dismissal compensation or re-instatement is non-existent for the small business owner squeezed out ingloriously by competitive market pressure or changing consumer appetites. The only redundancy pay being the ability to sell the business to someone else who is brave enough to give it a go. Other than a client list and goodwill, there is little to sell when your own skilled hands, intellect and labour have been the crux of the own business. For many family businesses – in particular but not exclusive to farmers – to surrender the business for sale is also to sell the home, resulting in personal dislocation. In such circumstances the ‘redundancy’ pay is also the superannuation needed to finance years of retirement.

Identifying this category of owner-workers is not to argue to bring them into the regulated system – they would not like that as these workers value their freedom and independence. It is to emphasise there exists a hypocritical view to fairness for workers in this country divided between those who work for themselves and those who work for others. While the system was intended to protect employees from abuse of perceived power-imbalance between boss and worker, the system has actually created a privileged class of protected workers (employees) who have the full benefit of a safety net and has ignored the lack of protections available to those (owners) who put their capital and livelihood at risk.

Fairness in the workplace is a subjective concept. The existence of a rigid, centrally mandated workplace relations system does not guarantee fairness for workers. In an illuminating disclosure, Kathie Muir revealed that after extensive focus groups conducted by the union movement for its Your Rights at Work (anti-WorkChoices) campaign:

“A number of people in the focus groups, especially lower-paid women with family responsibilities, thought the existing system was unfair, that they had never experienced fairness.”¹

The very centralised, heavily regulated and protected (pre-WorkChoices) system the union was fighting to retain between 2005 and 2007 was not considered ‘fair’ by the workers the union movement was seeking to appeal to.

The Commission should exercise great caution in relation to where it draws the line on fairness. Ultimately, the Commission should seek to demonstrate where there is genuine justification for ongoing government intervention in making its recommendations. Where such justification is lacking, the government should consider vacating the field.

The safety net and minimum wages

As indicated in PC Issues Paper 2, minimum wages are controversial. There is much academic literature on the potential for high minimum wages to distort the labour market and price disadvantaged, unskilled, inexperienced and unemployed Australians out of a job.

Just as there are small business owners who will not open their shops on Sundays and public holidays due to the high cost of award penalty rates, so too there are employers who will not employ a (additional) person because of the cost of labour (recognising that on top of minimum wages rates, superannuation, payroll tax and WorkCover premiums all compound). In crude terms, minimum wages are either set below the market clearing rate of labour, at which stage they are virtually ineffective, or set above the clearing rate at which point there will inevitably be a reduction of job opportunities.

It is a sign of Australia's prosperity and level of development that we are not a low wage country. Australia cannot compete in a race to the bottom with low wage nations and no serious policy maker would advocate a low wage pathway. Even if it were hypothetically possible for local businesses to offer employment at internationally low wages, they would soon find a lack of candidates willing to take on the task. It is already challenging for a number of industries to find suitable and willing candidates from amongst the ranks of the unemployed prepared to work unattractive tasks, for example in abattoirs (or meat processing plants, as such businesses prefer to be called these days). This has led to significant growth in the use and uptake of 457 sponsored work visas, attracting foreign workers to undertake the jobs at domestic pay and conditions which many unemployed Australians will not do.

In addition to making it easier for businesses to access 457 visa workers, there are other telltale signs that governments recognise our regulated minimum wages may be too high for the market and depressing the creation of new and additional job opportunities. The existence of wage subsidies and other labour market assistance programs targeting trainees and apprentices, the long term unemployed and mature-aged unemployed are the proof. The fact governments are prepared to invest taxpayers funds in such initiatives demonstrates a clear preference towards subsidy as opposed to tackling the wage hurdle.

While the loss of job opportunities available for unemployed and disadvantaged people resulting from regulated minimum wage rates are not to be frivolously discounted, it would appear there are higher priorities for beneficial reform than deregulating or reducing minimum wage rates. Further, the Government's stated intention to protect workers' pay and ensure a strong safety net would seem to indicate a preference for exploring reform options to other aspects of the workplace relations system.

That is not to say the Commission should not seriously explore policy options related to the frequency and nature of minimum wage rate reviews. The frequency of adjustments can be modified without undermining nominal pay rates or the fundamental integrity of the safety net system. Nowhere in the Ten Commandments does it say Australia's regulated minimum wage rates must be reviewed annually and keep pace with consumer inflation.

Indeed, during the early years of the fair or basic wage, as set by Justice Higgins in the Harvester judgement of 1907, the fair wage failed to keep pace with prices, especially between 1914 to 1920². In Harvester, Justice Higgins established the concept of 'fair and reasonable' wages to provide for the 'normal needs of the average employee, regarded as a human being living in a civilised community'. With a worker providing for himself, a wife and three dependent children, Justice Higgins, President of the Court of Conciliation and Arbitration, nominated 7 shillings per day (42s. per week) as the lowest wages he could set as fair and reasonable³. In December 1919 Prime Minister William Morris Hughes established a Royal Commission on the Basic Wage which in November 1920 found the basic wage in Sydney ought to be £5.17s. for a family of five. At that time the 'Harvester equivalent' minimum wages in Sydney were £4.13s. and even the Commission's chairman suggested the higher rate would ruin industries manufacturing for export while providing for some 2.1 million non-existent children and nearly half a million non-existent wives⁴.

The Harvester judgement was made in a long gone era where the social welfare supports provided by the Commonwealth today did not exist.

In the modern Australia, the universal taxpayer funded social welfare (tax and transfer) system (including unemployment benefits, old age and disability pensions, the wide range of family support payments) together with the Fair Work Commission regulated minimum wage comprise an effective financial safety net for the community. These two systems work together. At the lower income levels, workers can in certain circumstances continue to access certain social welfare benefits which phase out gradually as individuals increase their income.

This dual safety net system of regulated minimum wages and generous taxpayer funded social welfare support provides for the fair and egalitarian Australia.

New freedom for small business

Negotiations and disagreements between an employer and employee regarding wages and conditions within an individual small business represent a significantly much lesser potential for public disruption and strife than in big businesses, major infrastructure providers and in government agencies. At the same time, small business is especially disadvantaged by the heavily regulated workplace relations systems in comparison with its big business competitors.

Big businesses have the size, capital resources and diversity of skills amongst its employees to be able to acquire specialist professional assistance to manage the workforce and deal with the complexity of the legalistic workplace relations system. In small business, these responsibilities (in addition to dealing with valued customers, taxation, payroll, OH&S, local government regulations, etc) are often left to the owner or a senior employee. The smaller the business, the greater responsibility falls on one person.

A centralised workplace relations system favouring organised collective enterprise bargaining can represent an efficient means of negotiating wages and conditions for big business. There are no (or at best, much lesser) efficiency of scale benefits in a centralised system for small business.

Given the complexity of the system, many small businesses would be happy to take an industry award ‘off the shelf’ and apply it to its workforce, if it was simple and met the individual needs of the enterprise. Unfortunately, one-size-fits-all awards do not and cannot address the requirements of every small business. Often the employer representatives who have a voice in the award review process are required to represent conflicting priorities from both larger and smaller business members, resulting in compromises which may not proportionately benefit small businesses. For example, costs that a large employer is prepared to accept in an award because they have the additional staff to cover shifts and minimise overtime penalty rates exposure, may not be welcomed by small businesses. Indeed, the ability of larger businesses to more flexibly manage exposure to penalty rates (especially overtime) may advantage such businesses in opening seven days per week in direct competition with and to the disadvantage of a smaller business that may find the same penalty rates costs unavoidable and prohibitive if forced to open seven days.

At its core, a centralised workplace relations system favours big unions, big governments and big business. The deleterious impacts on small business are collateral damage.

It is therefore proposed that the Commission evaluate and recommend to the government the adoption of a two tier workplace relations system: deregulated for small business and retention of the current framework (with any necessary improvements the Commission may recommend arising out of the findings of this Inquiry) for big business (being those businesses not ‘small’).

There already exists bipartisan recognition of the special challenges faced by small business through the operation of a two tier system for unfair dismissals under both the former WorkChoices and current Fair Work legislation.

For small businesses to be successful, there must necessarily exist strong and effective relationships between owners and employees. These relationships are built on trust working together over time in the pursuit of shared business objectives. It is an environment where the business owner personally knows his or her employees and can negotiate and discuss wages and conditions issues with them effectively in person.

With industrial disputation (working days lost per 1000 employees) at near record low levels (including during the period WorkChoices was in effect), surely the nation has finally reached Sir George Reid's time where "a more rational and voluntary arrangement of intelligent [people] ... will be found of settling their disputes without any recourse to legal machinery".

The 'keep it simple' principle should apply to small business. Neither small business owners and operators nor their employees should need professional or legal support to understand and participate effectively in the workplace relations system. Let's take the system out of the hands of lawyers and give it back to the lay public.

A small business owner or employee should need no more than a one page document to understand the basic minimum wages and conditions expected for employees.

In this regard, it is proposed for evaluation that small business be exempt from Fair Work red tape, that small business employees and employers have the ability to negotiate individual employment agreements, retain access to modern awards on a voluntary basis, comply with a simple set of regulated minimum conditions and be exempt from unfair (but not from unlawful) dismissals provisions.

Small business employees and employers should be able to negotiate individual employment agreements as long as they comply with the safety net of a) the Fair Work Commission set minimum national wage and b) six Minimum National Employment Standards, representing:

- Maximum ordinary weekly hours (38 hours per week);
- 4 weeks annual leave (able to cash out after more than 4 weeks leave accrued at employees request);
- personal (sick)/carers leave (10 days, with no ability to cash out);
- parental leave;
- public holidays (ability to decline to work on public holidays protected); and
- agreements must set an agreed period for notice of termination/resignation, which must not be less than one (1) working week.

Small business would have voluntary access to the complex and detailed modern awards determined by the Fair Work Commission and could adopt modern awards unchanged as the employment agreement between employee and employer if that is the preference of both parties. Alternatively, employers and employees could refer to the modern awards conditions as advisory in structuring a new agreement specific to the needs of both parties and the enterprise. Under such a system, it would be possible for unions and employer organisations to draft their own (advisory) template awards for consideration by their members for use in certain industries and enterprise types.

Unlike the Howard Government's WorkChoices system – which was in a number of aspects from the perspective of small business, over regulated and burdened with red tape – small businesses should not need to lodge or register individual employment agreements with the Fair Work Commission or any government agency.

No worker should be worse off as a result of the introduction of a new system. Thus there would need to be suitable transition arrangements to ensure the protection of pay and conditions for all existing employees. The Commission could evaluate appropriate transition models. A suggestion could be that existing employees conditions and wages as at the transition date be grandfathered/protected as a minimum base in line with their existing agreement for a five year period (i.e. including any existing clauses for regular salary and performance reviews). During this five year transition period it would be unlawful for an employer to propose new conditions that were less favourable overall to the individual employee. In effect a 'no disadvantage' test. Penalties would apply to any breaches as well as restitution for loss in pay. The principle position that should be adopted is irrespective of the merits or otherwise of award rates or other conditions applying at the time an employee was contracted, the employer offered the job on those terms and such terms should be maintained even if the government changes the law, unless terms more favourable to the employee are to be negotiated.

There may be a wide range of contingencies that would necessarily need to be accounted for in legislation (i.e. attempts to dismiss and re-hire) to ensure compliance with the principle that no individual worker be worse off following the introduction of such a new system of regulating small business than they were before.

In addition to the safety net, it would be important that small business employees are free at any time to refer an agreement they have signed to the Fair Work Ombudsman for investigation if the employee suspects the conditions do not comply with the minimum wage and six minimum national employment standards. Small business employees who were employed prior to the change would also be able to go to the Ombudsman to ensure any new agreement is not worse than their existing agreement.

The right for an employee to go to the FWO could not be contracted out and penalties should apply if it is found pressure has been applied by a small business employer to deter an employee from going to the Ombudsman.

Small business employees should of course be entitled to have a bargaining agent of their choice present for all appropriate agreement negotiation discussions.

Adoption of a two tier workplace relations framework for small and large business raises the question of what is a small business. The small business provisions of the unfair dismissals regime under Fair Work applies where there are 15 or fewer employees. 100 employees was the defining number under WorkChoices. It is a question worthy of further research and consultation. While intuitively sympathetic to defining small business (as opposed to large business) closer to 100 employees – there are many businesses which would be considered small, local businesses in their communities that employ more than 15 people – the optimal threshold number of employees should be set at a level expected to minimise the incentive to distort business decisions or create unintended consequences, such as deliberate business restructuring to comply with the threshold. As such, adopting a higher headcount may be optimal.

Small business exemption from unfair dismissals

There exists much informed analysis on this issue. The deleterious impact of unfair dismissals legislation on small business has been recognised by both sides of politics, albeit the policy responses of both parties have varied widely. National unfair dismissals legislation is relatively new in the Australian context, having been introduced by the Keating Government in 1993. The Australian public voted on four occasions between 1996 and 2004 in favour of effective exemptions for small business from unfair dismissals legislation.

Those commentators who subscribe to a collectivist view of industrial relations will never support exemptions from unfair dismissals as they do not accept an employer should have the freedom to dismiss an employee except in extreme circumstances of misconduct, repeated substandard performance or financial vulnerability of the enterprise. Such commentators effectively subscribe to a value set whereby once someone is employed, they are entitled to remain employed in that business until they choose to depart. For this reason, some commentators are critical of Labor's approach to unfair dismissals in relation to small business under Fair Work⁵.

It should be recognised that it is a very serious thing for big government to step in and say to a small business owner that while the level of trust may have broken down between them and their employee, they must continue to employ the person and operate as if the trust was never broken. This is a form of tyranny for which the public interest must be very high in each specific case to justify such an intrusion.

In many small businesses, the workplace is as much the property and responsibility of the owner as is the family home. The state would not expect a homeowner to leave someone in occupation of their house while the family is out for the day, let alone someone with whom there has been a falling out. But this is exactly what the state expects when the Fair Work Commission orders an employee be reinstated to work in a small business.

In principle it doesn't matter what event has led to the break in the relationship, the mere fact of a split in working relationship which the business owner feels cannot be repaired is justification enough. There are after all serious potential hazards in retaining an aggrieved employee, such as potential impact on customers, lost sense by the owner of the security of the premises of employment, potential for WorkCover claims for any accidents resulting from risky behaviour (a particular concern in jurisdictions with no-fault claims systems), the undermining of morale of work colleagues or even sabotage.

If the state believes there should be greater protections in place for employees in the situation of termination of employment, the Parliament should regulate more extensive minimum conditions of notice of termination of employment as standard in employment agreements rather than legislate in the area of interfering with so-called 'unfair' dismissals.

When campaigning in favour of the re-election of the Howard Government in 2007, some of the feedback received from local businesses regarding the WorkChoices reforms was most instructive. The business perspectives presented were that the unfair dismissals exemption had a positive impact in the workplace, not because employers had utilised the legal flexibility to dismiss staff but because they had noticed improved performance and attitude towards work activities from certain employees after the reforms were implemented. This improved attitude had a positive flow-on impact with other staff who had been affected by the perceived poor attitude of said employees previously. Accepting such feedback at face value, these positive impacts of reform will be difficult to capture in statistical analysis but are real and beneficially meaningful for employers nonetheless.

By way of final reflection on the issue of unfair dismissals, it should be noted the Fair Work Commission in its annual report discloses that the medium time for finalisation of 90 per cent of unfair dismissals applications (including those that are withdrawn) was 146 days in 2013-14. That is five months as the medium time taken to resolve unfair dismissals applications – a completely unacceptable period of time to have the threat of forced reinstatement or monetary compensation hanging over the head of a small business employer trying to manage their enterprise.

Union right of entry

Over the past 20 years, the government has increased the investment by workplace regulatory agencies in compliance and enforcement of workplace laws. This is appropriate and requires fresh consideration of the role of unions in accessing workplaces.

Employees should be entitled to industrial representation and the right to associate (or not associate) with a union. This is not in question.

However, unions should not have the authority to enter workplaces where they are not representing members. In those workplaces where unions do represent members, they should only be granted access to act as bargaining agents on their members' behalf in properly scheduled meetings with management specifically related to bargaining matters. It is appropriate that employers and managers be able to designate where meetings with union officials, acting as bargaining agents for their members, should take place.

Union representatives have no reason to visit the workplaces of members to inspect for OH&S issues. The states have established competent WorkCover authorities and comprehensive workplace health and safety legislation to regulate safety in the workplace. These state authorities are well placed to despatch eminently qualified and authorised officers to undertake inspections of businesses where there is suspicion of unsafe workplace practices, plant or equipment.

Similarly, a business should be entitled to restrict the ability of union representatives to recruit for members at the workplace during working hours. A wide range of community and sporting organisations are required to recruit for new members and conduct meetings with its membership outside of working hours. There is no reason why unions should be any different, nor why they should enjoy a special privilege to recruit on someone else's property during work time, at the expense of the employer. The conduct of a union's internal affairs is not the concern of a business and should not intrude on the working time, productivity or premises of the business.

WorkChoices

In considering my submission to this Inquiry, I read the November 2005 report of the Senate Employment Workplace Relations and Education Legislation Committee into the *Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005*. A decade later, the case in favour of the WorkChoices reforms as at that time remains a compelling read. It is instructive that many of the concerns put forward by the then Labor Opposition were proven unfounded (for example the claim that "the purpose of the Australian Fair Pay Commission is to reduce real minimum rates of pay over time").

While there will inevitably be contention regarding which elements of economic and national policy, and which global influences, may have affected the state of the nation at any given time, the reality remains that remarkable jobs growth was achieved during the short period for which the

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WorkChoices reforms were implemented in Australia under the Howard Government. For the first time in a generation, the national unemployment rate fell below 4 per cent under WorkChoices.

In an evaluation of the Howard Government's performance, John Stone reported that over the twelve year period from December 1995 to December 2007 more than 2.26 million additional jobs were created, representing a 27.1 per cent rate of growth. Of these, 1.69 million jobs were created in the decade December 1995 to December 2005⁶, approximating the first decade of the Howard Government and almost nine years of individualised Australian Workplace Agreements.

Eclipsing this achievement, during the relatively short eighteen month period of April 2006 to September 2007 - during which WorkChoices was fully operational - Stone reports 499,000 additional jobs were created. This is a remarkable rate of jobs growth. Further, the growth was substantially in full time jobs (91 per cent), over-turning a long term trend of strong growth in part time (including casual) employment. Advocates for exempting small business from unfair dismissals had long projected employers would be more inclined to create full time job opportunities if freed from the arduous unfair dismissals regime. And so it came to pass.

The Howard Government's WorkChoices legislation may well be 'dead, buried and cremated', but there remains a strong case in favour of allowing employers and employees flexibility to negotiate individual employment agreements one-to-one in the workplace, subject to minimum standards and wages. There is also a need to exempt small business from unfair dismissals provisions.

With industrial disputation in the private sector at historically low levels, the Federation era justification for a national system of regulating the negotiation of industrial agreements has all but vanished. This is especially the case in the area of small business where the threat of strikes and lockouts in individual enterprises having a sizeable deleterious impact on the wider community is negligible.

There is a compelling case to release small business from the heavily regulated workplace relations framework. Similarly, there exists minimal justification in the public interest for the state to use its wide coercive powers to interfere in the process of informed and consenting adults reaching mutually beneficial employment agreements in the small business sector.

I wish the Commission well for its deliberations.

Yours sincerely,

Simon Price

Simon Price is a former Victorian Farmers Federation policy director, served as a ministerial chief of staff in the Baillieu and Napthine Victorian Governments and worked for the Minister for Employment, Education, Training and Youth Affairs, the Hon. Dr David Kemp, during the first and second Howard Governments.

Endnotes:

¹ Muir, Kathie, *Worth Fighting For: Inside the Your Rights at Work Campaign*, UNSW Press, 2008, page 58.

² Hancock, K and Richardson, S, 'Economic and Social Effects', in Issac, Joe & Macintyre, Stuart, *The New Province For Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, 2004, page 140.

³ Shann, Edward, *An Economic History of Australia*, Georgian House, 1963, page 377 (originally published 1930).

⁴ Ibid, pages 383-4.

⁵ For example, Anna Chapman castigates the ALP for not referring "to any labour market research, or broader policy debates and understandings to support its regulatory approach" for small business dismissals. Chapman, A, 'The Decline and Restoration of Unfair Dismissal Rights', in Forsyth, Anthony and Stewart, Andrew, *Fair Work: The New Workplace Laws and the Work Choices Legacy*, The Federation Press, 2009, page 225.

⁶ Stone, John, 'Jobs, Growth and Prosperity', in Windschuttle, Keith, Martin-Jones, David and Evans, Ray, *The Howard Era*, Quadrant Books, 2009, page 119.