Productivity Commission Review:

Australia's Workplace Relations Framework

Supplementary submission of Minter Ellison in relation to Issues Paper 3, 'The Bargaining Framework'

30 March 2015

MinterEllison

SUPPLEMENTARY SUBMISSION OF MINTER ELLISON
Issues Paper 3: The Bargaining Framework

This submission is made by Minter Ellison on behalf of one of our clients regarding the failure of the *Fair Work Act 2009* (**FW Act**) bargaining framework to adequately address disputes over the appointment or conduct of bargaining representatives.

Our client is available to provide a verbal briefing to add further context to the submission should the Commission require it.

The FW Act bargaining framework does not adequately address disputes over the appointment or conduct of bargaining representatives (and the individuals nominated to act on their behalf) to enhance productivity and/or remove impediments to efficient bargaining

The particular issue of concern to our client was that it was forced to negotiate an enterprise agreement with a bargaining representative who was an employee of a direct competitor.

In that case, a particular union was a default bargaining representative for the purpose of negotiating the Company's recent enterprise agreement pursuant to s. 176 of the FW Act (the '**Union**'). The Union nominated a particular union official to lead negotiations (the '**Union Official**'), who was a long term, full-time employee of one of our client's direct competitors. The Union Official was, at the same time, a senior officer of the Union.

The resulting actual or perceived conflict of interest, which was an inhibitor to productive bargaining and the improvement of productivity in the workplace, could not be resolved within the framework of the FW Act.

Actual or perceived conflict of interest impediment to productive bargaining

1. The involvement of an employee of one of our client's direct competitors in the negotiations gave rise to an actual or perceived conflict of interest, and, in our client's view, significantly inhibited the negotiations during prolonged costly industrial action. Our clients concerns were:

    (a) as an employee of our client's direct competitor the Union Official was in a position to advantage the position of their employer, and/or its employees, by:

        (i) involving our client in protracted and costly industrial disputation;

        (ii) pressing claims for the inclusion of provisions that reduced our client's productivity and competiveness; and

        (iii) removing a point of difference in the terms and conditions of employment at the two workplaces and potentially our client's competitive advantage,

    (no suggestion is made that in these circumstances the Union Official and/or their employer were complicit in any such action);

    (b) as a matter of practicality, the negotiations were prolonged in part by the limited availability of the Union Official to attend bargaining meetings because of their contractual employment obligations with their employer and, in the meantime, our client (and its employees) continued to suffer costly industrial action; and

(c) by being forced to negotiate with an employee of a competitor our client was discouraged from disclosing confidential/commercially sensitive information that may have assisted the parties to progress negotiations more efficiently and quickly.

Lack of recourse under the FW Act to address conflict of interest

2. Our client raised its concerns regarding the actual or perceived conflict of interest outlined above with the Union to no avail. There was then only limited (and, in the circumstances, ineffective) recourse under the FW Act to address that conflict.

3. In particular, there were no grounds under the FW Act on which the Company could seek the removal of the Union Official as lead negotiator on the basis of the perceived or actual conflict of interest. The Union was a default bargaining representative under section 176 of the FW Act and it was open to the Union to nominate the Official as the person who would lead negotiations with the Company.

4. The only potential basis to seek the removal of the Union Official as the Union's lead negotiator was if their involvement resulted in a contravention of the good faith bargaining requirements under section 228 of the FW Act (e.g. by failing to attend and participate in meetings at reasonable times and/or engaging in capricious/unfair conduct that undermines freedom of association or collective bargaining). The good faith bargaining principles do not directly address the conflict of interest issue.

5. Ultimately, it does not enhance productivity to have to wait for contraventions of the good faith bargaining requirements before an employer can remedy the perceived or actual conflict of interest, if at all.

Inequality of position in relation to employer and employee bargaining representatives participating in the FW Act's bargaining framework

6. The *Fair Work Regulations 2009* do recognise the potential for issues of conflict to arise in relation to the identity of bargaining representatives from the perspective of employees. In particular, Regulation 2.06 provides that:

> *'A bargaining representative of an employee must be…free from control by the employee's employer or another bargaining representative…and…free from improper influence from the employee's employer or another bargaining representative.'*

7. However, there is no equivalent provision guarding against conflicts that might be of concern to employers.

Potential change to bargaining framework is consistent with the objects of the FW Act

8. Therefore, a provision that recognises the (potential and realised) issue of conflicts of interest arising in relation to the identity of bargaining representatives (or individuals nominated to act on behalf of bargaining representatives) from the perspective of employers would arguably do no more than balance existing protections for the parties to proposed enterprise agreements and facilitate 'best practice' or productive enterprise bargaining. As foreshadowed above, in order to be effective, such a provision would need to extend beyond bargaining representatives to also address potential issues regarding the nomination of individuals to act on behalf of employee organisation bargaining representatives.

9. The proposed amendment to the FW Act and/or FW Regulations, which is contemplated above, would provide employers with a way to address concerns about an actual or

perceived conflict of interest in relation to a bargaining representative and would be consistent with the objectives of the FW Act as set out in section 171, as well as section 3, of the FW Act.

Minter Ellison
30 March 2015