

Workplace Relations Framework Inquiry

Supplementary Submission- Teys Australia Pty Ltd

EXECUTIVE SUMMARY

This supplementary submission is compiled and submitted on behalf of Teys Australia in response to the PC's draft report issued on 4 August 2015 and focuses on matters which are of major significance to our business units, namely-

- ***Minimum Employment Conditions and Awards***
- ***Penalty Rates***
- ***Agreements***
- ***Right of Entry***
- ***Regulation of Industrial Organisations***

In summary we submit that the PC should give careful consideration to amending its draft report as follows-

- ***We generally and strongly support the submissions of the BCA***
- ***Reduce Awards to industry sectors based aligned with ANZSIC (plus a small business award) and to include bare minimum non- monetary standards with generic minimum wage rates to be specified in a minimum wage order, not Awards***
- ***Minimum penalty rates for work during "unsociable hours" be standardised as a \$ per unsociable hour worked and based on a relevant % of Australian AWOTE. "Unsociable hours" to be determined by FWC in each sector Award.***
- ***Must be optimal wide choice of statutory agreement options with employer able to exercise initial election of which should apply, and Employer associations can make industry specific template agreements as per Business SA and SDA with NDT against sector Award.***
- ***There can be multi- employer/ site agreements but no coercion for an employer who wants variances or its own agreement.***
- ***Must have a stat individual agreement scheme but NDT against any relevant collective agreement – if no collective exists test is against sector Award.***
- ***Right of entry of permit holders must be better controlled.***
- ***Industrial organisations must be regulated by ACCC and officials having the same obligations as company directors***

Any PC, media, Government or other inquiries regarding this submission may be directed to-

Mr Tom Maguire

- ***General Manager- Corporate Services, Teys Australia Pty Ltd***

SUPPLEMENTARY SUBMISSION ON BEHALF OF TEYS AUSTRALIA

1. INTRODUCTION

This supplementary submission is compiled and submitted on behalf of Tey Australia in response to the PC's draft report issued on 4 August 2015. That draft report is comprehensive, making 45 recommendations, seeking further information on 18 other matters and the Commission has professionally captured the many issues which arise from such a thorough examination of the Australian IR system.

Perhaps inevitably, we are not enamored by all the draft recommendations, feeling that generally, they do not embrace anywhere near the amount of fundamental reform which is required to preserve and enhance Australia's economic future. However, that is not to say that the draft recommendations fail to suggest any sensible improvements to the system.

We don't seek to make further commentary and suggestions on all of the matters canvassed in the draft report- many are relative to issues which arise infrequently and we would prefer to focus our attention on matters which are of major significance to our business units, namely-

- *Minimum Employment Conditions and Awards*
- *Penalty Rates*
- *Agreements*
- *Right of Entry*
- *Regulation of Industrial Organisations*

and in a general sense we strongly support the position of the Business Council of Australia (BCA)¹ in this regard. In doing so, we note that Australia's largest meat processor (JBS) is a member of the BCA. Consequently, it can be safely said that employers who hold the lion's share of processing capacity and employ the most people within the Australian meat industry, are essentially as one, in terms of what is pressed as being the appropriate necessary reform to the system.

We respectfully request that the PC gives careful consideration to our comments and recommendations in compiling its final report to Government.

2. MINIMUM EMPLOYMENT CONDITIONS

This is arguably where most reform of the system is needed as it is essential, in our view, to ensure the floor boards of minimum employment standards are properly and consistently in place.

2.1 Awards

PC Draft report comment- *Awards are the regulations that describe various floors on wages and conditions for a wide variety of skill levels across multiple industries. They are unique to Australia (and NZ until 1991) and sometimes this is seen as an indication they are unnecessary. They remain relatively inflexible and are often ambiguous imposing costs on employers and employees. However few stakeholders recommended their elimination.*

In our substantive submissions, we advocated the transitional removal of Awards, whilst expanding the provisions of the NES as the safety net springboard for bargaining. We accept however, as stated in the extract above, that is not a position favoured by most stakeholders. In its substantive submission the BCA asserts-

The Australian labour market is moving away from narrowly-based occupational roles. Enterprises need workers with a broad set of skills who can adapt to changing environments and not be siloed into narrow occupational categories. Having 122 Modern Awards, including occupationally specific ones, works against this. It creates rigidities across the labour market and can effectively dictate to an enterprise how it manages its workforce.

¹http://www.pc.gov.au/_data/assets/pdf_file/0006/188304/sub0173-workplace-relations.pdf

The BCA's assertions resonate in our view and there seems to us to be no justifiable reason why Awards should not be set and designed to cover industries as defined in the ANZIC classifications as administered by the ABS², as well as a generic "small business" Award. This is due to the ANZSIC being well designed, tested and developed over many years to -

identify groupings of businesses which carry out similar economic activities. Subject to certain criteria being met, each such grouping defines an industry and the similar economic activities which characterise the businesses concerned are referred to as activities primary to that industry. When the classification is completed, any individual business can then be assigned an appropriate industry category on the basis of its predominant activities, ensuring consistency of statistical comparison.

However, to break the nexus from the industrial past, which differs in approach from the ANZIC concept of defining an "industry", we advocate designating these new Awards as "sector" as opposed to "industry" Awards. There are compelling reasons for such an approach including , but not necessarily limited to-

- *it aligns with the standard statistical and economic treatment of businesses in Australia , and*
- *it significantly reduces ambiguity as to what Award/s cover certain work, and*
- *it removes any potential or actual duplication of Award coverage of all businesses, and*
- *creates consistency of minimum safety net conditions of employment within a business, and*
- *it significantly reduces the workload of the FWC in reviewing Awards, and*
- *it removes occupational based Awards which are anathema to a system focused on the primacy of enterprise based outcomes and inhibits pattern bargaining, and*
- *it assists in creating a consistent and true sector wide benchmark for assessment of the NDT*

whilst allowing industrial organizations the capacity and flexibility to reach industry (as the term has applied traditionally and as opposed to a sector) wide and more comprehensive arrangements to apply to those employers who want to access them (eg such as the much publicised Business SA / SDA template retail agreement³ and the desired global arrangements seemingly preferred by the members of Clubs Australia⁴)

2.2 Minimum Rates of Pay

We see the merit in the PC's draft recommendation that the FWC be split into two divisions with the minimum standards division charged with the responsibility and authority to periodically review and set minimum rates of pay. Furthermore, we strongly support the contentions of the BCA , that minimum rates of pay should be generically rather than Award set encapsulated as follows -

Minimum wages and terms and conditions should be contained in separate instruments. Wages should sit in the Minimum Wage Order, and terms and conditions in the awards or the National Employment Standards. Awards should be confined to specifying ordinary hours of work for different industries and premium rates should be economy-wide minimums that are set by the Fair Work.

2.3 Penalty Rates

PC Draft report comment- *Penalty rates are strongly dependent on when work is undertaken and the total time spent working. The three principal time related wage rates are*

- *shift loadings and week end penalty rates*
- *overtime rates*
- *payments for work on Public Holidays*

²<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/BB548CA0D13E46F6CA25711F00146D72?opendocument>

³<http://business-sa.com/business-advocacy/advocacy/all-news/article/sa-retailers-get-a-break-on-penalty-rates>

⁴http://www.pc.gov.au/__data/assets/pdf_file/0009/187641/sub0060-workplace-relations.pdf

If it is the case that there should be minimum standards of premiums for work performed during non-standard or (to use a more contemporary term “unsociable” hours) , then presumably there is a cogent argument that the level of additional compensation should be-

- *Equitable for all those who work such hours, and*
- *Be payable only when work is performed during such unsociable hours*

and the current mechanism of FWC setting penalty rates via Awards achieves neither of these objectives.

In our view the current controversies which rage around the setting of penalty rates may be able to be relatively easily resolved as follows.

The minimum levels of penalty rates to apply in all Awards should be based around a relative % of the prevailing Australian Average Weekly Ordinary Time Earnings (AWOTE) as published from time to time by the ABS, expressed as a \$ figure per hour as an additional premium to be paid only when work is performed during additional or unsociable hours.

The advantages of such a minimum penalty rates regime are -

- *It is equitable , and*
- *It has some tangible link , not being some arbitral historical % figure, and*
- *Penalty premiums apply only when work is performed during non-standard hours, and*
- *Increases the \$ value of penalty rates to employees as the AWOTE rises, and*
- *it will encourage employers to utilise the services of lower paid employees during non-standard hours, and*
- *lower paid employees receive more pay as a % of their base rate when working non-standard hours than do their higher paid counterparts, and*
- *Employers know with certainty in advance what each unit of labour will cost during non-standard hours, and*
- *It does not distort or compound penalty rates by applying % premiums as the current system sometimes does.*

Whilst accepting any valid argument of a need for further analysis testing and refinement, by way of example only, the following might represent an appropriate new minimum penalty rates regime in say a Manufacturing Sector Award based around the AWOTE as at May 2015 which was \$1,484.50 per week or \$39.06 per hr -

<i>Penalty Rate Category</i>	<i>Time when penalty rate paid</i>	<i>% of AWOTE \$ per hr (currently \$39.06 per hr)</i>	<i>Additional \$ per hr penalty rate</i>
Overtime	First three hours on any day or shift	30%	\$11.72 per hr
	After first three hours on any day or shift	50%	\$19.53 per hr

	On week ends	50%	\$19.53 per hr
Afternoon and Night work as ordinary hours	From 6 pm to midnight Monday to Friday	10%	\$3.91 per hr
	From midnight to 6 am Monday to Friday	0%	\$7.80 per hr
Weekend work as ordinary hours	Midnight Friday to midnight Sat	30%	\$11.72 per hr
	Midnight Sat to midnight Sat	50%	\$19.53 per hr
Work on Public Holidays	On NYD, Australia Day, Anzac Day, Good Friday, Easter Sat, Easter Sunday, Easter Monday, Xmas Day and Boxing Day	50%	\$19.53 per hr
	On other Public Holidays	30%	\$11.72 per hr

(Notes-

1. Applies only to Award covered employees unless the Award provides for an exemption (eg where an annual salary arrangement paid under Award provisions is clearly designed to compensate an employee for non-standard hours and / or overtime).

2. In any event does not apply to employees receiving the high income threshold or above, even if otherwise covered by an Award

3. FWC's role in setting the minimum penalty rate regime will be limited to -

- specifying in all Awards the generic % factors to apply to the AWOTE rate, and
- determining when penalty rates are payable in each sector Award (eg it may be that the 6am/ 6pm/midnight trigger points may be different in the various Awards, and
- determining if other formulae to create discounted rates for juniors/ trainees and apprentices are justified .

4. There is no compounding of minimum penalty rates. Employees receive only the highest \$ per hour figure relative to the particular non-standard hour worked)

We support the position of the BCA in respect to preferred hours clauses, and see no reason why such arrangements could not be satisfactorily accommodated via an IFA approach, with an exemption from the BOOT or NDT in circumstances where the employee clearly identifies and attests that it is they who have sought the preferred hours arrangement.

3. AGREEMENTS AND AGREEMENT MAKING

PC Draft report comment-

Following almost a century of centralised conciliation and arbitration, Australia introduced enterprise level bargaining in 1993. It involves employees working together to reach an agreement with their employer over the terms and conditions of their employment.

Enterprise bargaining provides some flexibility to take into account the special circumstances of any one firm. This contrasts with collective bargaining across multiple industries and industries which did not have a focus on the individual enterprise.

The Fair Work Act has detailed rules around enterprise bargaining. While the bulk of agreements appear to be formed with no

difficulty and with benefits to all parties, there are several flaws in the current arrangements.

Whilst the general trust of employer body submissions to the PC inquiry supports continuation of bargaining at the enterprise level, after twenty odd years, there are many employers who now regard the ritual of enterprise bargaining as little more than an unproductive chore which comes around all too frequently.

And when one examines the ludicrous chain of events experienced by Teys Australia over the last two years, whereby it-

- *has been forced to abandon a ground breaking 2013 EBA containing an innovative profit share arrangement for employees, in favour of*
- *a costly reversion to an archaic, unproductive 2010 EBA which reduces employees earnings in a range of 10% to 20%, despite*
- *judgments from the Federal Court which lament the outcomes, whilst reiterating and reinforcing that if the FWC is in error, it is nonetheless entitled to be so, simply and solely because*
- *some of Teys employees were, at the precise time the 2013 agreement was made via secret ballot, temporarily assigned to a training program*

and it is not difficult to appreciate why there are a significant and growing number of employers who are most reluctant to persevere within a system which produces such bizarre unacceptable outcomes.

Indeed, employers in the hospitality space, as represented by Clubs Australia whose submission⁵ rather pointedly asserts-

At section 3(f) of the Objects of the Act it states:

"achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations".

*CAI is of the view that whilst enterprise bargaining has a role to play for some businesses and employees, **that it is not an appropriate, necessary or accessible option for the majority in Australia**, being the small-medium business enterprise and accordingly, CAI queries the relevance of the section 3(f) objective.*

are clearly unconvinced of the benefits. Nor are those operating in the-

- *aged care sector⁶ who are unable to accurately predict the extent of prospective Government funding they will receive when they are negotiating a three or four year EBA, nor*
- *security services⁷ arena who assert they compete purely on the basis of labour cost in circumstances where competitors operate on EBA's long since passed its nominal expiry date which do not have any obligation to pass an enduring BOOT.*

So, if one takes all the various submissions into account, it is respectfully perhaps a little surprising that the Commission's draft report contains the final sentence highlighted in the box above.

The only realistic way to overcome the current difficulties with the EBA system (*which we say the draft report significantly understates*), is to allow employers and employees the widest possible range of statutory agreement options, such as -

- *individual agreements, and*
- *specified group agreements either within a work site or across an employer's sites should it operate more than one, and*
- *multi-site agreements, and*

⁵http://www.pc.gov.au/__data/assets/pdf_file/0009/187641/sub0060-workplace-relations.pdf

⁶http://www.pc.gov.au/__data/assets/pdf_file/0007/187540/sub0042-workplace-relations.pdf

⁷http://www.pc.gov.au/__data/assets/pdf_file/0005/187619/sub0050-workplace-relations.pdf

- *template multi- employer agreements developed, negotiated and registered by employer associations with relevant Unions, and*
- *multi- employer agreements, and*
- *enterprise specific agreements, and*
- *greenfields agreements, and*
- *merger/takeover agreements*

and realistically it needs to be the employer who, at least initially, makes the election as to which form of instrument it wishes to pursue, but with capacity for employees to seek an alternative option, should they collectively wish.

However, if the capacity to access the range of options detailed above is to be properly and fully considered by the PC in finalising its final report, it reasonably compels us to make comment on two other matters upon which the PC has sought specific comment. In doing so we stress, that we are obviously only able to make informed comment on our behalf and having regard to our experiences- these may well be very different to those in other industries such as the construction sector.

3.1 **NDT**

PC Information Request -

What should be the basis for the revised no-disadvantage test, including whether, and to what extent past forms of the NDT provide a suitable model and would be workable within the current legislative framework?

If our suggested setting of minimum standards via the NES and sector Awards is adopted, the NDT will be very easily assessed on a line by line approach. However, in respect to individual statutory agreements this may be a little more complex because this would be an assessment against any collective agreement in place at the relevant enterprise.

3.2 **Pattern Bargaining**

PC Information Request -

The PC seeks feed back on whether there is a mechanism that would only restrain pattern bargaining -

- *where it is imposed through excessive leverage or is likely to be uncompetitive*
- *while allowing it in circumstances where it is conducive to low cost that parties genuinely consent to*

This is arguably the most vexed issue when one examines or considers reform in the IR space and understandably creates a significant challenge for the PC.

On the one hand, as highlighted above, there are clearly employers such as those represented by Clubs Australia who seemingly would prefer to collectively operate to a set of predetermined, standardised conditions of employment within licensed clubs. On the other, there are numerous employer bodies who decry anything vaguely resembling pattern bargaining as an anti-competitive scourge which must be purged.

Pattern bargaining is currently defined in Section 412 of the FWA and Section 422 allows a Court to injunct industrial action if a bargaining representative is engaging in pattern bargaining. It seems that in some industry sectors at least, these provisions have been impotent in preventing an unwelcome spread of pattern bargaining.

The difficulty it seems lies not in preventing pattern bargaining altogether, because indeed some employers, employer bodies and Unions actually embrace it, but in any coercion of employers to submit to it. It is perhaps trite to note that employers too can engage in pattern bargaining, however this does not seem to be of particular concern to anyone, if one considers all the submissions to the PC.

In circumstances where we recommend that there should be the widest possible range of agreement options and initially at least, the election of which is best for a business should be an employer prerogative, it is impossible for us to reasonably recommend that employees, *(individually, collectively or as represented)* should be prevented or limited from legally pursuing certain employment conditions which may be consistent with others, already established on an enterprise, industry, geographic, occupational or indeed any other basis.

As we indicated in our substantive submission to the PC, any employer should be permitted to initiate or engage in any form of legitimate bargaining but should not be coerced into any form of pattern bargaining arrangements, against its will.

Beyond the obvious remedy when faced with such challenges of being master of ones own destiny via its own resistance, the PC might consider recommending that in circumstances where the ACC via inquiry and/or complaint considers that unproductive and/or anti-competitive pattern bargaining is about to occur or is actually occurring, it may have standing to seek cease and desist orders via the FWC.

However, without being disparaging of any particular employers or groups of them, the stark reality is that the suffocating tentacles of any damaging pattern bargaining campaign will only be relaxed or released when the employers being subjected to it, collectively resist it.

4. RIGHT OF ENTRY

PC Draft report comment-

The provisions providing right of entry by Union officials to work sites are broadly sound, although at times both sides play games with each other.

With the greatest of respect, the comment highlighted above is one borne of naivety and/or ignorance of the realities of having to deal with the inconvenience, disruption and angst, caused by frequent entry requests.

We strongly urge the Commission to alter its draft report to reflect the following-

For a Union to obtain and maintain right of entry for any of its permit holders, into a particular work site for the purposes of discussions with members and/or employees it is eligible to cover, it will need to -

- ***write to the the relevant employer seeking discussions and agreement on all matters re those arrangements including frequency of visits, identification of officials who can enter, times of entry, location of discussions with employees, etc, and***
- ***following those discussions, gain approval from FWC as per the above agreed arrangements or in absence of agreement on terms and conditions determined by FWC as being reasonable in the circumstances of the individual site, and***
- ***any approval granted by FWC may be rescinded at any time due to established abuse or misapplication of it and must be reviewed before each biennial anniversary of it being granted, unless the relevant employer indicates to FWC that such a review will not be necessary.***

5. REGULATION OF INDUSTRIAL ORGANISATIONS

More recent revelations emerging generally *(such as in the HSU and Boral cases)* and via the Royal Commission into Trade Union governance surely must strengthen the argument to an almost compelling level for-

- ***industrial organisations to be regulated by new legislation to be administered by the ACCC, even if it largely mirrors the current provisions, and***
- ***for elected officials (and/or employees) of industrial organisations to be subject to the same fiduciary, compliance and other legal obligations as are company directors.***