

Submission to the Workplace Relations Enquiry by the Productivity Commission
Comments on Aspects of Agreement Making in the Western Australian Construction
Industry under the Fair Work Act 2009 and Related Regulation

1.0 Background and Observations

- 1.1 This paper is aimed primarily at commenting on the Productivity's Commission Issues Paper 3: Workplace Relations Framework: The Bargaining Frame Work. It extends into other areas in discussing project construction labour management.
- 1.2 The framework is the framework, and the processes ability to stifle or encourage productivity improvement is only limited by the imagination of the user. To that extent this paper strays into the manner in which the framework is being applied to the detriment of opportunities for productivity improvement.
- 1.3 This paper does not seek to propose solutions to perceived productivity inhibitors located within the framework. Rather is seeks to identify some of the results of application of the framework as an initial step.
- 1.4 These comments are based on the proposition that the level of enterprise workplace productivity is dependent on the manner in which labour, material and equipment are collectively managed to produce the desired outcome. Capital is considered to be an element of material.
- 1.5 The measure of productivity used in this paper is the cost of producing a unit of work within a specified time scale, including lost revenue and opportunity costs of not meeting targets.
- 1.6 This paper also adopts the view that productive work needs to be measured by direct and indirect labour costs incurred in the production of a unit of work by an employee and not the level of earnings of that employee.
- 1.7 This paper identifies where the product of collective bargaining, in the form of industrial instruments, hinders an enterprise in its endeavours to pursue, or even preserve, more productive methods of working.
- 1.8 Most comments relate to the resource, resource construction, and resource maintenance and facility management services industries in Australia with a bias to the Western Australian experience.
- 1.9 The writer is a person with 49 years experience in the provision of industrial relations, employee relations and human resources advice to industry as an employee in mining and construction industries and with employer organisations. Currently the writer is a principal consultant with a consultancy providing strategic and operational industrial relations, employee relations, human resources and business migration advice to primarily the resources and related industries. He is a founder of that consultancy that was established in its present form in 1996 and remains the largest of its type in Western Australia.

- 1.10 Finally it is extremely important to remember that the clear majority of employers are, and the clear majority of employees are employed by, small business. Their ability to cost effectively participate meaningfully in the Bargaining Framework simply doesn't exist due to process complexity and the overly legalistic content of the relevant provisions of the *Fair Work Act 2009* (Cth) and often the level of sophistication of head contractors on labour management.

2.0 Construction Project Industrial Relations Planning

- 2.1 The current philosophy in planning the industrial relations strategy for a large project is to minimise potential construction delays so that the project owner's product can be sold in the market as soon as possible. This is quite logical where large capital debt needs to be serviced as quickly as possible in order to maximise a return to the project owner. The actual direct cost of labour is largely ignored.
- 2.2 The major mining and oil and gas projects within Western Australia have, for some decades, been built on the strategy that common terms and conditions contained in "project" enterprises agreements across a construction site minimises the potential for industrial disputation. This approach is encouraged by project owners generally through the negotiation activities of a willing and major construction contractor whose reward is obtained through the award or potential award of a significant contract on the project. The project owner exercises varying degrees of direct or indirect influence through its contract conditions and approvals.
- 2.3 Criticism that this approach is de facto "pattern bargaining" is avoided through carefully worded invitation to tender documents and contract documents. This degree of control is particularly evident by the client specification of the basis of labour costs for tendering, and the manner in which the contractor is to manage employment related issues on sites.
- 2.4 The result is the removal of any encouragement to negotiate an agreement outside of the site standard. Innovation in bargaining outcomes and productivity is ignored in favour of "one size fits all". This type of approach is supported by project owners, head contractors and unions.
- 2.5 Project owners of smaller projects generally do not attempt to control the content and format of the contractors' employment instruments. Rather they rely on the contractor's ability to manage its employment relationships for the benefit of the project with the ability to impose penalties if that does not occur. This type of environment encourages labour innovation and productivity.

3.0 Construction Industrial Relations Bargaining

- 3.1 Project specific Greenfield enterprise agreements have been a popular method of establishing and maintaining common site employment standards to the benefit of unions who don't want members with different employers on the same site receiving different terms and conditions. It also relieves the contractor of having to manage disputes over comparative terms and conditions. Once the first project agreement is in place, the following contractors virtually undertake a perfunctory negotiation. It suits the project owner keen on removing potential risks to schedule.

- 3.2 The other like alternative is collective agreements made with employees but yielding the same project specific content. Given the overly detailed process required to establish these agreements, the Greenfield agreement is more popular and relieves the contractor from actually having to negotiate with its employees and create or further a working relationship.
- 3.3 The negotiation of project industrial agreements based on the needs and culture of the enterprise, the needs of the employees and reward for productivity is negligible. Whilst there is a desire to do so amongst some contractors, many project owners discourage the practice through the tender process. The writer does not know of a union that encourages the practice.
- 3.4 In recent years, the time and cost spent in the negotiation process has encouraged some contractors to negotiate “base” agreements with their employees that contain “jump up” provisions. These agreements contain the minimum terms and conditions that the employer believes it could employ local labour at its base location. The “jump up” provision allows the employer to set higher terms and conditions on which it would intend to engage employees for a specific project. These higher terms and conditions generally yield total earnings of a like level to those yielded by site specific agreements. This allows the employer to set terms and conditions that are competitive within the local employment environment whilst still retaining its own remuneration and benefits structure. Most importantly it avoids the cost of negotiating a succession of site specific agreements.
- 3.5 There is some concern that subsection 10 (1) (b) of the Advance Release copy of the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 could be applied by the regulator to disallow the creation of “jump up” provisions. There is further concern that project owners of head contractors could use this provision for similar purposes. Such an application is seen as contrary to the interests of labour productivity and agreement making under the *Fair Work Act 2009* (Cth).
- 3.6 Some project owners currently adopt the attitude that if a contractor specific agreement yields, on balance, similar earnings to the prevalent site terms and conditions then it is “acceptable” for their project. It enables the contractor to preserve its workplace environment that should have been a factor in contractor selection.
- 3.7 Other project owners take a hard line that makes standard project conditions a precondition of contract award and site access. The contractor either enters into the Greenfields project agreement or uses a “jump up provision” that replicates the terms and conditions of the Greenfields project agreement, including the wording. Despite the apparent contravention of the freedom of association and agreement making provisions of the *Fair Work Act 2009* (Cth) the regulators appear to be silent on the issue. There is no interest on the project owner’s part in labour productivity influenced by work organisation and reward for effort.
- 3.8 Individual Flexibility Agreements (IFAs) have been held out by the regulators as an opportunity for an employer to undertake individual bargaining with its employee. This is nonsense. The content of the IFA is restricted and one party has the unilateral right to terminate the agreement whilst preserving the contract of employment on which the IFA is based. Even the now defunct Australian Workplace Agreements were a sham in many businesses and

enterprises where there was no individual negotiations that could result in different terms and conditions.

4.0 Containing Labour Costs

- 4.1 The Pilbara resource projects have probably operated in an industrial environment where project owners complain about high labour costs and yet encourage the establishment and maintenance of those very same costs. The writer does not know of any recent period where wages were generally an issue in negotiations. Project owners are quick to blame Australian employment legislation for the high cost of labour. That is rubbish. It is the unwillingness to pre plan and support robust negotiation that has led to the relatively high level of wages and conditions.
- 4.2 A contractor will bargain as hard as it has to obtain or maintain a contract. Where there is project owner encouragement for project specific agreements there is no encouragement to contain or develop more productive ways of rewarding employees.
- 4.3 Project owners traditionally have refused to contribute to the training and retention of employees on the basis they are not costs specifically associated with the project. The result is increased cost and lower productivity. A contractor will generally not train employees unless the training overhead can be reimbursed. The result is the encouragement of the termination of core crew at the end of a project; a dwindling supply of suitably qualified and experienced labour; and the lack of continuity of employment on which productivity improvement is built. The standard of supervision has also generally declined for like reasons. Opportunities for productivity improvement are lost.
- 4.4 For years base labour costs in the Pilbara have escalated at 5% per year. That is encouraged by project owners seeking to mitigate construction schedule delays. It is absolutely amazing that high labour costs are blamed for cost blowouts when labour costs are so well known at the time budgets are put together. Some pseudo productivity measures have been introduced that are really only rewards for attending work as per the employee's contract of employment. Meaningful reward for effort is discouraged.
- 4.5 Project owners encourage high wages and escalation in their attempt to minimise potential disruption by slavishly following the norms.

5.0 Managing Field Construction Labour

- 5.1 This "common approach" to employment regulation is reinforced by the use of project industrial relations advisers whose role is to coordinate site wide approaches to industrial issues and provide advice to contractors.
- 5.2 Whilst the provision of contractor assistance by these advisors is valuable, they generally are directly or indirectly heavily influenced by client attitudes to various issues and favour common solutions to common issues across the site. There is seldom an appreciation or an accommodation of an individual contractor's workplace environment in the provision of this advice. The result can be twofold. For a contractor who just isn't concerned with its relationship with its employees, it can avoid managing them and making decisions,

preferring to relay on the advice of the adviser. Other contractors just avoid having advisors involved in their issues until it is too late.

- 5.3 Success of the advisor service is based on the contractor's perception of its independence from the client and its understanding of the contractor's internal work environment.

6.0 Summary

- 6.1 Productivity improvement on project construction is driven by the contractor's internal working environment and its encouragement of innovation by meaningful reward.
- 6.2 The explicit or implicit imposition of standard terms and conditions of employment and workplace issue management results in higher than necessary labour costs and the removal of incentives to improve productivity.