

PRODUCTIVITY COMMISSION WORKPLACE RELATIONS REPORT: BLUESCOPE'S RESPONSE

Following an informal meeting with representatives of the Productivity Commission on 28 August 2015, BlueScope is pleased to submit a response to the Productivity Commission's draft report on the reform of the Workplace Relations system. Comments in this response address specific issues where BlueScope believes more fundamental reforms are necessary to reflect the need for greater change in workplace culture and productivity.

As a general observation, the draft report indicates an approach which is constrained by the established models that have governed the adversarial legacies of the past.

If this observation is correct, it would be a missed opportunity for a fresh approach and generational change.

More specific comments are noted below.

1. Workplace Culture

Although the draft report introduces a number of concepts for discussion (such as the Enterprise Contract), there is insufficient emphasis on the core importance of facilitating an aligned, productive culture in the workplace as a key policy imperative.

BlueScope's submission highlighted the significant change in the nature of the Australian workforce and the need to facilitate a shift away from the historical legacy of traditionally adversarial workplace bargaining. Although the concept of an alternative approach has been loosely implied in a number of areas of the Product Commission's report, the principle needs to be firmly established as an unambiguous policy foundation. This ought to provide a framework for discussion about reforms that should embody the interests of economic prosperity into the future.

The debate and assessment of proposals for change would be improved if the importance of an aligned, productive workplace culture is articulated in the context of the need for micro economic reform.

2. Enterprise Contracts

The Productivity Commission's invitation to discuss the proposal of an Enterprise Contract is welcomed.

The concept of an Enterprise Contract is one of the few proposals that involves a different approach to traditional collective forms of employment arrangements.

However, the potential for an Enterprise Contract to serve as an alternative employment stream has not been noted in the Productivity Commission's proposal. If the description and purpose remains as described in the opening commentary in the relevant section of the draft report, it is an idea that will soon be forgotten.

The idea of an Enterprise Contract should not be considered in the context of a niche group of small to medium sized businesses seeking some alternative to common law contracts. There appears to be an assumption that businesses which have established cohesive, aligned, individual arrangements under common law are seeking (or would benefit from) the uncertainties of a statutory regime that can change as often as political circumstances change. In fact, individual arrangements are suited to the

personalised owner-operator model common in small, and many medium sized enterprises. There is no "policy gap" here, as is suggested in the draft report. In fact, the policy gap exists at the other end of the enterprise spectrum.

The Enterprise Contract should be considered to be a mainstream alternative for medium to large companies that wish to transition out of existing collective statutory arrangements governed under the existing system of adversarial bargaining. A proposal more consistent with this purpose was discussed in BlueScope's original submission to the Productivity Commission under 5.1 "Direct Engagement Stream".

Aside from the "niche" purpose suggested by the Productivity Commission, there are two other important differences with the BlueScope proposal.

The Productivity Commission's proposal would see an Enterprise Contract being governed under the auspices of the Fair Work Ombudsman. The BlueScope proposal involved the exclusion of the statutory system, to enable common law to govern the alternative stream (similar to the existing governance over the large majority of Australia's workforce which is covered by individual employment contracts). If there is any prospect of the Enterprise Contract having a more significant role in any reform to the workplace relations system, the risks and benefits of the two different approaches to the governance of the proposed Enterprise Contract is worthy of further discussion.

The second difference is that the BlueScope proposal is intended to operate across the whole of a work team, by majority support. The Productivity Commission's approach could see Enterprise Contracts operating concurrently with some members of the work team, while others in the same work team maybe on standard collective arrangements, with union and FWC involvement. This prospect raises a number of practical issues, and other issues that go to the question of a cohesive work place culture.

In the form proposed by the Productivity Commission, the Enterprise Contract has the potential to be used as a means to divide workforce allegiances with concurrent and competing workplace agreements within the same workforce teams and classifications. Australian Workplace Agreements were occasionally also used in this way, and were eventually brushed aside through a change of government and have been maligned (perhaps unfairly) as an ideological "fifth column" ever since. Consequently, any alternative form of statutory agreement that has a similar character, is likely to suffer the same transient fate.

For an existing workforce that wishes to be regulated under collective arrangements, the exclusive operation of an Enterprise Contract with the support of the majority serves to align workplace culture and purpose, not fragment it. The issues raised above warrant further discussion if a more substantive proposal is to be developed.

3. Greenfields Agreements

In a greenfields situation, a business should have a choice in regard to the form of collective agreement that would most suit the objectives of their investment.

The potential for an Enterprise Contract (in the form suggested in this response to the Productivity Commission's draft report) to be an alternative collective instrument for a greenfields investment is highly attractive. Subject to the tests of fairness and no disadvantage, a business would have the opportunity to create a more aligned, productive and engaged workforce culture through an Enterprise Contract than might otherwise be possible under the Enterprise Agreement bargaining process.

The Enterprise Contract should be considered to be an alternative means of greenfields agreement, not as appears to be suggested in the draft report, an option if all else fails. The figure 15.5 “Greenfields agreement making process” in the draft report reinforces the general observation made at the beginning of this BlueScope response. Why, when one would have expected the Productivity Commission to suggest incentives for new investment, would the opposite appear to be the case? A process that requires new investors to include in their business case a gauntlet of forced union collective bargaining to be exhausted is a disincentive. It institutionalises another missed opportunity to create directly aligned workplace culture to support the productive prospects of new instruments.

4. Transfer of Business

Notwithstanding the level of concern expressed about the present transfer of business provisions, there is an absence of comfort in the draft report that these concerns will be addressed. Although current provisions of the Fair Work Act enable applications to be made to the Fair Work Commission to discontinue old arrangements, such discretion is not helpful when constructing a business case for an acquisition.

In addition to the issue raised in the original BlueScope submission regarding the acquisition of assets (as distinct from the business entity) the following is proposed. As a minimum, there ought to be a compulsion on the FWC to relieve the acquiring company of the obligation to transfer employment terms and conditions if the assets acquired are clearly distressed and the prospect of unemployment in the alternative situation is real.

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