

# Submission DR267 - JW Shannon Engineers - Workplace Relations Framework - Public inquiry

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**JW Shannon Engineers**

This paper responds to the Productivity Commission draft report of August 2015,. It comments on matters included in the report and recommends that some changes and additional considerations be included in the final Productivity Commission report .

## Contents

1. Overview .....	3
2. Productivity Commission Draft Report (Full text)	
3. Section 3. Institutions - Incident Response. ....	3
4. Section 17. The enterprise Contract. ....	4
5. Section 13 Penalty rates. ....	5
6. Section 20, Sham contracting. ....	6
7. Section 24. Interactions between competition policy and the workplace relations framework.....	6

## **1. Overview**

The PC invitation for submissions produced a large and comprehensive response. Many of the individual contributions were exceedingly thorough. They must have been produced at considerable cost. We recommend this be acknowledged.

We support the PC decision to endorse the present IR/WR arrangements in broad terms whilst recommending minor adjustments. We do this because the final outcome must receive electoral approval to achieve any lasting benefit. The political action is not within PC control, however the whole enquiry will be a waste of time and taxpayer funds unless lasting benefits can be achieved. To this end we hope that negotiating the maximum bipartisan support will be pressed at all levels and will succeed.

We acknowledge and applaud the previous actions by the FWC to simplify, demystify and reduce WR/IR complexity. We support without comment the "Draft recommendations" included in this section.

## **2. Productivity Commission Draft Report (Full text)**

Two important matters have not been addressed and we recommend their addition to the PC considerations. They come within the scope of;

"Incident response" in section 3 Institutions.  
and  
"Worker participation" in section 17. The enterprise contract.

There is a factor common to both. It is competition.

It seems that competition in the PC draft is treated as an unnamed force for good, a benign unseen presence in the WR/IR system. In reality it is an oppressive threat for all those in productive endeavour. Control of unbridled competition is almost the entire purpose of our industrial laws and system. Competition is disliked by unions, shareholders and managers alike. It is the level playing field everyone wishes to tilt in their favour. It is the root cause of most unfair treatment of workers, the losses of shareholders and as a precursor of management villainy. We live a dream if we pretend it is always welcome as good for all.

Because competition is fundamental to human nature and is necessary for the progress of society, we have it and we need it.

## **3. Section 3. Institutions - Incident Response.**

On page 150 of this section the PC recommends subdivision of the FWC activities into two defined responsibilities. We are comfortable with this recommendation and refer to the named Tribunal section below.

Our concern is that there is no proposal for dealing with the FWC failure to resolve many WR/IR problems expeditiously. This is an explicit problem identified in several of the submissions to the PC. It is implicit in others.

Submission 134 submitted by the Chamber of Commerce and Industry of Western Australia provides a background. The Chamber claims 9000 members. Clause 1.3 breaks them down as follows:

- 80% with 0-19 employees.
- 15% with 20-99 employees
- 5% with more than 100 employees.

Whilst the Chamber does not represent the very large employers such as BHP Billiton, Rio-Tinto and Woodside, 9000 members is an impressive number and the subdivision of them above confirms the importance of small business to employment.

With the above in mind, delays in resolving WR differences can also be usefully compared to marriage. Everything we know about the destructive effects of poverty, drugs, violence, child neglect and paedophilia in homes, confirms the need for instant effective intervention. Without it, total damage increases, the frequency and extent of the incidents increase and the consequences of the damage become a permanent problem for the victims and society.

In the same way, the effects of industrial disputation at the "Tribunal" level, including bullying and unfair dismissal, underpayment and unreasonable behaviour are all exacerbated by a delayed hearing. It is far better to have an early, faulty finding, subsequently amended, than delayed response.

It is our recommendation that such delays be eliminated.

We propose that this remedy is provided by using part time Arbitrators to hear the disputes. Australia has an established Arbitration system of good standing. The practising members are trained, and have a wide range of enterprise experience that will surpass what is available from most WR/IR practitioners. They work within the existing legal system.

This proposal has the following benefits:

- 1) In the absence of dispute, it is cost free.
- 2) An arbitrator with experience in the individual industry involved in a dispute, has a natural authority with the litigants.
- 3) An Arbitrator acceptable to both parties can be appointed to hear a dispute.
- 4) Failing such agreement, an arbitrator with the most appropriate experience of the industry, can be appointed by the President of the Institute of Arbitrators.
- 5) Wide choice within the available panel will be most likely to provide instant or at least early response.
- 6) Determinations can be binding and final or alternately subject to a subsequent FWC or court of law hearing. Regard less of the type of finding each must have the support of immediate law enforcement or the authority of an injunction when subject to appeal.
- 7) Hearings will be inexpensive.
- 8) Costs can be apportioned to deter the unworthy or vexatious.

#### **4. Section 17. The enterprise Contract.**

This PC proposal fills a gap in current WR organisation choices by adding the option of a new model for an enterprise. We endorse the PC initiative because we believe it can help.

International competition, national indebtedness, high living standards, an aging population and unemployment, threaten our future. It does not take much of a reduction in international income or a world currency crisis to push us into recession. Change is often unexpected and sudden. Recent examples include the GFC and Uber, the reduction of iron ore and gas revenues, the failure of Hutchison Ports. These represent but a tiny example of those that have caught us unawares. New unexpected events will continue to test our resilience.

Just to maintain our position in the world we must maximise import replacement, increase employment and export earnings. Any improvement to any of these is too important to ignore. Flexible response to unexpected market change is the most common characteristic that distinguishes the successful enterprise from the rest in the international market. For small companies this is relatively easy, for the medium and larger sizes it is increasingly difficult. Nevertheless the larger the enterprise the greater the benefit we receive.

We support the PC Enterprise Contract proposal because it provides an opportunity for entrepreneurial enterprises to arrange their businesses to work most competitively in their markets. It will make it easier for medium and medium to larger companies to succeed and grow.

Worker Participation, is the essential factor.

Successful enterprises will have a market or develop one, they will have dedicated innovative and flexible workers at all levels. Of their own free will, such people adapt, organise, innovate and accept inconvenience to get the results required. They will do these things best when they have security.

To accept the reality of competition and provide security we recommend adding the following to the PC plan:

- Formal proof (minutes) of involvement and agreement by employee elected representatives prior to adoption of the organisation model.
- Identification of participants.
- Formal induction and departure of new and retiring participants.
- Timely accounting and reporting for that enterprise or section, to public company standards.
- Periodic formal reporting by the enterprise to the participants to a specified time table.
- Formal voting by the group representatives on specified matters.
- An agreed method of dealing with disputes.

In the first instance immediate attention to OH&S issues should be addressed as a priority between workers and supervisors. When an employee, a group of employees or union claim OH&S issues are not being addressed, or an employer claims that safety issues are being misused, then the appellant should be able to call an urgent compulsory arbitration hearing.

## **5. Section 13 Penalty rates.**

This subject has sufficient scope to occupy all parties to the exclusion of any other progress and therefore we concentrate on one aspect only. We endorse the PC proposal to make the FWC aware

of and responsible for action to maximise job opportunities for the young, for students and the unemployed.

## **6. Section 20, Sham contracting.**

We agree that this can have attractions for both the contractors and employers.

Union opposition to this arrangement is reported because it threatens union membership. This may be so, however because workers will not willingly pay union fees if the FWC provides adequate representation at no cost, it is the FWC that is the greatest threat to union membership. It makes much more sense for unions to have the FWC disbanded.

Perversely every union submission to this enquiry seeks continuation and/or strengthening of the FWC.

Sham contracting is a tax minimisation system. Leave it to the ATO.

## **7. Section 24. Interactions between competition policy and the workplace relations framework.**

Key points dot 4. Secondary boycotts.

Multiple administrative systems to regulate any single action are an abomination. Problems are never dealt with in a timely or clear way. An example is Workplace Safety that unions use to apply both safety bans and industrial pressure directly to employers. The regulation rests with state statutory inspectors. Sham contracting above is an example where multiple administrations apply. We recommend all examples be redefined to fall under just one jurisdiction.

Secondary boycotts are currently treated as an offence to competition law by the ACCC and an industrial weapon by (one) union. In fact they are intimidatory actions not WR/IR events. They should not be a part of PC consideration or reporting.

Secondary boycotts are not WR/IR events.

In Box 24.1 the CMFEU-Grocon-Boral boycott is identified.

This is not a dispute between Boral and Boral employees or between Boral and the CFMEU. In other words it is not a part of WR/IR. It is actually a dispute between Grocon employees and the CFMEU. Grocon employees apparently do not wish to join the CMFEU and the CMFEU wishes them to join. Whether they join the union or not, is in theory, a decision for each individual Grocon employee. In practical terms most of the employees will have a common policy. It is not likely they want to have CMFEU members working with them. It will be claimed that Grocon is inducing or forcing its employees to refuse to join. On the other hand it is clear that the union intends to force Grocon to employ a CMFEU workforce by forcing Boral to withhold concrete that Grocon needs to conduct its business.

Few enterprises are able to survive the damage caused to Boral and many would not try. In this case construction companies not party to the dispute, who required concrete, avoid buying it from

Boral to prevent industrial action against themselves. This is a sensible decision taken in the best interest of each company.

It is understood that regulation rests with the ACCC. Their response was pitiful. Furthermore the action finally initiated, is parked on a court waiting list. Our view is that the law that is intended to deter secondary boycotts should be clarified and the administration of it include compulsory timely action. However since this matter is not WR/IR we recommend it be removed from the PC report because it will be used to delay or deny other important changes.

In section 24.4 the recent ACCC Toll / TWU case is reported.

Toll is one of only a few nationwide transport and courier services with comprehensive national coverage. It is organised and equipped to negotiate and service major contracts.

Its attraction to its clients includes acceptably priced, safe, reliable and fast transfer of goods.

The Toll industry is competitive. Toll clients have access to alternative suppliers, this means that industrial disruption of Toll performance can damage Toll client base.

Toll pay its TWU members rates negotiated with the TWU. This encourages competitors who have cheaper or more flexible services. To offset this vulnerability, Toll employed and paid the TWU to selectively bargain with, harass and disrupt, competitors individually named by Toll. On the face of it this is not WR/IR. It is Toll bribery of a union to selectively harass competitors of Toll. On the face of it, a police matter.

We anticipate that the RC report will recommendation changes to the law. We recommend it be omitted from the PC report.