

Submission to  
Productivity Commission  
Inquiry into Workplace Relations

**Submitted By**

**Brendan McCarthy**

**10 March 2015**

**(Submitted by email)**

- **Introduction**

- I am making this submission as an individual having had a long experience in workplace relations as an industrial relations practitioner and advocate with an extensive involvement in policy. I was a Presidential member of the Fair Work Commission (the FWC) and its predecessor bodies. I was appointed to the Industrial Relations Commission of Australia (the AIRC) in October 2001 as a Deputy President and retired from the Fair Work Commission (the FWC) on 29 December 2014. During that period I was a resident in Perth. For the majority of my term at the AIRC and the FWC I have been a member assigned to the Metal, Manufacturing and Construction panel. The majority of industry specific work I was involved in was the construction industry and especially major resource construction projects.

- I have considered the propriety of my making this submission as a recently retired member of the FWC. The Inquiry is dealing with a number of important public policy matters and I consider it to be my duty to contribute given my experience.

- I have confined most of this submission to that part of the Inquiry that deals with the Regulatory Agencies and specifically the FWC. I will also confine my submission to that area I have recent experience of and knowledge about, namely the operations of the Tribunal of the FWC. I do not deal with the administrative role of the FWC involving matters such as the oversight of registered organisations. Thus where I refer to the FWC I am referring to the FWC as defined in the Fair Work Act 2009 (the FW Act). That is the role performed by members of the FWC.

- I emphasise that it should not be inferred from this submission that I am critical of any past or present Members of the FWC. Where I am critical the criticism is directed at the role and functions of the FWC that arises from the Fair Work Act (FW Act) and not at those responsible for performing those roles and functions.

- The issues I address in this submission are not exhaustive and nor have I supported them with any statistical analysis. Rather

they are suggestions that arise from my own observations and experience.

- **Productivity Commission Issues Paper**

**The roles of the FWC**

- The Issues paper accurately describes the role of the FWC as follows

- *"The Fair work Commission (FWC) is the national workplace tribunal. It is responsible for setting minimum wages and employment conditions. It approves registered agreements, can make and change awards, make decisions about what constitutes lawful (protected) industrial activities (outside the construction and building industry) and can hear cases relating to unfair dismissals and bullying. It also provides information to employers and employees."*

- The Issues paper appears to approach examining the functions of the FWC as though the FWC is a Regulator . In my view the FWC has a number of functions. I consider those functions FWC can be categorised into four broad areas. Those functional areas are

- Legislating minimum terms and conditions of employment(*setting minimum wages and employment conditions, and making and changing awards*)

- Adjudicating on disputes involving individuals (*unfair dismissals and bullying and dealing with disputes arising from Grievance procedures in agreements*)

- Facilitating enterprise Bargaining (*approving enterprise agreements, dealing with disputes during enterprise bargaining and issuing prevention orders determining whether industrial action is protected or not*)

- The provision of information and advice

- The Issues paper then poses the questions
  - *How are the FWC and FWO performing? Are there good metrics for objectively gauging their performance?*
  - *Should there be any changes to the functions, spread of responsibility or jurisdiction, structure and governance of, and processes used by the various WR institutions?*
  - *Are any additional institutions required; or could functions be more effectively performed by other institutions outside the WR framework?*
  - *How effective are the FWO and FWC in dispute resolution between parties?*
  - *What, if any, changes should they make to their processes and roles in this area*
- I do not address the first and third questions however I will endeavour to address the three other questions.

## **The Functions of the Fair Work Commission**

- **Legislating minimum terms and conditions of employment**

- I have deliberately used the description of the function of the FWC has in respect of minimum standards as one of legislating. Some may describe all of the roles of the FWC as that of being a regulatory agency however in my opinion that is not an accurate description. The role of a regulator is usually one involving the supervision and control of conduct of organisations or classes of people according to prescribed standards. A regulatory body may be involved in an advisory capacity in the development of regulations but the establishment of those standards is usually subject to parliamentary scrutiny and either approval of or disallowance of the proposals. Regulatory bodies usually have the responsibilities that arise from a Statute or from Regulations established under that statute. Regulators thus are usually those that implement and enforce legislation and its subsidiary instrument.

- The FWC in respect of standard setting is quite different from a usual type of regulatory body in that the FWC is the sole legislator of standards it is charged by the FW Act to establish. There is no further involvement of the parliament for those employment standards other than through the primary instrument being the FW Act that establishes it and defines its functions

- Thus for minimum standards established through awards the FWC should be viewed as an instrument in which parliament fully delegates to the FWC what in other spheres would be its role.

- There are some roles of the FWC that could be described as Regulatory such facilitating enterprise bargaining and I address some issues relating to that role below.

- The instruments that FWC through which the FWC establishes minimum standards is awards. It is well known but worth repeating the evolution of the legislative role of the FWC. It began as a rather limited one of settling industrial disputes that extended beyond any one state. The instrument used was to establish awards for those that were involved in the dispute. Importantly the award only

applied to those that were parties to that dispute although over time awards generally applied on extensively but not universally in any state.

- Awards now are not directed at resolving interstate disputes, rather they are directed at establishing industry wide minimum conditions uniformly across Australia. Whether or not there should be such uniformity is not something I have addressed.

- Awards also are also very detailed documents addressing a wide array of employment related standards. Awards can be contrasted to some other instruments regulating workplace's are more general are directed at conduct and responsibilities through self-regulation aimed at achieving optimum standards within the workplace. The most obvious of the different approaches is Occupational Health and Safety legislation through the general duties it establishes for occupiers, employers employees and suppliers.

- A question that the discussion paper raises is whether the FWC is the appropriate body for various roles. My submission is that in order to properly answer that question in respect of its function in relations to awards one must view the FWC as a legislator and not confuse its other roles with that function.

- The performance of a legislator's function should be should be transparent in its procedures with the capacity for public involvement in its deliberations and considerations. A legislator should also have the appropriate expertise and diversity within that expertise. A legislator should also be aware of the consequences of regulation it establishes including the implications for other areas of parliamentary or government responsibilities. Finally and most importantly a legislator should be accountable to the public for the regulations or legislation established.

- It is my submission that the FWC is not the appropriate body for the role of establishing minimum award standards.

- The main reason for that view is that the FWC is not sufficiently accountable. That is not an observation of or criticism of the FWC as it clearly does endeavour to be accountable through the procedures it establishes. For example the FWC does invite and

involving anyone who wishes to be involved for its considerations regarding awards. The FWC only performs the functions the parliament directs it through the legislation to perform and in the manner it is expected to. Rather my criticism is that of the structural problem through the FW Act by the full delegation to the FWC of what should be the parliaments role to establish minimum award standards.

- There are a range or reasons the FWC is not accountable. Firstly its decisions in respect of minimum standards are final. Reviews by Awards carried out by the FWC are conducted by Full Benches of the FWC formed for that purpose. That is a requirement of the FW Act. However Full Bench decisions cannot be appealed or in any other way reviewed other than the limited capacity for judicial review of whether the FWC has undertaken the tasks required of it.
- Judicial reviews of FWC Full Bench decisions are very limited. Essentially if the FWC asks the right questions but gets the wrong answers it cannot be overturned. (See [2015] FCAFC 11)
- Another aspect of the absence of normal types of accountabilities for those that establish standards is the tenure of Members of the FWC. There are other bodies with a legislative or regulatory type role that have been given an independent role by parliament. Those bodies usually have persons appointed to them for a limited term. For example the Reserve Bank Board and its Governor do not have tenure like that FWC members do.
- The usual course for establishment of standards is for the proposed standards to be either established directly by the parliament or prepared for parliament by an agency for approval or disapproval by the parliament. The parliament is thus responsible for the standard and in turn the parliament is accountable to the public for that standard. With the standards the FWC creates it does not matter how correct or incorrect the standard is, how acceptable or unacceptable it is to employers, employees or the community at large, or if the if seen unforeseen or even foreseen consequences of a decision is damaging on other areas of the economy or community.

- The unaccountability is worsened by the different approach the FWC appears to have for the establishment or raising of standards compared to the repeal or variation to standards. For a standard to be established or increased the FWC seems to accept expert opinion of consequences and effects of the change. However for applications seeking variations through more flexibility or reduction of those standards the approach seems to be to require more substantial proof. The proof required usually involves extensive evidence. (I intend to provide a Supplementary submission though citing a case study of the Apprenticeship Rates Decision of 22 August 2013)

- The FWC also does not have the appropriate and extensive enough expertise amongst its members to deal with deliberations on minimum standards. I do not exclude myself from this criticism but once again it is not a criticism of the members performing the role but rather whether they should be performing that role. The members of the FWC generally have a background in law, public administration or union or employer organisational backgrounds. Certainly some from those backgrounds were involved in a wide diversity of experiences but usually in an advisory or representative capacity. The members of the FWC seem to have more expertise in dispute resolution and determination but that expertise does not generally include an expertise in examining and determining appropriate minimum employment standards. Employment standards generally involve a mix of analysis of economic material, research and an understanding of what drives and dissuades employers to employ, employees to be employed and an appreciation of what rational conduct consequences there may be when standards are changed or for that matter refused to be changed.

- There is some recognition of access to and involvement of economic expertise but it is confined to the consideration of the Minimum Wage. In my view the application and effect of awards is much more far reaching implications and consequences than the minimum wage. The determination of award reviews is conducted solely by permanent members of the Commissions in their consideration of award matters. There is also added expertise provided for consideration of Superannuation matters although one could not regard that as being an overwhelming success. Ironically expertise and



experience in superannuation matters are an area where there is a depth of experience amongst FWC Members. Notwithstanding that in my view a relevant financial regulator such as APRA should perform all aspects of Superannuation regulation.

- Given the limited access to expertise the President has for the establishment of Full Benches for award reviews and major case considerations one would have expected that there would be a wide diversity of members involved in these sorts of matters. In April last year I wrote to the President outlining my concerns at what appeared to me to be a narrow base of members involved in major cases and especially standards setting matters. ( A copy of the memo sent to the President is attached). It appeared to me then, and it does not seem to have changed since, that the composition of Full Benches for Major cases and in particular is drawn from a narrow base of members of the FWC.

- Another reason why the FWC is an inappropriate body for dealing with setting national standards is that the FWC has a history of avoiding much diversity amongst those on the Full Benches established for that purpose. For example FWC Members from Western Australia appear to be excluded from involvement.

- One would ordinarily expect that in a national body that there would be some involvement from each of the state's resident members in matters that establish national standards. That is standard practice in any national organisation for good reason. There have been three resident members in Western Australia I think since about the mid 1980's. There has been at least one Presidential member for all of that time until December 2014 and for about eight years two Presidential members. However there has been no resident Western Australian member on a standard setting Full Bench since 1989. indeed no resident Western Australian member has been involved in any matter involving the initial establishment review of so-called modern Awards nor in any matter involving a review of those awards.

- Indeed for about the last three years resident Western Australian members have not been involved in any Full Bench apart from those involving appeals arising out of decisions of their WA based colleagues. One explanation may be because of the travel costs

involved. These reasons cannot be valid for two reasons. Firstly the FWC is equipped with sophisticated video conferencing equipment and has been for at some years. Secondly the cost of involving non-WA members in WA Full Bench matters would be the same cost as involving WA members in not WA matters.

- Another explanation may be the workloads or timeliness of dealing with matters by WA members being such that there is no capacity for Full bench matters. If they be reasons, then a better transparency of all members of their workloads and timeliness should be regularly published to illustrate that ground for exclusion. If workload is a restricting factor then the remedy would seem to be to have more equitable workloads. If timeliness is an issue then presumably all members timeliness performances would be analysed before they are appointed to Full Benches.

- Some of the core competencies of the FWC are (i) regional knowledge, (ii) knowledge of specific industries (especially traditional and long established industries) and (iii) a capacity to deal with certain types of disputes between an employer and employees. Those competencies should be relevant in matters involving standards but appear from the exclusionary approach to WA members' participation not to be regarded as such.

- The FWC also does not in my view have a competence, and certainly not a core one, of understanding the workings of the economy or of economics generally or on how enterprises work. Moreover I do not think this lack of competence in this area can be overcome by a supplementation for members involved in standard setting matters. In my view the standard setting role is a very different one to the majority of matters the FWC is involved in and requires a separate class of member for that role.

### **Recommendations regarding Employment Standards setting.**

- Firstly the standard setting role should be which the Parliament should be involved in, just as it invariably is with any other area of Regulation. My suggestion is that awards should be given a status of employment Regulations for specific industries. A proposed Award should be tabled in parliament and subject to

approval or not by the Parliament. Such a process would have the effect of both making the body giving the recommendation more accountable and secondly providing open and transparent access and influence for the whole community. It would also enable the parliament to take into consideration the other implications of approving the Award Regulation, such as impacts on the welfare system or impacts on rebates or subsidies for training and apprenticeships.

- Secondly a body should be established solely for the purpose of setting employment standards. That body should comprise people with a variety of backgrounds but with an emphasis on an understanding of economics and the operations of firms

- If the role is to remain with the FWC then a division of the FWC should be established with Members of that Division having the sole role of dealing with minimum standards.

- If the role is to stay with FWC and a Division of the FWC is not to be established then at the very least the President should be obliged to take into consideration the breadth of experience and diversity of backgrounds of those that will be involved in making decisions and to issue a statements explaining the rationale for his selections. I made suggestions to the President in 2014 regarding the transparency of Full Bench compositions ( see attached the Memo to the President of April 8 last year). I would add to those suggestions that the President should be required to publish details which show the composition of Full Benches.

- **Determining disputes involving individuals**

- Most of the work performed by the FWC Tribunal is involved with dealing with disputes between an employer and an individual. The vast majority of those disputes involve applications by individuals that alleging unfair dismissal. Another substantive part of the FWC's role is dealing with General Protections matters. A small portion of the FWC's work involves allegations of bullying. Dealing with individual disputes has become the core work of the FWC tribunal. I would estimate that about 80-85% of all substantive matters that are dealt with by the FWC members involve these types of disputes.

- In my view the FWC deals with these types of disputes competently, expeditiously and in a consistent manner. Whilst there are always examples that can be raised criticising a particular decision, given the number of matters that the FWC deals with the number of complaints and examples seems relatively few.

- Furthermore the appeal mechanism to deal with decisions parties are aggrieved with in my view establishes the required level of accountability for and consistency of decisions.

- In recent years the FWC has delegated some of the role to staff rather than Members. In principle this is a useful approach to efficient resource allocation.

- The current approach in administration of individual dispute matters for the performance is a central command and control model. The administration is centralised, directed and controlled from Melbourne. This approach appears to me to create a bloated Melbourne office.

- The staff resources allocation is instructive in the extent of the centralization involved. Whilst my figures are estimates only I would estimate that over 75% of all staff ( that is those that are not members) resources are located in Melbourne. I estimate that about 15 % is located in Sydney, Brisbane about 6-7% , Adelaide 2-3% and Perth about 2-3%, and about 1% in Canberra and Darwin. If the

analysis was one based on total labour cost the centralisation would be even starker.

- This degree of centralization is peculiar given that individual disputes by their very nature are local. There has been criticism of other bodies such as the Australian Broadcasting Commission for being Melbourne/Sydney but the ABC by comparison to the FWC would be considered decentralised.

- The question arises as to whether the current approach promotes continual improvements in efficiency of the administration of this role. It appears to me that the central control and uniform approach leads to a lack of innovation and no capacity for any type of regional performance comparisons.

- The uniformity of approach and central control in my view results in a lack of improvement in administrative dealing with these types of matters and where there is change it is usually retrograde in the level of satisfactions for users of the FWC.

- **Recommendations regarding determining disputes involving individuals**

- My suggestion is that the FWC should have sufficient regional resources for those regions to be self-reliant and indeed locally controlled and managed for matter of this nature. For this purpose fewer managers should be located in Melbourne and more senior management established for each Capital city, with the possible exception of Hobart.

- Each Region should also have a Member appointed and assigned as the Member responsible for the allocation and management of files. That Member should have the responsibility similar to those of a Panel Head. The President should have the responsibility for appointment of that person but be required to consult with appropriate people in the region ( such as the State Minister with responsibility for Workplace Relations ) before making the appointment. A transparent process of selection of the Member should also be established (see attachment – Memo to President of 8 April 2014)

- I also suggest that the usual types of statistics should be published for each region such as, volume of matters, timeliness of matters and resources required for the administration of matters. Such an approach should lead to better efficiency and transparency of workloads and efficiency of work outputs.

- **Facilitating enterprise Bargaining**

- There are three broad functions of the FWC in relating to its function of facilitating enterprise bargaining. Firstly the FWC is required to approve agreements if certain requirements of the FW Act are met. Secondly the FWC is required to regulate the conduct of the parties in their bargaining. Thirdly the FWC is available to assist the parties to reach agreement in their bargaining.

### Approving Agreements

- The first of the broad functions, namely the approving of agreements is , or should be, a relatively simple administrative exercise and function. Enterprise agreements are under-pinned by a combination of statutory National employment Standards and awards. With such extensive underpinning safety nets there should be little requirement for anything other than a formality of lodgement for an agreement to be approved.

- The role of the FWC is to ensure the agreement provides better overall wages and conditions for employees it covers (the BOOT test) and that requirements for the making of agreements have been satisfied.

- Furthermore for many agreements it is impossible to know whether the better off overall (the BOOT test) is met as there is usually no guarantee what the exact hours of work will be. Because of this difficulty many agreements are approved with undertakings that the employer would provide an employee upon request with a comparison of what they would have earned under the award and the agreement for hours actually worked. The undertakings also provide an obligation to make good any shortfall. If such the test there were a

requirement that a similar provision must be in every agreement in my view there would be little reason for requiring approval at all.

- Furthermore the complex array of procedural requirements for the making of an agreement appear to me to be unnecessary if there were a sufficient remedy for employees where an employer did not comply.

- I also raise the current trend of centralization of resources for dealing with agreement approvals. For example in Western Australia's case resident WA members deal with no applications for approval of agreements. This will lead to a gradual decline in local confidence in the FWC.

### **Recommendations regarding Agreement Approving**

- If the current types of obligations and conditions for enterprise agreements to have effect are to be maintained the approval process should be abandoned. In my view the current arrangements create an unnecessary layer of red tape. The vast majority of agreements meet the requirements, and even if they did not, the approval process is an inefficient and unsatisfactory approach to ensuring compliance.

- I suggest that some type of unconscionable conduct type provision be provided for in the FW Act and a remedy available to employees for breach of that provision. This should provide a means where red tape is reduced but remedies for employees are available if obligations of employers are breached.

- If FWC Member involvement in the approval process is to be retained then it should be a default position that a member is not required to approve the agreement. That is agreements should be approved though an administrative process not requiring Member consideration unless someone, which could include a person to be covered, an organisation with an interest or even an administrative officer within the FWC, requests it.

## Regulating conduct during bargaining

- The second general role of the FWC in respect of enterprise bargaining involves what the regulatory function of ensuring conduct during bargaining does satisfy the obligations under the FW Act. There are other means that bargaining conduct could be regulated. My submission presumes that the FWC is to be retained as the regulator of conduct as it is the most appropriate body for such a function.

- There are three main functions that the FWC performs in regulating bargaining conduct. Firstly it can issue various types of Orders (majority support orders and bargaining orders and the like). I consider that the experience and the law is insufficiently developed to be able to form any firm views about these types of matters.

- Secondly the FWC must issue Protected Action Ballot Orders (PABO) if it is satisfied that the requirements for a ballot order have been met. With few exceptions PABO's have become a formality and nothing more than an administrative function. I question whether they now serve any useful purpose at all. The evolution of PABO's appears to have arisen from the development of the capacity to take protected industrial action and for a secret ballot of employees before protected industrial action could be taken. For the majority PABO's employers now do not dispute the PABO being issued and often either consent to it being done on the papers without a hearing being conducted or do not attend the hearing if one is held.

- I consider this process to also be an unnecessary one. Presuming protected industrial action and requirements to be satisfied before the industrial action can be protected are retained then a PABO should be issued through some type of administrative process without the need to involve members of the FWC at all.

## **Recommendations regarding Protected Action Ballot Orders**

- It should be a default position that if an application for a PABO is made that an administrative officer should simply issue the order. If either the administrative officer or an interested party wishes



to challenge the issuance or refusal to issuing an order, either before or after it is issued, only then should the matter be able to be considered by an FWC member.

- It also seems to me that the persons wishing to undertake the protected action should bear the responsibility and cost for conducting the ballot, rather than public through the electoral commission.

### Orders relating to industrial action

- The third general area of regulating bargaining conduct is issuing of Orders by the FWC. There are a number of types of orders that can be issued but there are two main types that I deal with. Firstly Orders must be issued by the FWC if industrial action is happening, threatened or probable. The FWC in those circumstances must issue Orders that industrial action stop, not occur or not be organised. (s.418 Orders) The second type of order that the FWC may issue is significant harm or damage Orders (significant harm Orders; s.423). If the FWC is satisfied that a party is suffering significant harm, or that the health and safety of the public is at risk an order suspending or cancelling protected industrial action can be issued.

- The obvious legislative intent for s.418 orders is that expeditious relief can be obtained by an employer if industrial action is occurring in circumstances where the action is asserted to be unprotected or where the industrial action is causing significant harm. It is indicative that a low bar was required to satisfy the requirements for FWC to be obliged to issue s.418 Orders especially. The standards are of "it appears" to the FWC that the industrial action was unprotected. Furthermore the FWC must issue an Interim Order for relief within 2 days. In my view effectiveness of s.418 Orders has been reduced by the application of the provisions by the FWC. It might in part be that the legislation is not as clear or as directive to the FWC as the apparent intention was. Or it might be in part a consequence of the same body that assists parties in reaching agreements is also responsible for the issuance of the Orders.

- For s.418 Orders in my view the FWC has adopted an approach of process and form over substance and intent. Unions routinely request delays asserting lack of knowledge of the industrial action or for a need to seek to consult members, or seek instructions. The urgency and effect of Orders is thus seriously diminished. The recently developing and narrower view of the available relief also diminish the effectiveness of the provision when Orders are issued.

- What often is not appreciated is that Orders issued can be effective not so much because it disciplines conduct but rather that it provides a defense for employees that may feel intimidated into taking industrial action when they do not really want to.

- In respect of significant harm Orders the FWC has interpreted the meaning of "significant" in such a way that the hurdle to achieve relief is extraordinarily high. It would appear that the only way an employer can obtain relief is to create a crisis. This was evident in the case of Qantas when it grounded its aircraft. I would observe that an object of the legislation was to avoid crises rather than to encourage them.

- Whatever the reason in my view the legislation is not as effective as it was intended to be for either type of Order.

### **Recommendations regarding Orders relating to Industrial action**

- For s.418 Orders a reverse onus should apply. Persons who organize or take industrial action are those best placed to establish that the action is not industrial action or that it is protected. Indeed such a provision would help ensure that before action is taken those involved are confident that it is protected or not industrial at all. Furthermore a limited number of FWC members should deal these matters, perhaps only Presidential members.

- Secondly for significant harm Orders (s.423 and s.426) a clearer legislative direction to the FWC should be established. It should be directed at ensuring that the primary, if not the only considerations, should be the public interest and not the rights and interests of those involved in the action. Furthermore as there are very few applications for significant harm Orders they should be dealt with by a Full Bench of the FWC, as was done in the case of Qantas.

- **Provision of Information and advice**

- Some of the core competencies of the FWC I consider to be (i) Influence in resolving disputes and having determinations accepted (ii) Regional knowledge of those often involved in disputes or the nature of industries involved and (iii) Consistent procedures and local facilities to deal with disputes.

- What are not core competencies are (i) the provision of information and advice (ii) research (iii) promotion of approaches to bargaining conduct (iv) understanding of economic issues and the behaviours of firms.

- I won't expand on these views. Currently they are matters for the President in the context of what resources are allocated. It should be clear from observations and submissions above that currently resources are skewed to Melbourne and to a substantial degree for non-core areas.

Submitted by

Brendan McCarthy

10 March 2015