

Productivity Commission Workplace Relations Inquiry

Submission by

**Australian Road Transport
Industrial Organisation
(ARTIO)**



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1. An Introduction to the Australian Road Transport Industrial Organisation (ARTIO)

- 1.1 The Australian Road Transport Industrial Organisation (ARTIO) is an Industrial Organisation of Employers registered under the Fair Work (Registered Organisations) Act 2009. It has been so registered since 1984. Through its Branches, ARTIO represents employers in the transport and logistics industry, particularly those engaged in road transport.
- 1.2 ARTIO's membership includes large multi-national transport companies including those publicly listed. Its collective membership extends across privately owned small to medium sized companies. Collectively, members of ARTIO's Branches perform a large percentage of Australia's urban, regional, remote and interstate freight task across the manufacturing, retail, housing and construction, agriculture, mining, import, export and other sectors of the economy.
- 1.3 ARTIO's views are developed having regard to a detailed knowledge of Australia's diverse freight task delivery, largely undertaken, apart from a small number of Publicly listed companies, by Small to Medium Enterprises.

2. The Workplace Relations Inquiry

- 2.1 The Australian Government has asked the Productivity Commission (PC), by Terms of Reference, to examine possible improvements to Australia's workplace relations systems.
- 2.2 The PC having produced a number detailed issues papers has asked a series of questions including:
 - What works well in the Australian Workplace Relations system (the system)?
 - Views on minimum wages, penalty rates, unfair dismissal, compliance burdens and related matters, and
 - Changes one would like to see?
- 2.3 ARTIO has reviewed the Issues Papers released by the PC and makes the following comments.

3. Legislation

- 3.1 Members of ARTIO Branches have endured numerous and significant changes in employment legislation since 2006. These legislative changes, along with numerous reviews and amendments to modern awards, include additional obligations created by the Road Safety Remuneration Act and orders issued by the Road Safety Remuneration Tribunal. There are many examples in such orders which impose obligations which are a repeat of existing Legislation e.g. Workplace Health & Safety Law and Heavy Vehicle National Law, and have increased red tape burden without necessarily delivering a practical benefit to either employers or employees.
- 3.2 However ARTIO believes those changes which deliver improved productivity, reduce red tape and restore balance in the system are welcomed by employers.

- 3.3.** ARTIO believes the benefits referred to in Clause 3.2 above could be achieved by implementing all the recommendations from the Report of the Fair Work Act Review, which was commissioned by former Workplace Relations Minister, Bill Shorten, and was released on 2 August 2012.
- 3.4** Only a limited number of the 53 recommendations in this report were implemented by the former Government. However, these recommendations have the potential to benefit employers by delivering business certainty, the potential for improved productivity and greater efficiency in the employment relationship.

4. Safety Nets

- 4.1** ARTIO generally supports the concepts behind the various safety nets that currently exist to provide protections in the system. ARTIO believes that the three planks of the current system – the minimum wage, the National Employment Standards and Awards, which include penalty rates - provide an adequate set of safety nets for employees, particularly in the freight and logistics industry.
- 4.2** ARTIO submits that there needs to be further work on the development of the system, especially with respect to:
 - 4.2.1** Development of a uniform national long service leave entitlement as current entitlements vary widely in each jurisdiction.
 - 4.2.2** Ensuring each jurisdiction works collaboratively to develop a more consistent and uniform system of Public Holidays in order to improve efficiency and productivity of the national freight task and economy as a whole.
- 4.3** In ARTIO's view other legislative amendments that should be implemented include:
 - 4.3.1** Reversing the prohibition on prepayment of annual leave through a loaded base rate (*Hull Moody [2011] FWAFB 6709*).
 - 4.3.2** Preventing annual leave accruing during absence on workers compensation.
 - 4.3.3** Clarifying that annual leave loading is not payable on termination of employment unless specified in an award or enterprise bargaining agreement (EBA).
 - 4.3.4** Providing non-monetary benefits in Individual Flexibility Agreements.

5. Bargaining

- 5.1** While Australia's road freight industry is recognised as being amongst the most productive in the world, there remains scope for further improvements. In a service industry such as freight and logistics, productivity improvements can be expected to be derived from technological, engineering and legislative improvements in areas such as:
 - 5.1.1** More productive, efficient and safer multi combination vehicles, for example those approved under the nationally recognised Performance Based Standards framework.
 - 5.1.2** Better infrastructure, particularly roads and ports.
 - 5.1.3** Better traffic monitoring and traffic management.

- 5.1.4** Increased rail utilisation, particularly on capital city to capital city freight movements.
- 5.1.5** Improved communication, co-operation and co-ordination between supply chain parties.
- 5.1.6** Improved harmonisation in areas such as road law and workplace health and safety law.
- 5.2** The current bargaining regime is structured around parties being in an ‘equal position’ to bargain in good faith. This does not occur in a service industry such as road transport.
- 5.3** This is because a threat to take ‘protected industrial action’ puts enormous pressure on a transport company to agree to a claim as customers need to have their freight moved within agreed time frames. If that appears unlikely to occur, it can be expected that the customer will approach another transport company very quickly.
- 5.4** Customer loyalty is almost non-existent and transport companies can be expected to ‘cut a deal’ in an attempt to protect their business relationship.
- 5.5** In circumstances where ambit claims are made, ARTIO submits that it is imperative that arbitration be available to resolve those bargaining disputes.
- 5.6** ARTIO also submits that protected industrial action should only be available where negotiations for an EBA have commenced. ARTIO’s position seeks to overrule *J.J. Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.
- 5.7** Further, the process involved in having an EBA approved is time consuming and inefficient. Some rules also condemn the EBA for any trivial or innocuous ‘non-compliance’ with the process. There is little room for the Fair Work Commission to apply discretion in the application of technical rules. For instance:

 - 5.7.1** If the Notice of Employee Representational Rights contains a typographical error or other mistake the whole process can be stopped.
 - 5.7.2** If a proposed agreement is lodged on the 15th day after its making, then it will not be approved. This is despite the fact that it is often difficult to meet administrative requirements such as arranging signatures within the designated 14 day period.
- 5.8** It can be difficult to objectively determine whether or not a proposed agreement passes the ‘better off overall test’ (BOOT), especially if there is more than one award which could apply to the work in question.
- 5.9** The paperwork required, especially the employer’s statutory declaration, can take several hours to complete and, in ARTIO’s opinion, adds no real value other than making an attempt to comply with the specific detail in the Fair Work Act.
- 5.10** While ARTIO appreciates there is a need for a degree of prescription in what is a quasi-legal process, it submits that there is a case for giving those responsible for adjudicating such matters a degree of discretion in order to create a more efficient administrative system for EBAs.

6. Employee Protections

6.1 ARTIO supports in principle employee protections which are:

6.1.1 Protection from ‘harsh, unjust or unreasonable’ dismissal, which is often referred to as ‘unfair dismissal’

- i. However, a termination may be just and reasonable but nevertheless unfair. This can only be determined after the event and gives rise to concern and confusion amongst employers.

6.1.2 The General Protections, including adverse action.

6.1.3 The anti-bullying regime

6.2 ARTIO submits that in 6.1.1 and 6.1.2 above, there is still too much emphasis on process and protocols which can make it difficult for employers to remove an employee who is harming their business.

6.3 In many situations, this leads to the payment of ‘go away’ money, especially as the telephone conciliators seek to resolve a matter before arbitration.

6.4 This ‘go away’ money can often be up to five or six thousand dollars.

It has created a culture whereby employees expect to receive something, irrespective of the merits of the termination.

6.5 Of concern is that an industry of lawyers/consultants, who represent dismissed employees, has developed and their focus becomes one of recovering their costs, often resulting in the ‘genuine unfairly dismissed’ employee being unable to articulate the merit of their position.

6.6 The General Protections or adverse action claims are often used as an alternative to unfair dismissal and attempt to invalidate the legitimate termination of an employee for sub-standard performance.

6.7 Similarly, the legitimate adverse action claims are lost in the plethora of unmeritorious claims without a chance of a success, helped by a culture of ‘ambulance chaser’ employee representatives.

6.8 It is without surprise in ARTIO’s opinion that with respect to the anti-bullying regime, where monetary compensation is not available, that in over 700 applications, there has only been one successful order made.

6.9 In ARTIO’s view, this demonstrates that unlike the circumstances listed above, employees must focus on the alleged conduct rather than compensation, when pursuing a “bullying claim”.

7 Institutional Framework

7.1 ARTIO submits that the Fair Work Commission should be re-named to, say, the Australian Workplace Relations Tribunal. Many employers and employees do not understand or even consider that there is a difference between the Fair Work Commission and the Fair Work Ombudsman. A distinct name can be expected to assist in better understanding what are different roles and responsibilities of these two bodies.

- 7.2** ARTIO is concerned about its ability to meet governance requirements designed for large organisations. The compliance costs surrounding the running of a registered organisation, such as ARTIO, are a financial and administrative burden. Whilst ARTIO understands the need for stringent regulations for registered organisations and also the public's expectation to ensure good governance, nevertheless ARTIO is concerned that no consideration is given to the size of the organisation. ARTIO notes that the Australian Charities and Not-for-Profits Commission has a sliding scale of accounting and auditing standards which are based on turnover. ARTIO submits that consideration should be given to adopting a similar approach to the administration of registered organisations.

8. Conclusion

- 8.1** ARTIO submits that there are genuine issues to be addressed by the PC in this inquiry.
- 8.2** ARTIO is currently seeking to gather specific practical material from operators in the industry, with the aim of further assisting the PC in any scheduled hearings.
- 8.3** Should the PC seek clarification of any element of this Submission or require further details, please contact ARTIO's Secretary/Treasurer, Peter Garske on email