

**PORTS AUSTRALIA – SUBMISSION TO THE PRODUCTIVITY COMMISSION  
INQUIRY INTO THE AUSTRALIAN WORKPLACE RELATIONS FRAMEWORK**

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## **Introduction**

Ports Australia is the peak industry body representing Australian port authorities and corporations both publicly and privately owned. The organization has been in existence in one form or another since 1916 when the first interstate harbour conference was held in Melbourne.

Ports Australia is a constituted company limited by guarantee with a Board of Directors, comprising the CEOs of 11 member ports. Our website is at [www.portsaustralia.com.au](http://www.portsaustralia.com.au)

Ports Australia works closely with the Government and its agencies, and with other industry stakeholders, on the development and implementation of policies and regulatory settings that will facilitate the efficient operation of our ports and their supply chains, and ensure that they have the ability to develop their capacity to meet Australia's freight task.

## **Approach to Inquiry**

Ports Australia makes this submission on behalf of an extensive public and private sector membership which collectively is responsible for the performance and productivity of substantial economic infrastructure which drives and supports our competitiveness in international markets. Ports are the largest freight hubs in the country and key to economic growth and job creation in our highly trade exposed economy.

This submission focuses on the Workplace Relations Framework (Issues Paper 2), Bargaining (Issues Paper 3), Other Issues, in particular Competition, Contracting, Coastal Shipping and the Fair Work Act (Issues Paper 5). We also make brief submissions in relation to Employee Protections (Issues Paper 4).

Ports Australia adopts the view that “productivity” as the term is used in labour markets and therefore in the context of this Inquiry, is essentially output per labour-hour. It is true that gradually more Australian workers are being remunerated in relation to the volume of their output but the dominant method is still by time, (i.e. per hour). To enhance productivity, either we do more with the same inputs or the same with fewer inputs. The employment laws which impede the achievement of this outcome are rightfully the subject of the Inquiry and this submission.

Wherever possible the paragraph section is numbered as closely as possible to the corresponding numbering in the relevant Issues Paper.

## Issues Paper 2 - Workplace Relations Framework: Safety Nets

### 2.1 Providing Safety Nets

Ports Australia is supportive of a basic safety net.

### 2.2 The Federal Minimum Wage (FMW)

2.2.1 Ports Australia supports the maintenance of a federal minimum wage and the capacity of employers and employees to influence decisions about the quantum and timing of changes to it. Ports Australia would prefer that influence be exercised through a specialist tribunal (as now) rather than our parliaments.

2.2.2 Ports Australia suggests the appropriate role of the FMW is to act as a minimum income for employees and be set at a level which does not undermine productivity based reward efforts of employers.

2.2.3 The FMW is relevant and appropriate to ensure a level playing field from employers' perspectives and basic needs from employees' perspectives.

### 2.3 National Employment Standards (NES)

2.3.1 There should be nothing in the NES that is not a genuine national standard. Presently, public holidays, community service leave and long service leave are included, but are not settled matters in the sense that the NES then refers to state/territory legislation as well. Either the item on the NES is in fact a *national standard*, or not.

2.3.2 Taking the example of long service leave, because it is an NES matter, it is given the full force of Commonwealth law since state/territory laws are subservient. However the NES itself refers to state/territory long service leave conditions so the end result is not a national standard. Similarly with public holidays, there are some nominated in the NES, others are very much the stuff of local observance – the antithesis of a national standard.

2.3.3 The NES should not be inflexible in the sense that they should be capable of being re-shaped in the course of enterprise bargaining or through employment contracts which provide the same level of overall benefit, merely in a different form. For example, for some of Ports Australia's members potentially, the ability to trade 10 public holidays for an additional two weeks annual leave might be a useful productivity measure, especially given the 24/7 nature of port operations generally.

2.3.4 Nothing in the NES should be contingent upon it being contained in an award and/or enterprise agreement before it can be accessed or activated. Again, either it is a national standard or it is not.

## 2.4 The award system and flexibility

2.4.1 Ports Australia's membership is very experienced at enterprise based industrial regulation. Historically most members had enterprise specific awards in place to regulate conditions. The modern industry award has minimum standards largely gleaned from 'industry standards' (see further comments below at 2.4.3) hence this award is of less significance in the context of regulation for this industry, than might otherwise be the case in some industries.

2.4.2 However as a matter of principle, Ports Australia shares the view that modern awards should be crafted with the specific needs of the relevant industry in mind. Also, it is timely that they move from being concerned almost exclusively with employee entitlements, to a more balanced mix of rights and responsibilities of both parties.

2.4.3 In Ports Australia's case, the Port Authorities Award 2010 bears little resemblance to facts on the ground in respect to salaries and operating times. That Award is largely a template taken from other industries awards. The inappropriateness of this structure is all the more obvious when it is appreciated that the first ever such federal award was made in 2009. Conditions were simply determined on the basis of other industries experience, many of whom had restrictions arising from external influences such as State based 'shops and factories' legislation with long histories.

## 2.5 Penalty Rates

2.5.1 Ports Australia tends to the view, postulated by the Issues Paper, that penalty rates ought to be a matter determined at the enterprise experience. This is so because the arbitrariness of their application now does not reflect the diversity of the workplace or the workforce. There is no consistency of application in the modern award system. Several awards have no penalty rates (for ordinary hours) and others have some, which are of minor significance compared to those industries which frequently complain of their imposition.

2.5.2 This inconsistency is evidence itself that penalty rates are not some kind of fundamental right regardless of the situation, but rather the outcome of negotiations and arbitration over many years. Ports and marine authorities operate 24/7 as would be expected, so it is immediately apparent this is an industry whose regulation should fit the realities, not the experience of other industries that operate with the constraints referred to above.

2.5.3 Ports Australia also notes that in continuous operations, such as ports, these extra payments are not penalties, but incentives. It is unusual for an industrial tribunal to arbitrate incentives in addition to basic wages (one would assume the latter was its domain, the former the responsibility of the employer). This is why Ports Australia is attracted to the Commission's discussion about dealing with the need for these incentives at the workplace through bargaining, rather than having them arbitrarily imposed at the award level.

## Issues Paper 3 - Workplace Relations Framework: The Bargaining Framework

### 3.1 Bargaining and industrial disputes

3.1.1 Ports Australia supports the devolution of industrial regulation to the enterprise level which has occurred over the last two decades. Ports Australia sees enterprise agreements as useful tools to minimise the regulatory burden by incorporating as much of the workplace relations rules as possible in one consolidated document.

3.1.2 However Ports Australia is concerned that the underlying positive objective of enterprise bargaining for employers – enhanced productivity – is undermined by pattern bargaining which effectively establishes then pushes, industry standards, rather than enterprise needs. The immunity that unions enjoy at law from cartel conduct in both pattern bargaining and the immunity at law for a wide range of industrial action is not reciprocated to employers.

3.1.3 As an example, the three unions most relevant to Port Australia’s membership are able to move from one agreement at one port to a new agreement at the next port. That union has the knowledge of what has occurred in the previous negotiations, it has the in house skills and it has the relevant resources to ‘pick off’ an individual employer. The demands that are then generally made are usually based on what was achieved not in the relevant port’s last agreement, but rather the last agreement achieved in the industry. This is regardless of the enterprise level requirements.

### 3.2 Types of bargaining and their key processes

3.2.1 Ports Australia members are generally well established businesses with a long history of enterprise specific regulation. Ports Australia is aware however of the process of bargaining, including the interaction with the approval body, the Fair Work Commission (FWC), having shortcomings.

3.2.2 The red tape burden associated with bargaining and approval processes is onerous even for well-resourced employers. However there are some quite detailed and precise steps to be taken in the process which if missed or miscalculated, invalidate any agreement subsequently made.

3.2.3 Missteps in the process should not derail the substance. The removal of FWC’s discretion to waive irregularities has meant that even where it was obvious that no harm was done; FWC was obliged to reject an agreement.

### 3.2.4 Restrictions on agreement content

3.2.4.1 Ports Australia supports the retention of ‘*matters pertaining*’ to the employment relationship’ as that term has been used industrially in the making of agreements. Ports Australia does not support the inclusion of terms which are rightfully a matter for management such as the use of contractors, labour hire, quotas, manning levels and the like.

3.2.4.2 Ports Australia believes the way to address this issue in legislation is to adopt the course of citing in the legislation relevant case law (as is now done for example with the citing of “*Loty’s Case*” in s.381 of the Fair Work Act). This approach gives unambiguous direction to FWC in dealing with what would be ‘matters pertaining to the requisite relationship’ and legislative authority for it to find accordingly in any particular case. “Matters pertaining” has a long history going back to the original definition of ‘Industrial matters’ in the *Commonwealth Conciliation and Arbitration Act 1904* with an equally long history of judicial interpretation<sup>1</sup>.

### 3.2.5 Agreements need to make employees ‘better off overall’

3.2.5.1 Ports Australia submits it is axiomatic that employees would be better off overall following a bargaining process, otherwise why would employees agree to the bargain (save and except for exceptional circumstances, such as a business rescue plan). Ports Australia accepts that any change to the ‘better off overall test’ regime may be portrayed as unbalanced and hence unfair. Ports Australia shares the view held by other employers that in a piece of legislation called “fair”, that there is a perception of imbalance with this requirement. It may have dissuaded some employers to enter the bargaining stream. To Ports Australia’s knowledge, the previous “no disadvantage test” did not cause any such hesitance.

3.2.5.2 A larger problem with the better off overall test (BOOT) has been its application by FWC. FWC takes the view that the BOOT is a comparison between the award and the proposed enterprise agreements, and not what actually happens on the ground<sup>2</sup>. It then ends up being largely a mathematical exercise, with most conditions of employment reduced to a monetary value and comparisons between two *documents* (as distinct from two real-life working scenarios) made.

3.2.5.3 This approach has the capacity to prevent working arrangements of mutual benefit to the parties from being implemented. This is so because the motivations of the employees to agree to certain terms and conditions may be more focussed on non-monetary benefits on offer. Generally FWC can’t account for these, as the case law supports the monetary approach to assessment of the BOOT.

3.2.5.4 The legislation requires the FWC to compare and contrast, at a point in time, the terms and conditions on offer in a proposed agreement to the otherwise prevailing modern award. The agreement also has to apply to future employees and employment situations. The law has been applied by FWC to include hypothesising about the practical application of the agreement in future. FWC sometimes requires undertakings that employers will retain a watching brief on the award and ensure that the practical application of the agreement on the ground continues with the better off overall test. The law appears to be clear as s.193 of the Fair Work Act uses the defined expression

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<sup>1</sup> Relevant cases include *Australian Tramway Employees Association v Prahan and Malvern Tramway Trust* (1913) 17 CLR 680, *Metal Trades Employers Association Claimants; & Amalgamated Engineering Union Claimants* (1935) 54 CLR 387, *R v Wallis* (1949) 78 CLR 529, *R v Commonwealth Conciliation & Arbitration Commission; ex Parte Transport Workers’ Union of Australia* (1969) 119 CLR 529, *R v Portus; ex Parte Transport Workers’ Union of Australia* (1977) 141 CLR 1 and *Electrolux Home Products Pty Ltd v Australian Workers’ Union* 221 CLR 309

<sup>2</sup> *Bupa Care Services and Others* [2010] FWA 2762

“test time”, however in practice; this is not always easy to apply. The agreement making parties need this uncertainty removed.

### 3.2.6 Requirement to consider productivity improvements?

3.2.6.1 Ports Australia notes that as far back as the early-1980s, a predecessor of FWC, the Australian Conciliation and Arbitration Commission, instituted requirements for tangible productivity improvements to be included in its federal awards, before it would approve a reduction in the standard working week of 40 hours to 38 hours<sup>3</sup>.

3.2.6.2 This trade-off requirement continued with the establishment of award based superannuation<sup>4</sup>. The practice required parties to convince the tribunal that the cost of implementing the improvements in conditions had been offset, as much as possible, by either the removal of other award conditions deemed to be impediments to productivity or the inclusion of productivity enhancing provisions.

3.2.6.3 Given that this process had reasonable success, there is no reason to believe that another version of that principle, this time at the enterprise level, could not work.

3.2.6.4 The worth of requiring productivity improvements prior to approval of agreements lies in adding to the incentives for employers to bargain. If the legislation includes a balance – better off for both sides – it stands a chance of being more attractive to the many employers who eschew it now in favour of the award and ad hoc over-award benefits.

3.2.6.5 The other great benefit of a legislative requirement for agreements to have productivity offsets will be the raising of consciousness among many employers in Australia to think more seriously about the link between performance of the business and pay/conditions. In Ports Australia’s view, too many employers (and employees for that matter) still see wage and conditions’ improvements as something ‘conferred’ externally. They often do not relate it sufficiently to enterprise level productivity and the strategic aspirations of their respective companies.

### 3.2.7 Requiring parties to bargain in good faith

3.2.7.1 Ports Australia supports the current good faith bargaining requirements but notes the capacity of the FWC to issue scope orders may cause fragmentation of a workplace. Scope orders can require an employer to bargain with different sections of its workforce separately and in some instances, this may work against other programs and policies of the employer.

3.2.7.2 Ports Australia suggests that good faith bargaining requirements could extend to unions being required to demonstrate that they are bargaining in relation to the specific *enterprise* (and not the industry) as a way to address the negative impacts of pattern bargaining. Even more importantly perhaps, the unions ought to be required to demonstrate they are bargaining in relation to the specific enterprise and not just for the employees in occupations for whom their union has

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<sup>3</sup> *National Wage Case 1983* (1983) 4 IR 427

<sup>4</sup> *National Wage Case June 1986* (1986) 14 IR 187 and *National Wage Case December 1986* (1986) 15 IR 395

constitutional coverage. Unions need to consider the particular circumstances their members are in at the enterprise level and not merely adopt a stance regardless of the employer's situation.

3.2.7.3 Take for instance a tug boat operator; the crew usually consist of three personnel on any shift, and these are members of three different unions. It is possible for a tug boat operator to have to deal with scope orders requiring it to bargain separately with each union and potentially to have multiple agreements applying to a single place of work.

3.2.7.4 Ports Australia submits that the ultimate right of a business owner to run and manage the business ought to weigh in the balance when it comes to scope orders and the like, as the whole point of the exercise is to focus on the enterprise, not an industry or a class of employees – factors which were hallmarks of the previous centralised industrial relations framework.

### 3.2.8 Individual Flexibility Arrangements (IFA)

3.2.8.1 There are fundamental problems with the IFA regime. Firstly, IFAs can be unilaterally cancelled by either party on the giving of notice. This kills certainty.

3.2.8.2 Secondly, the legislation requires the employer to ensure that an employee executing an IFA is 'better off overall' than if the award/enterprise agreement applied. There is little guidance given as to how the employer is to affect this requirement, other than to adopt the simple monetary approach akin to that applied by the FWC when approving enterprise agreements. Many employers are uncertain about what would occur if they entered into an IFA and it were subsequently challenged in a court as being "less than" statutory entitlements. That hesitancy has not assisted the take-up of IFAs.

3.2.8.3 Thirdly, employers cannot craft an IFA and offer it to employees as a term of employment prior to engagement. This means that if a workplace has certain practices in place which existing employees have agreed to via IFAs, new recruits cannot be required or expected to conform.

3.2.8.4 Ports Australia is also critical of the requirement for the subject matters of IFAs to be listed in awards or agreements, and hence restricted to only those matters. An IFA should be open to contain any number of issues relating to the employment relationship and not be so restricted. A useful innovation would be that the legislation provides that parties can enter IFAs regardless of what award applies to them, whether there is an enterprise agreement or not and that there is no restriction on the range of topics that can be included in an IFA. It would also be useful if the legislation specifically prohibited awards and agreements from purporting to restrict the range of topics an IFA could include.

### 3.3 When enterprise bargaining disputes lead to industrial action

3.3.1 Ports Australia members' experience of enterprise bargaining is varied. They share the wider business' concerns about the ease with which protected industrial action can take place, especially when bargaining has barely begun.

3.3.2 In a nutshell, Ports Australia believes the current system has too many features of an out-dated adversarial system where ‘strike first, bargain later’ tactics deliver ultimately, unsustainable outcomes. A truly mature system would see industrial action as a last resort, taken only when the parties have reached a serious impasse and exhausted all other avenues of settlement.

3.3.3 It is particularly difficult for some employers, in capital intensive industries, to resist sustained industrial action. In Ports Australia’s situation, the closure of, or disruption to, port operations, can and usually does have serious ramifications for customers at every point of the compass – shippers, shipping lines, consumers, exporters etc, and can quickly lead to major disruptions to trade and job losses elsewhere.

3.3.4 The law is weak in relation to the need for the parties to demonstrate that the negotiations have been extensive but nevertheless fruitless, and there is no requirement to use the expertise of the industrial tribunal to lend assistance prior to authorising protected action. Such a requirement would not be out of place or contrary to fairness in the system, given the nature of the port industry and the obvious consequences of disruption. After all, what is the point of the “industrial umpire” if it never gets to blow its whistle?

3.3.5 Further, employers really have only lock-outs at their disposal to respond to industrial action which is then seen as disproportionate. Other options such as cancelling leave already approved, delaying reimbursement of expenses (despite award/agreement provisions requiring timely payments) are by and large unsatisfactory. As was demonstrated in the Qantas case<sup>5</sup>, a tactic of signalling industrial action, only to withdraw it at the last moment, causes disruption and damage to the employer but none to the employees. There is no countervailing action available to employers, other than locking employees out and bringing matters to a head in a much more confrontational environment (again, like in the Qantas case).

3.3.6 Ports Australia supports the continuation of mandatory secret ballots before industrial action during bargaining can occur. Ports Australia believes a decision to effectively jeopardise one’s own income is so important it ought not to be subject to any kind of intimidation, group thinking or peer pressure.

### 3.4 Individual arrangements outside enterprise agreements

3.4.1 The Australian workplace relations framework is complex because of the interaction of the common law, the Fair Work Act, state/territory legislation, enterprise agreements, awards, and in many cases, a signed ‘Contract of Employment’ document each employee has executed with his/her employer.

3.4.2 This layered set of rules is a recipe for error. A major problem arises because too many parties to employment contracts operate under the misapprehension that such a document displaces regulatory oversight and all the layers of red tape. The legal framework needs to be overhauled to bring this confusion and complexity to an end.

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<sup>5</sup> *Transport Workers Union v Qantas Airways Limited* [2012] FWA 6612

3.4.3 If we as a nation are to retain a specialised set of employment rules and a dedicated tribunal to set them, then there has to be reconciliation with the common law. That is, too many areas remain the subject of overlap, open to forum shopping in disputes, and subject to different interpretations (see for example the endless argument about contractor versus employee, casual versus permanent).

3.4.4 In the view of Ports Australia the net effect in the Australian experience seems to be that individual arrangements are upheld wherever they are to the benefit of the employee, but any trade-off the employer was due under the arrangement, falls away if it is not sanctioned by an award or approved enterprise agreement. The old expression “one cannot contract outside the award” is all one way traffic.

3.4.5 There is a step in the right direction in relation to higher income earners. Presently, a high income threshold is established whereby certain rules do not apply. It is effectively a buy-out, allowing a simplified approach to managing reward and effort. Ports Australia would support a system which allowed employers and employees to construct a comprehensive contract of employment which supplanted all of the various pieces of regulation so that both parties could know, and rely on the boundaries being unambiguously set.

3.4.6 Most employees of Ports Australia’s membership are employed on tasks requiring care, professionalism, self-direction and as such many are employed on salary packages. This approach is widespread in many industries. Mechanisms to permit the crafting and registration of employment contracts which take in consideration all aspects of the work performed ought to be available to employment parties. Such contracts would displace the plethora of detailed minutiae currently requiring conformance.

3.4.7 Ports Australia believes there are sound reasons to provide this stream for employment contracts. Firstly, properly done, they can improve certainty for the parties on the boundaries. Secondly, they permit re-shaping of community or industry standards to the needs of the direct parties, often the employee seeking flexibility to better organise their non-work commitments and pursuits. Thirdly they enhance fairness through permitting individual reward for individual effort. Finally, they tend to diminish disputation as the parties are focussed on their direct needs.

### 3.5 Resolving disputes over terms and conditions

3.5.1 Ports Australia’s members have experience of protracted bargaining sometimes in a difficult environment. This can result in a major focus on key issues and relative neglect of lesser issues. Typically, to resolve a deadlock, the parties will agree to include a term in an agreement, but its practical operation on the ground will always be “subject to consultation” or some other such caveat.

3.5.2 The net effect of this situation is a stream of constant disputation throughout the life of the agreement over a wide range of operational matters. This goes to the heart of productivity. Often the matter involves a change to a method of work, or timing for example due to customer demand.

3.5.3 Since it is mandatory for enterprise agreements and modern awards to contain dispute settling procedures and consultation provisions, parties ought to be free to access the tribunal at short notice and to have their matter dealt with by a tribunal member familiar with the dynamics of the industry. This happens now to a large measure, although currently, anecdotal evidence suggests the tribunal is reluctant to push the parties to reach a settlement. A hallmark of earlier iterations of the Fair Work Commission was the willingness of tribunal members to act quickly and also demand resolution between the parties.

3.5.4 However Ports Australia is of the view that prevention is preferable and would welcome legal requirements for productivity offsets to be as important in the enterprise agreement approval processes as ensuring employees are better off. That would mean these irritants which require Ports Australia members to endlessly consult about running their businesses would not in all likelihood be approved. What would happen in practice is the employer would invoke the assistance of the tribunal during negotiations and the tribunal should be required to indicate firmly that, unless these impediments are removed, the chances of the agreement being ratified are slim.

#### **Issues Paper 4 - Workplace Relations Framework: Employee Protections**

4.1 Ports Australia shares the dismay of other employers at the development of the unfair dismissal regime turning into a racket. It acknowledges that occasionally, some employers do act egregiously, and deserve sanction. Ports Australia therefore recognises that employees ought to have access to redress if they form the view that the termination of their employment has been without reasonable cause. However the FWC statistics<sup>6</sup> bear out a simple fact; parliament has created a giant edifice of uncertainty for employers in return for a very small dividend.

4.2 A cursory glance at the daily activities of FWC shows an enormous use of a resource on this issue. Highly paid members of the tribunal with decades of experience are sitting in rooms listening to days of evidentiary material and submissions, and delivering lengthy judgements over relatively petty matters. In many instances, procedural irregularities trump unacceptable behaviour by employees. Ports Australia submits that by its very nature, the unfair dismissal regime is fraught. The openness of the meaning of “unfair” is a fundamental problem and no codification thus far has assisted reduce the opprobrium this regime attracts from employers (such as the much touted Small Business Code)

4.3 In 2009, Parliament added a raft of other ‘rights’ to the list which have been interpreted by the Federal Court to effectively include any matter relating to the employment relationship<sup>7</sup>. These go under the umbrella of Adverse Action. Ports Australia has no quibble with the longstanding laws which protected freedom of association and related issues about entitlements to wages etc. But these laws to cover a workplace right are very wide indeed, with an employee protected from “mak(ing) a complaint or inquiry: ..... (ii) if the person is an employee—in relation to his or her employment.”<sup>8</sup>

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<sup>6</sup> See Tables 12 - 15 Unfair Dismissal Arbitration – Outcomes, Fair Work Commission Annual Report 2013/14

<sup>7</sup> *Shea v TruEnergy Services P/L (No 1)* [2012] FCA 628 (15 June 2012)

<sup>8</sup> S.341(1)(c) Fair Work Act 2009

4.4 Ports Australia understands the anti-bullying regime to have resulted so far (after one year in operation) in only one anti-bullying order being issued by the tribunal. Ports Australia suspects the absence of monetary compensation may influence the lack of interest in this regime.

4.5 Ports Australia does not dismiss lightly the incidence of, nor the deleterious effects of, bullying behaviour. Ports Australia is of the view that its members will be alert to the issue and where possible deal with it as matter of course as managers. Most of Ports Australia membership has HR expertise either in-house or easily accessible who are able to address such behaviour including in the WHS context.

4.6 It is not of a mind to support the expansion of the anti-bullying regime. This is because in the Australian experience, what will happen is that it will be the employer, and not the perpetrators, who will be penalised. However, if it is to be expanded, then the behaviour of union officials, including on-site delegates, ought to be brought within the purview of the regime.

## **Issues Paper 5 - Workplace Relations Framework: Other Issues**

### **5. 1 The role of the main WR agencies**

5.1.1 As Ports Australia has touched on earlier in this submission, the complexity of the Australian system includes the various forums in which matters can arise. These are listed in the Commission's Issues Paper.

5.1.2 Of particular concern to Ports Australia is the Road Safety Remuneration Tribunal (RSRT). At a fundamental level, Ports Australia is not in favour of specialist tribunals within the FWC and is not supportive of a wage setting regime which is underpinned by the view that safety can be achieved by higher wages.

5.1.3 Wages paid to truck drivers, especially in the long haul sector, are mainly linked to distances travelled. This is productivity based remuneration. But that is a two way street – the more kilometres or trips the driver does, the more total earnings. Experience tends to show that drivers will opt for more trips no matter what the reward per kilometre driven, so Ports Australia is very sceptical that higher wages will induce drivers to reduce the number of kilometres they drive each year.

5.1.4 Additionally, the RSRT is empowered to make Remuneration Orders against participants in the supply chain which includes Ports Australia's members. This is anathema to business planning as so much of the transport driver's activities are beyond the influence, let alone control, of Ports Australia's members. Road safety is the subject of a vast web of federal/state/territory legislation and those agencies charged with enforcing that regulation should be brought to account if they are failing. Creating another layer of regulation to control an industry potentially vicariously through tangential parties in the supply chain, is not addressing the core issues, it is blame-shifting. The RSRT should be abolished.

5.1.5 The Fair Work Ombudsman (FWO) should be required to give written advice on award/agreement interpretation (like the ATO). Those advices should not have a disclaimer exonerating FWO in the event its advice is found contrary to law by the courts. If an employer seeks the FWO's advice and acts on it, that employer should be absolutely entitled to rely fully on that as a defence. The courts should be obliged not to convict and punish employers in such cases.

5.1.6 The FWBC is charged with trying to bring order to the construction sector. Its efforts should result in costs and delay reductions for the development of infrastructure so its existence is welcome and its charter supported by Ports Australia.

## 5.2 How well are the institutions working

5.2.1 Ports Australia is of the view that largely the institutions are only as good as the legislation and the quality of appointments to them, allow. Generally Ports Australia is reluctant to make specific criticisms about FWC personnel or the nature of decisions. However it notes a high number of successful appeals has occurred since the Fair Work Act commenced. It also notes some astonishing outcomes of decisions (including an unheard of three-way split in one instance<sup>9</sup>), whereby contradictory full bench decisions have added to employers' uncertainty of the law<sup>10</sup>.

5.2.2 The FWC attempts to organise its activities based on industry panels, the purpose being that groups of tribunal personnel develop and retain industry knowledge. It doesn't always do this, and some tribunal members deal with matters of which they have absolutely no background, or industry knowledge. The parties have to start from scratch, which is very inefficient. Having specialists within the tribunal is very useful provided the parties trust and respect the members concerned

5.2.3. Now that the FWC is the main tribunal for the country and the state systems have been dramatically reduced in importance, the FWC's personnel ought to be deployed less in Melbourne and Sydney.

5.2.4 Assuming the FWC will continue to be the certifying body for enterprise agreements, it ought to be required to ensure its Panel system referred to above is extended to that function.

5.2.5 Registered organisations have an automatic right to appear in proceedings before the FWC whether the organisation has an active member(s) concerned with the matter or not. Individual employers cannot be represented by an agent without making significant submissions justifying the need for such representation<sup>11</sup>. Given the complexity of the law, this is an unnecessary impost and should be removed.

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<sup>9</sup> Newlands Coal Pty Ltd v CFMEU [2011] FWAFB 7325

<sup>10</sup> Canavan Building Pty Ltd [2014] FWCFB 3202

<sup>11</sup> Warrell v Walton [2013] FCA 291

### 5.3 Compliance costs

5.3.1 The main compliance costs for Ports Australia's members is management and staff time used in negotiations, whether that be or an enterprise agreement or for day to day disputes. The physical outgoings for costs such as legal fees can be very substantial.

5.3.2 Employers are obliged by the law to deal with unions regardless of union membership density in a particular workplace. This raises compliance costs. Often more formal processes are automatically engaged when a union is involved rather than an employee and, say, a HR manager, dealing with a dispute in-house.

5.3.3. If the employment contract stream postulated earlier above were in place, Ports Australia would expect that the certification process would be no more than a registration of a formal document, as distinct from the elaborate approval processes now in place for enterprise agreements. In such a case that would significantly reduce compliance costs.

5.3.4 The other big improvement that would reduce compliance costs generally would be the genuine modernisation and streamlining of awards, with the aim to minimise the number and complexity of mandatory employment conditions with which an employer has to comply.

### 5.4 Competition laws and interaction with the WR system

5.4.1 Ports Australia is in favour of the retention and strengthening of secondary boycotts legislation. The legal framework of specialised workplace laws should not be undermined or circumvented by actions which are akin to industrial action, but disguised or engaged in tangentially by industrial parties. It is beyond the pale that employers are expected to, and generally do, play by the WR system rules, only to see unions adopt boycott action.

5.4.2 This extends to so-called 'community action'. These are protests organised by union officials allegedly acting as private citizens. They enrol the assistance of members who are either on strike or unemployed to engage in pickets, protests, blockades and disruptive behaviour generally. The typical path employers have to use now is to argue in state/territory courts about breach of the peace and like actions. This is not always quick and again, when the courts are bereft of context, they can make decisions based in tortious law rather than in the umbra of the WR system.

5.4.3 Unions set labour prices through these and other actions. Pattern bargaining is effectively a manifestation of price-setting and is poorly discouraged by the existing framework.

### 5.5 Public sector workplace relations

5.5.1 State owned enterprises can and do operate industrially as if they were no different to other employers in the WR system. Some members of ports Australia include public sector organisations, including regulatory agencies and state owned corporations. These organisations can and do make workplace arrangements under the auspices of the national WR system.

5.5.2 Given the nature of their operations, Ports Australia's members do not see any justification for the employment relationship not to be regulated in the same or similar manner to private enterprise. Ports Australia does not subscribe to the view that productivity is not a relevant factor in the delivery of public services. It does acknowledge the view that productivity measurement is not as clear cut in some public sector circumstances.

## 5.6 Alternative forms of employment

5.6.1 Ports Australia supports a system which permits different forms of employment. Ports Australia is opposed to a system which either prohibits or impedes employers from having services provided by independent contractors, self-employed persons, labour hire, casuals, part time employees, seasonal employees or any other such arrangement.

5.6.2 Ports Australia believes various styles of working are matters for the circumstances concerned. There is too much emphasis on conformity in this area, with tribunals and courts seemingly obsessed with "converting" contractors to employees after the event. Too little notice is taken sometimes of the intention of the parties and the practicalities of the situation.

5.6.3 Seasonal influences or peaks and troughs in the flow of business, are obvious candidates for flexible responses with the deployment of labour. Any system which is antagonistic to this is an impediment to productivity because employers balk at the prospect of sham contracting allegations and the like with the potential financial costs that can cause.

5.6.4 On the other hand, many people are not interested in the full time employee model, preferring the capacity to work in more flexible ways. As the population ages, it is likely more people will seek out short term assignments, part time and casual engagements, contracting, locum work and other much more varied means of applying their skills. The WR system is almost hostile to this type of person and those who would engage them. It needs to be eased considerably to facilitate a much wider range of working methods.

5.6.5 To illustrate the rigidity of the system and the mentality of some of the major players, it is still not uncommon to see clauses in enterprise agreements prohibiting the use of contractors and for labour hire companies to adopt the terms of employment required of the host employer regardless of the industrial regulation that might otherwise apply to the labour hire company (e.g. its own enterprise agreement).

## 5.7 Other elements of the WR framework

### 5.7.1 Right of Entry

Ports Australia believes where basic trespass laws are effectively suspended to allow a union official access to members, that right should be accepted with a concomitant enforceable requirement for that official to behave in accordance with the basic requirements of the employer. Access is a privilege and it ought not to be abused. The laws regarding removal of individual official's right of entry following bad behaviour are slow to deliver results and heavily weighted in favour of the union.

### 5.7.2 Long Service Leave

Ports Australia supports the intention to have national standard. That standard should permit cashing out of long service leave and the capacity for employees to take it in any number of periods subject to the agreement of the employer. The current situation of each state/territory having different standards, different administrative rules, access rules, timing rules is unhelpful and contradictory in a so-called national system.

### 5.7.3 International labour standards

Ports Australia understands Australia to have the most highly regulated and complex labour laws in the world. It knows of no other country with prescriptive detailed awards, legislation and a tribunal such as exists in Australia which can involve itself so intimately in the business affairs of employers. Inasmuch as the system is already complex and many-layered, Ports Australia is generally of the view Australia has no need to embrace further international compacts or covenants.

## 6. Coastal Shipping

6.1 The decision to extend the Fair Work Act to foreign crews stands as one of the regulatory impediments to vessels operating in Australia's coastal trades.

6.2 Ports Australia supports the Government's goal to establishment regulatory arrangements that promote coastal shipping as a viable alternative to road and rail in addressing the growing domestic freight task and in supporting Australia's languishing manufacturing sector.

6.2 The Bureau of Infrastructure, Transport and Regional Economics published figures in 2013 showing the decline in the size of the major trading fleet engaged on the coastal trade. In 2006/7 the total number of ships in this category was 37. It peaked at 46 in 2010/11, but has declined to 38 by 2012/13. This coincided with the awards system and other Australian employment laws applying to employees on foreign vessels involved in the coastal trade.

6.3 This development is of particular concern to Ports Australia's membership in regional Australia where coastal shipping opportunities exist to provide greater connectivity for their communities and regional produce to other Australian markets.

**Ports Australia**  
**April 2015**