

SUBMISSION TO THE PRODUCTIVITY COMMISSION'S INQUIRY INTO THE WORKPLACE RELATIONS FRAMEWORK 2015

Introduction

This submission addresses the following issues identified in the terms of reference of the Productivity Commission Inquiry. It states:

- A key consideration will be the capacity for the workplace relations framework to adapt over the longer term to issues arising due to structural adjustments and changes in the global economy. In particular, the review will assess the impact of the workplace relations framework on matters including:
- unemployment, underemployment and job creation...
 - productivity, competitiveness and business investment
 - the ability of business and the labour market to respond appropriately to changing economic conditions
 - ...
 - the ability for employers to flexibly manage and engage with their employees
 - red tape and the compliance burden for employers...¹

The *Fair Work Act 2009* (Cth) (*FWA*) in part responded to some of these issues by reinstatement of legal support for procedures over ‘consultation, representation and dispute settlement’ requiring consultation of representatives about ‘major workplace change’.² Our submission will address how the FWA consultation procedures over major workplace change might better respond to issues of structural adjustment and global competitiveness.

This submission also addresses other issues raised by the terms of reference of the review in relation to the FWA consultation procedures. We note that ‘in conducting the review’, the terms of reference require that ‘the Productivity Commission will draw on the full spectrum of evidence’³ and ‘identify gaps in the evidence base where further collection may assist in the analysis of the overall performance and impact of the system’.⁴

There is relatively little publicly available research into the procedures over ‘consultation, representation and dispute settlement’ provided for in s 205 of the FWA and Schedule 2.3 of the *Fair Work Regulations 2009* (Cth).⁵ Hence, it is difficult to assess how effective the statutory consultation requirements have been in terms of their contribution to the ‘overall performance and the impact of the system’.⁶ We urge the Productivity Commission to recommend further research into the consultation requirements provided for in the legislation and regulations.

The Productivity Commission has also been asked to review ‘the Act’s performance against its stated aims and objects, and the impact on jobs, incomes and the economy’ and examine the ‘experience of

¹ Productivity Commission, *Workplace Relations Framework: The Inquiry in Context*, Issues Paper No 1 (2015) iii-iv.

² See *Fair Work Act 2009* (Cth) s 205.

³ Productivity Commission, above n 1, iv.

⁴ *Ibid* v.

⁵ See B Creighton and A Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 315; Amanda Pyman, Peter Holland, Julian Teicher and Brian K. Cooper ‘Industrial Relations Climate, Employee Voice and Managerial Attitudes to Unions: An Australian Study’ (2010) 48(2) *British Journal of Industrial Relations* 460.

⁶ Productivity Commission, above n 1, v.

countries in the Organisation for Economic Co-operation and Development'.⁷ Accordingly, we compare the consultation provision in the FWA with evidence from comparable European laws and best practice. Improvements to the model term would enhance the operation of the Act consistent with its objects.

Enhancing the Consultation Term Consistent with the FWA Objects

We highlight for the Commission's consideration the objects specified in ss 3(a) and (e).⁸ Section 3 provides:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and ...
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms;...

We note that the Act provides that a consultation term must be included in an enterprise agreement requiring consultation of representatives about major workplace change.⁹ If an enterprise agreement does not include a consultation term, then the model term is taken to be a condition of the agreement. The model consultation term for enterprise agreements is prescribed in the regulations, which require consultation of relevant employees and appointment of employee representatives.¹⁰ It is notable that similar consultation procedures over major workplace change are also required for modern awards under s 139(1)(j) of the FWA. However, we only focus in this submission on the model term required in enterprise agreements.

The model term provides:

- a right to representation at work;
- a procedure for addressing grievances; and
- a self-regulatory compliance mechanism.

The model term could be improved if the consultation provisions better addressed other objectives of the Act, including co-operation and productivity.

Enhancing Consultation Procedures in Australia by Reference to the Experience of European Countries

There are other ways in which the model term could also be enhanced.

First, the topics for consultation in the model term are far more limited than in comparable European laws. Under the model term, consultation is required where a major change is likely to have a significant effect on employees if it results in:

⁷ Ibid iv.

⁸ *Fair Work Act 2009* (Cth) s 3.

⁹ See *Fair Work Act 2009* (Cth) s 205.

¹⁰ *Fair Work Regulations 2009* (Cth) Schedule 2.3.

- (a) the termination of the employment of employees; or
- (b) major change to the composition, operation or size of the employer's workforce or to the skills required of employees; or
- (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
- (d) the alteration of hours of work; or
- (e) the need to retrain employees; or
- (f) the need to relocate employees to another workplace; or the restructuring of jobs.¹¹

From 2014, where the impact of a change to an employee's regular roster or ordinary hours of work does not constitute major workplace change, an employer will nevertheless be subject to the same consultation obligation regarding these matters. Section 205 of the FWA requires consultation of representatives about major workplace change and change to the regular roster or ordinary hours of work of employees to be a term of an enterprise agreement. From 2014, amended s 205 provides for a new consultation process to be included in a term in an enterprise agreement.¹² The term requires an employer to consult with their employees about change to a regular roster or ordinary hours of work by:

- providing information to the employees about the change;
- inviting employees to give their views about the impact of the change (including any impact in relation to their family and caring responsibilities); and
- considering any views put forward by those employees about the impact of the change.¹³

Professors Creighton and Stewart note that the model term introduced in 2009:

is similar (in the extent of information provision and consultation it requires and the range of issues in respect of which these processes are to occur) to the consultation clauses that were commonly inserted in awards and collective agreements following the Termination, Change and Redundancy Case in 1984.¹⁴

Despite the modest amendments to the model term operating from 2014, Australia lags well behind mandated consultation requirements over structural adjustment adopted in the European Union. Since the mid-1980s, the European Union has developed new directives requiring all member states to adopt information and consultation procedures that extend beyond those provided for in the model term. For instance, the European Union Directive requiring the establishment of employee information and consultation procedures in undertakings in each of the member States provides a more general list of topics to be discussed by employers and employees.¹⁵ These include:

- the future development of the enterprise's activities and its economic situation;¹⁶
- employment, particularly where there is a threat to employment within the business; and¹⁷
- issues likely to lead to substantial changes in work organisation or contractual relations, especially issues directly affecting job security such as collective redundancies and business transfers.¹⁸

Thus, the topics to be discussed include firm performance, continuance of employment and job security. Most importantly, discussion of the economic situation of the firm would include consultation over

¹¹ *Fair Work Regulations 2009* (Cth) Schedule 2.3 (9).

¹² *Fair Work Act 2009* (Cth) s 205(1A).

¹³ Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth) 20 [47].

¹⁴ B Creighton and A Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 315.

¹⁵ Council Directive 2002/14/EC, 2002 O J (L 080): ('*ICED, 2002*').

¹⁶ ICED 2002: art 4(2)(a).

¹⁷ ICED 2002: art 4(2)(b).

¹⁸ ICED 2002: art 4(2)(c).

productivity. The topics discussed by Works Councils in the Netherlands and Germany are also far more extensive than in the model term.¹⁹

Turning from the topics of consultation to the form of consultation required by the model term, the term specifies that it must allow for the employee to be represented during the consultation²⁰ and the Explanatory Memorandum²¹ notes that the representative could be an 'elected employee or a representative from an employee organisation'.²² However, the model term provides no mechanism for election of representatives.

The model term requires the employer to consult employees or their representatives, but provides no structure for ongoing consultation. For instance, there is no reference to a committee structure, such as those provided for by the European Works Councils Directive²³ and the Works Councils legislation in Germany and the Netherlands.

The model term does not provide an effective model for information and consultation procedures for a developed 21st century economy. Improved consultation mechanisms are required to address skills development to provide greater employability and to address global competitive pressures faced by Australian businesses to enhance productivity and flexibility. It is notable that enhancement of employability, job security and competitiveness underpin the policies of EU directives regarding informing and consulting employees.²⁴ Effective implementation of a consultation procedure may not only enhance job security, but also employability, flexibility and productivity.

Regulatory Burden and the Statutory Framework

Implementation of information and consultation procedures does not impose a significant regulatory burden on most employers because it is an elite form of consultation, that is, through representatives. A statutory framework can reduce costs for employers who would otherwise have to expend funds to devise their own schemes for structured communication with their workforce. A legal framework can minimise the risk of productive discussions being impeded by the conflicting interests of labour and capital.

¹⁹ See Works Councils Act (WCA) (*Wet op de Ondernemingsraden*), the Netherlands; Betriebsverfassungsgesetz 1972, Works Constitution Act, Germany.

²⁰ *Fair Work Act 2009* (Cth) s 205(1).

²¹ Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [876].

²² Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [876].

²³ European Parliament and Council (EWC)(1994) 'European Works Council', Council Directive 94/45, 1994 OJ (L 254); European Parliament and Council (EWC) (1997) 'European Works Council', Council Directive 97/74, 1998 OJ (L 010); The Transnational Information and Consultation of Employees Regulations (1999) UK Statutory Instrument 1999, 3323.

²⁴ Key aims mentioned in the preamble of the ICED 2002 are: to promote social dialogue between management and labour; to strengthen dialogue and promote mutual trust within undertakings; to increase employee availability to undertake measures and activities to increase their employability, promote employee involvement in the operation of the future of the undertaking and increase its competitiveness.

Impetus and Effect of Reform of the FWA

We note from Europe that there is very considerable evidence that joint consultation and/or works councils enhance productivity outcomes.²⁵ There has also been significant scholarly research and government reports chronicling the need and the benefits of an effective information and consultation procedure for Australian employees.²⁶ We would urge the Inquiry to recommend to the government that they revise the model term to more effectively implement the objects of the Act.

Finally, the modest but useful 2014 changes to s 205 indicate that new information and consultation procedures may be developed under the the FWA. However, millions of Australian employees who are not covered by the FWA remain unrepresented. Consequently, consideration should be given to developing legislation to promote information and consultation procedures for employees and employers not covered by the FWA.²⁷

²⁵ See for example, A Wilkinson, P J Gollan, M Marchington, and D Lewin, 'Conceptualizing Employee Participation in Organizations' in A Wilkinson, P J Gollan, M Marchington, and D Lewin (eds) *The Oxford Handbook of Participation in Organisations* (Oxford University Press, 2010) 3-25; S Wood, 'High Involvement Management and Performance' in A Wilkinson, P J Gollan, M Marchington, and D Lewin (eds) *The Oxford Handbook of Participation in Organisations*, (Oxford University Press, 2010) 407-425.

²⁶ See for example, P J Gollan and G Patmore 'Transporting the European Social Partnership Model to Australia' (2006) 48 *The Journal of Industrial Relations* 217, 217 - 256; P J Gollan, G Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy: Labor Essays* (Pluto Press Australia, 2003); R MacCallum, G Patmore, 'Works Councils and Labor Law' in I Ross, R Markey and P Gollan (eds), *Works Councils for Australia: Future Prospects and Possibilities* (Federation Press, 2002) 74-100; P J Gollan, 'Nonunion Forms of Employee Representation in the United Kingdom and Australia', in B E Kaufman and D G Taras (eds), *Nonunion Employee Representation: History, Contemporary Practice, and Policy* (M E Sharpe, 2000) 410-449; P J Gollan, R Markey and I Ross, 'Additional forms of employee representation in Australia', (Working Paper no. 64, Australian Centre for Industrial Relations Research and Training, 2001).

²⁷ For a comparison of information and consultation provisions, in Australia, the United States and the European Union see G Patmore, 'A legal perspective on employee participation' in A Wilkinson, P J Gollan, M Marchington, D Lewin (ed), *The Oxford Handbook of Participation in Organizations* (Oxford University Press, 2010) 76-104; for a comparison of the different approaches to labour law regulation, focusing on exclusivity in the United States and plurality in Australia, see G Patmore, 'Evaluating Legal Regulation of Collective Bargaining and Consultation in Australia and the United States: A Normative Analysis' (Paper presented at the Australian Labour Law Association Conference, University of Sydney, 15 November 2014) 5 and footnote 15 in relation to bargaining and 6-7 in relation to consultation; see also P J Gollan, G Patmore and C Xu, 'Regulation of Employee Voice' in A Wilkinson T Dundon, J Donaghey and R Freeman (eds), *Handbook on Employee Voice* (Edward Elgar, 2014).