

**PRODUCTIVITY COMMISSION INQUIRY
INTO WORKPLACE RELATIONS FRAMEWORK**

SUBMISSION

THE AUSTRALIAN MEAT INDUTRY COUNCIL

MARCH 2015

1. INTRODUCTION

- 1.1 The Australian Meat Industry Council (AMIC) welcomes the opportunity to comment upon aspects of the Productivity Commission Inquiry (the Commission) into the *Workplace Relations Framework*. The AMIC does not intend to comment on each of the considerable issues raised by the Commission in the 5 *Issues Papers*. AMIC understands there may be an opportunity to expand on key issues at public hearings.
- 1.2 The AMIC is an employer organisation registered pursuant to the provisions of the Fair Work (Registered Organisations) Act 2009 (Cth.). It has been registered as an employer organisation under federal legislation since 1928. The AMIC eligibility coverage is all employers 'in or in connection with the meat industry.' The AMIC is the peak meat industry employer body in Australia pursuant to workplace law.
- 1.3 Throughout a long history the AMIC has serviced its members as a registered organisation under successive federal industrial legislation - 1904-1997 Act, 1988 Act, 1996 Act, 2005 Amendment Act (Work Choices) and finally the Fair Work Act 2009 (the 2009 legislation).
- 1.4 AMIC is aware that a submission may have been filed under the names of a number of meat processing establishments. On the draft supplied to us, a large number are members of AMIC. We are aware that each of the entities on the draft supplied operate to an Enterprise Agreements. There are approximately 90 registered export slaughtering and over 100 registered domestic facilities that slaughter and bone and slice for the domestic market. Over and above these groups there are country slaughtering houses throughout the country in regional Australia.
- 1.5 The AMIC position on identified issues is expressed below in this submission. On some important issues, the position of AMIC (representing industry) may be different from those expressed in any submission of individual/group of meat processing establishments. The reason being that the industry covered by

AMIC consists of many meat processing establishments and other vitally important meat sectors. AMIC intends to adopt an 'achievable' outcomes approach consistent with industry policy over a period.

- 1.6 In this brief submission, AMIC talks about the issues raised by the Commission relative, primarily, to the meat industry. The reason is not because the AMIC has no interest in a multitude of other industries and/or occupations or that it does not appear before the Fair Work Commission (FWC) on issues common to all modern awards. Or that it does not attend or appear at general industry gatherings where workplace relations issues are discussed. It is simply to give the Commission an overview of the period 2010 to present for a particular important national industry concerning the issues raised for discussion by the Commission.

2. THE MEAT INDUSTRY

- 2.1 The meat industry employs thousands of employees in all states of Australia and Territories. The width of the industry covers operations such as meat processing establishments, meat manufacturing establishments, meat retail & wholesale establishments. The industry includes all ancillary operations such as treatment of by-products, transport, clerical and administration, packing and storage and many others. Throughout, we have used the terminology as defined in the primary industrial instrument: see *clauses 2 and 7 of the Meat Industry Award 2010*.
- 2.2 The meat industry covers employers who employ a handful of employees to entities employing thousands. AMIC notes that the Minister's Request to the Commission specifically cites the needs of 'small businesses' in the review.
- 2.3 There is a complete interrelationship between sectors of the meat industry and this is primary reason why there is one Modern Meat Industry Award 2010. For example:
- Processing establishments operate retail operations and vice versa;

- Processing establishments operate retail /wholesale operations and vice versa;
- Meat manufacturing establishments operate retail/wholesale operations and vice versa;
- Meat retail establishments operate wholesale operations;
- Meat establishments operate storage and package facilities.
- Meat establishments interchange labour where appropriate from one operation to another:

(see AMIC's filed submissions 1 August 2008/5 November 2008 with AIRC during Part 10A Priority Industries award stage for retail industry)

3. THE MEAT INDUSTRY AND THE 2009 ACT

3.1 Since the commencement of the 2009 Act AMIC (on behalf of members) has been involved with:

- any number of the 122 modern awards on behalf of the meat industry;
- award reviews before Fair Work Commission (FWC) during 2012 and 2014 on behalf of the meat industry and Common Issues;
- penalty rate issues before FWC on behalf of the meat industry;
- numerous unfair dismissal claims in conciliation and subsequently, arbitration;
- other general protection matters especially adverse action applications during conciliation and subsequently, arbitration;
- advising on potential bullying claims;
- involvement in countless enterprise bargaining negotiations from commencement to approval/disapproval and the difficulties, restrictions and pitfalls associated with the steps;
- industrial action including protected industrial action matters.
- interpretation of the NES and awards with compliance bodies such as the FWO;

- right of entry matters for entities in the meat industry;
- foreign workers and migration law issues relative to workplace laws;
- Parliamentary Inquiries considering amendments to workplace laws

3.2 AMIC can therefore speak with extensive experience on a variety of issues raised for discussion.

4. THE FAIR WORK ACT 2009

4.1 There is little doubt that the 2009 legislation substantially altered the rights and obligations of employees/employers and registered organisations (and their officers) compared to any of the previous legislation listed above in 1.3. Ironically, it was the legal court battles concerning the validity of Work Choices that provided a platform for the 2009 Act by examining and re-defining certain aspects of s.51 of the Australian Constitution. As Kirby J., in his dissenting judgement in Work Choices, concluded:

“....Once a constitutional Rubicon such as this is crossed, there is rarely a going back....” (2006) 23 ALR 1 at 641

4.2 So indeed, Kirby J was correct. The 2009 legislation has proved to be unlike any previous federal workplace legislation. Rights, entitlements and protections, never before envisaged for legislation, became enshrined as law. In the short time since enactment of the 2009 legislation having regard to decisions of tribunals and courts, the pendulum has swung any perceived imbalance in Work Choices firmly back in favour of employees (and employee organisations) and beyond.

4.3 One should not lose sight of the political environment that existed when the 2009 legislation was in Bill form and before Parliament. The present Prime Minister was not the Leader of the Opposition and the Opposition was shell-shocked by the reaction to Work Choices in the lead up to the 2007 federal

election. The Bill passed without much reasoned and necessary debate at all. And so the Bill, with all its deemed (but now known) failings, became law.

4.4 Essentially, in the modern era, employment entitlements for employees and employment obligations for employers are determined and set by one of three methods:

- Legislation; (and interpretation by courts);
- Modern Awards setting minimum entitlements for those covered, or
- Bargaining between the parties resulting in an approved Enterprise Agreement.

4.5 A major issue, to be discussed and commented upon by the Commission having regard to the Scope of the Inquiry, is whether a balance concerning the dot points 4.3 above has been achieved. We know that the NES and Workplace Rights are not limited to award covered employees so provisions such as these provide a further dimension as they were not contained in federal workplace legislation prior to 2010.

4.6 Many Parts of the 2009 legislation are far too complex and detailed and procedure is inefficient. If this be correct, the outcomes listed in s.3 of the 2009 legislation are not being achieved.

4.7 AMIC provides comments on some of the matters raised by the Commission below.

5. THE AWARD SYSTEM

5.1 The Commission posed a number of issues under this head in Issues Paper 2 as follows:

“The modern award system is seen as another important safety net, and is specified as such in the Objects clause of the FWA (s. 3(b)). While there has been a large reduction in the number of awards and a dramatic decline in the number of wage classifications per award (Hamilton 2012, p. 10), modern awards still spell out minimum wages and conditions for a wide range of industries, occupations and skill levels (such as the wage rate for ‘Cemetery Employee Class 1’ or a ‘Car Parking Officer Level 1’). A question is whether there are arguments for further changes to awards, including:

- further consolidation and simplification*
- reliance instead on the other safety nets in the WR system (potentially supplemented by the addition of some other basic provisions in the NES)*
- changes to the processes for their determination by the FWC*
- whether the four yearly review process is suitably nimble in addressing changing economic circumstances — an issue raised by some parties in early consultations.*

The choice among these options depends on the:

- appropriate role of awards in a decentralised WR system that emphasises enterprise bargaining and allows for individual arrangements*
- economic and social impacts of various type of award arrangements (including alternatives), taking account of the effects on different parties*
- the scope for reducing the problems posed by awards through changes to the modern Award Objective and the processes used by the FWC to periodically determine awards, including the timing of reviews.”*

Some initial comments on the subject

5.2 The modern awards only commenced to operate barely 4 years ago. AIRC handed down 122 modern awards following the Request of the then Minister pursuant to s.576 of the Workplace Relations Act 1996. One of the tasks that the AIRC had to consider in making the awards was “...*the desirability of reducing the number of awards operating in the workplace relations system*”: see Minister’s Request 29 April 2008.

5.3 The AIRC did not complete the task because of any number of reasons. The end result was that when the modern awards were made by FWC under the 2009 Act early January 2010, any number of the modern awards still applied to particular industry workplaces irrespective that an industry award was in place

i.e. the most obvious example are classifications under manufacturing award though there are many other examples primarily covering occupation awards.

- 5.4 From surveys conducted by AMIC in the period 2010 to present, the making of the modern awards did result in increased costs for entities in the meat industry across Australia in varying degrees. Those costs had to be absorbed without any regard to productivity improvements and irrespective of the standard ‘award flexibility’ clause being inserted into all the modern awards. As an aside, the pre-reform meat industry awards already contained wider facilitative provisions and these were inserted into the Meat industry Award 2010: *see for example clauses 8 and 24 of that award.*

Further consolidation of modern awards

- 5.5 Further consolidation of awards, across historically unrelated industries, is undesirable and most probably would result in increased compliance costs for most entities in the meat industry for no tangible benefit. If every *meat retail/wholesale establishment* was pushed into the General Retail Award this would result in vastly different award provisions with cost ramifications. AMIC was successful in opposing this direction in 2008/2009 for that exact reason. AMIC was successful with the same argument for *meat processing and meat manufacturing establishments* into a general manufacturing industry award and similarly for *transport and storage* and *clerical* occupations into other awards. Productivity and flexibility would be compromised if this cross industry consolidation occurred. And for what reason? All the impact matters referred in the Minister’s Reference would be compromised.
- 5.6 The period 2008-2009 was difficult enough transitioning into single industry awards. Imagine cross industry consolidation and the next 10 years. If the process presumably occurred before the FWC, one may be dealing representatives of organisations that have never been involved in a particular industry at all. We outline some of the pitfalls of representation in the modern award era when discussing the award reviews below.

- 5.7 Further consolidation is occurring by agreement during the 2014 award review. AMIC anticipates this trend to continue into the future and should continue where appropriate. AMIC has not heard or read any submission during the 2012 or 2014 FWC award reviews that advocated further consolidation to 80 or 60 or 20 industry awards.
- 5.8 AMIC is opposed to any recommendations that would have the effect where sectors of the meat industry are dispersed into a minimum number of generic awards. AMIC was successful in the Part 10A process because of completely different wage levels, different span of hours and related matters, different penalty rates of all description, different facilitative provisions, different employment categories in cross industries. The same ‘one shoe doesn’t fit’ logic concerning consolidation would apply to most of the other industries.
- 5.9 Severe and compelling evidence would need to be led to convince AMIC otherwise, given the ‘impact matters’ detailed in the Minister’s Terms of Reference.

A decentralised system with further emphasis on enterprise bargaining

- 5.10 The Minister’s Request raises the needs of ‘small businesses. Small business (well beyond the employee numbers covered by the Code) has never the desire or inclination – for whatever reason - to entertain the enterprise agreement path. AMIC small business members rely on the industry award for flexibility. The small to medium processors, meat manufacturers, meat retailers and meat wholesalers rely on the award. It is Part 2-3 of the 2009 legislation that needs to be modernised and made relevant.

Whether the four yearly review process is suitably nimble in addressing changing economic circumstances

- 5.11 The process is not working efficiently or as it should. The problem is not necessarily the FWC but the procedure itself that has become too cumbersome. The fault lies with the legislation that sets few boundaries or guidelines. Witness the 2014 review concerning *Transitional Provisions* which anyone would have thought was a simple matter. Witness all the other Common Issues matters

being arbitrated and the mechanism. In the award stage of the 2014 review we have employee organisations making submissions that have had no participation in the award making process for particular industries for decades, not even in the making of the modern awards. Some of these employee organisations – per their eligibility rules – do not cover the whole ambit of industries yet they are making submissions as if they represented all employees in an industry. We are not advocating a return to ‘parties bound’ provisions in awards but any party wishing to make submissions should necessarily have to show a real interest and be limited to that interest if it concerns only one sector of an industry. All this is hardly practical when one is dealing with substantial applications to vary awards. In the *Common Issue* matters during the 2012 review and now during the 2014 review employee organisations (and the ACTU) are relying on outmoded test case decisions handed down years before 2010 submitting principles have been determined and therefore should be implemented.

5.12 The process of review appears flawed because of the legislation.

5.13 We make some comments on s.134 of the 2009 legislation below.

Further simplification

5.14 All the above leads one to conclude that the mechanism for further proper simplification (rather than review) of modern awards needs to be reviewed and implemented so as to promote productivity and flexibility. The present legislative provisions are too onerous and inflexible to achieve such a result. We especially refer to s.134 of the 2009 Act. The provisions of the 1996 legislation paved the way for AMIC to begin simplifying federal meat industry awards and resulted in removing tallies from awards, increased span of hours, reduced weekend penalties in key sectors; see s.143 of *Workplace Relations Act* 1996. The Commission itself, during the meat industry simplification cases, released a report titled *Work Arrangements in the Australian Meat Processing Industry* (October 1998) that assessed outmoded work practices. The AIRC reacted accordingly. The report is still relevant in to-day’s environment.

5.15 AMIC doubts it could achieve the results it achieved following 1998 – 2002

award simplification for the meat industry under the 2009 legislation.

- 5.16 The 2009 Act needs to provide a balance for employers and industry to benefit. It is our view that the Modern Award Objective (MAO) in s.134 of the 2009 Act is a barrier to achieve further and real modern award reform and some of the sub-clauses need to be deleted and the section re-written as it contains incorrect criteria when dealing with the needs of the modern award system. The previous Federal Government proposed and achieved amendments to s.134 in its last dying days of office as it did with sunset provisions for transitional provisions. This ad-hoc approach to serious legislative reform is not conducive to real and proper reform and merely satisfies 'myopic' interest groups.

The addition of other basic provisions in the NES at the expense of awards

- 5.17 AMIC is totally opposed to extending the NES to provide for further minimum entitlements presently contained in modern awards.
- 5.18 There may be some that advocate abolishing modern awards or a further drastic consolidation of them and thereby (on either approach), handpicking some key terms, average monetary amounts, perhaps even penalties, and thus extending NES to enshrine the terms into legislation. This, in our opinion, is unworkable for all industry whether a corporate entity employing thousands or a sole proprietor employing a handful of employees.
- 5.19 Once enshrined in legislation, compared to modern awards, an extended NES would provide little or no flexibility for any industry, sector of an industry or individual party for the future. It opens the way for successive federal governments to attempt to extend higher and higher and wider. Australian Industry would be beholden to Government for award terms and conditions that, for over a century, were determined by a (supposedly) independent umpire without regard to technicalities. One cannot stand at the bar table and argue concerning the merits of legislation. Witness the debates concerning ss.90, 91 and 92 of the 2009 legislation that are still continuing in the 2014 review. The addition of a generalised penalty rate structure into NES (be it for overtime or

weekend or public holidays) cannot relate to the particular circumstances of individual industries or sectors of industries. AMIC's view is that no model along these lines would succeed and placate all interests of business regarding real reform.

- 5.20 The modern political process in Australia should be a sufficient reminder of the risk of extending NES with terms more suited in awards.

The Meat Industry Award 2010

- 5.21 We make a brief point here. The submission referred to in 1.4 above may remark about this award. The larger meat processing establishments were key participants and heavily involved in the making of the simplified award (that abolished tallies) and the Modern Meat Industry Award 2010 that included nearly every one of the terms of the pre-reform awards. These awards did provide much flexibility. Other small to medium sized processing establishments and the remainder of the meat industry apply the award without undue drama.
- 5.22 AMIC is clearly of the view that vast majority of the meat industry would have a contrary opinion to any submission that called for the abolition of the award system and extend the NES that enshrines them into legislation.

Regulated set of base wages

- 5.23 The Commission makes mention of some saying modern awards have regulated unnecessary base wages. Those who make the comment could never have been at the bar table during the Part 10A process. There is a simple reason for this particular matter and it concerned the making of the modern awards themselves and the process. There were no parties bound provisions as determined very early by the AIRC in the Part 10A process. The dilemma was that if classifications were not covered by one modern award one may have to look at other modern awards: see for example the standard clause 4.6 of the Meat Industry Award 2010. It was a completely new framework compared to the previous century.

What should occur to the award system?

5.24 AMIC is of the view that:

- (i) *There is no rational reason why one industry award should not apply to all particular employees in the coverage clause of an industry award. For example, if the meat industry award covers meat processing establishments, meat manufacturing establishments and meat retail/wholesale establishments then the award should apply to all employees of those establishments leaving aside supervisory, salaried and managerial staff who have always been award free. The objective of the modern award process was to lessen the number of awards applying to a workplace. The objective was never fully completed. Such an approach as suggested would result in reduced compliance costs and open the way for productivity improvements and flexible work practices.*
- (ii) *If the modern award system is to remain viable with industry awards then the NES (or equivalent) should not be extended for the reasons given.*
- (iii) *Part 2-3 of the legislation needs a complete radical re-think especially sections 134, 136, 143, 144, 145 and Division 5.*
- (iv) *Further simplification of award terms must be undertaken once (iii) is satisfactorily enacted.*
- (v) *Sections 157 to 161 in the 2009 legislation need to be reviewed. The sections are too technical and restrictive in relation to award variation.*

6. THE NES AND MINIMUM ENTITLEMENTS

6.1 The Commission, in Issues Paper 2, commented:

“Nevertheless, the Commission does not propose to undertake the same holistic analysis of the NES, unless submissions present solid grounds for review. Unlike the minimum wage, there appears to be little controversy over the NES as a whole. Although the value of the benefits rises with each increase in the wage level, the primary policy interest appears to lie with specific aspects of the NES.”

Initial comments

6.2 There is certainly controversy about specific aspects of the NES. Those debates are occurring within the precincts of FWC in the 4 yearly review.

6.3 There are a few issues AMIC wishes to raise concerning NES as examples.

6.4 The first issue is s.90 (2) which provides that, on the termination of an employee, the employer must pay the employee ‘*the amount that would have been payable to the employee had the employee taken that period of leave.*’

6.5 In all probability most of the modern awards provide for annual leave loading when taking annual leave but a vast number provide no annual leave loading on termination. It appears that s.90 (2) prescribes that the payment on termination of any untaken annual leave includes the loading.

6.6 Many modern awards, derived from previously applicable industrial instruments, do not provide for loading on untaken annual leave termination payments. We note that there is before Federal Parliament a Bill effectively negating s.90 (2) but it appears to be stuck in ‘limbo’ so as to speak.

6.7 Whether annual leave loading should even be an allowable award matter is a matter for policy and merit considerations. AMIC believes it is a relic from the strictures of award making last century and has no merit whatsoever in the current workplace environment. Why should employees receive a loading for taking annual leave? It follows that the payment of the annual leave loading as part of untaken annual termination payments is clearly lacking any meritorious basis.

- 6.8 The second issue we raise concerns long service leave (LSL) which appears in Division 9 of Pt 2.2 of Ch 2.
- 6.9 Some parties may agitate for standardised LSL provisions across the country. The AMIC position is not that simple. There are important and severe cost and flexibility ramifications.
- 6.10 Until there is full agreement in principle on all of the terms between the Commonwealth, States and all industry across Australia, the present provisions in NES should be maintained. AMIC has received no feedback from any present member that it is an issue. AMIC has always had a clear view on the interpretation of this aspect of NES.

What should occur?

6.11 AMIC is of the view that:

- (i) *Apart from eradicating s.90 (2) from the legislation AMIC makes no other comment at this point.*
- (ii) *NES should not be extended to include other minimum conditions.*
- (iii) *Nothing should happen to the LSL provisions in NES until the criteria set out in 6.10 is fully achieved.*

7. PENALTY RATES

7.1 In Issues Paper 2, the Commission raised the following matters:

“How should penalty rates be determined?”

What changes, if any, should be made to the modern awards objective in relation to remuneration for non-standard hours of working?

What are the economic effects of current and alternative penalty rate arrangements on business profitability, prices, sales, opening hours, choice of employment type, rostering, hours worked, hiring, unemployment and incomes?

Were penalty rates deregulated, would wages fall to those applying at other times, or would employers still have to pay a premium to attract labour on weekends and holidays?

What are the long-run effects of penalty rates on consumers and on the prices of goods and services?

To what extent does working on weekends or holidays affect families, employees and the community? Are penalty rates effective at addressing any concerns in this area?

What do the experiences of countries like New Zealand, the United Kingdom and the United States — which generally do not require penalty rates for weekends — suggest about the impacts of penalty rates?

What are the variations in profit margins and sales over the week, and to what extent does this affect the appropriate design of penalty rate arrangements?"

Initial comments

- 7.2 Nothing offends the trade union movement more than someone raising the spectre of penalty rates, questioning their relevance and seeking a review. Even though the Commission flagged discussion by raising the above issues, the Federal Government has already ruled out any possible legislative change as we understand the public comments. When the Federal Government made the public comments the newly elected Victorian Government raised the ‘fear factor’. All of this is unhelpful to public debate.
- 7.3 The FWC is currently hearing applications during the 2014 review to reduce certain penalty rates in a limited number of industries including retail, hospitality, fast food and retail pharmacy. The applications mostly relate to weekend work and public holidays, reducing the penalties and non-payment of casual loading when casuals are receiving the penalties. Should the applications fail, AMIC suggests it will be because of the restrictions contained in s.134 as discussed above and especially 134(da).
- 7.4 There are a number of matters of principle that need to be addressed as a matter of policy:
- (i) In many industries, Saturday and Sunday ordinary hour work payments have been far too high given the socio-economic changes in the workforce compared to decades past when the penalties were mostly struck at the current levels and usually by consent between organisations of employees and employers as parties bound to a particular award.

Hence, the basis of the present rate levels in these industries is dubious having regard to economic and social criteria.

- (ii) There can be little justification, in many industries, for the present levels weekend penalty rates on top of the ordinary hourly for performing ordinary hours on Saturday or Sunday.
- (iii) Similarly, there can be little justification for the level of present public holiday penalty rates across industry.
- (iv) There is definitely no justification whatsoever for a casual employee receiving the casual loading + any Saturday/Sunday/public holiday penalty for working ordinary hours on those days. The casual should be entitled to only the penalty prescribed for a full time or part time employee.

Meat processing and meat manufacturing

- 7.5 AMIC recently conducted a random survey of meat processing establishments and whether they operated public holidays. The purpose of the survey was to simply obtain brief information as to the views of the processing sector in relation to working public holidays.
- 7.6 Replies were received from export and domestic plants; the replies covered all states; the number of employees for the plants that replied ranged from more than 500 to less than 50; half of the plants are covered by EA's and half operate to the Meat Industry award 2010; half the plants operate to an incentive scheme per the award and half do not; since 2010 near half the plants have operated on public holidays and half have not.
- 7.7 The survey asked establishments for the reasons operating public holidays since 2010. Replies noted the following collated reasons:
 - contract kill commitments and deliveries must be scheduled for the next working day;
 - urgent customer requirements;

- the need to supply the customer's requirements on the next working day following the holiday;
- maintain the plant and manage stock;
- need to contract kill for small stock;
- customer requirements;
- meet urgent contract requirements;
- urgent seasonal requirements;
- necessary for small stock contract kill;
- need to operate during spring lamb season;
- supplying product to other states.

7.8 Where work on a public holiday is necessary because of any of the above reasons the margins are drastically reduced. To operate a meat processing plant on a public holiday represents an enormous expense. Replies to the survey indicated, depending on the size of the workplace and economies of scale, that it sometimes is uneconomic to operate the plant. Sometimes, there is no alternative to operate on a public holiday because of contract commitments. Working public holidays can possibly triple labour costs of an ordinary day.

7.9 Operating Public Holidays is enormously expensive compared to ordinary days. To slaughter the stock one needs labour along the chain. To breakdown and bone and slice one needs labour on the chain. Then there follow-on labour and chilling room labour. Then if one is an export plant there are obligatory inspection personal paid for by the establishment. Past studies have shown that labour costs in the meat processing sector represent 60 per cent of total industry value added: Chapter 3, 1998 Productivity Commission Report into *Work Arrangements in the Australian Meat Processing Industry*. In Chapter 2 the Report also noted that other studies have shown that it was more costly to process livestock in Australia than in major competing countries.

Retail/wholesale survey

7.10 AMIC conducted a similar survey for retail/wholesale establishments. Though a different sector, the results offered for meat processing are similar:

- labour costs are excessive for working public holidays;
- labour costs for ordinary hours weekend are bearable;
- labour costs for overtime and weekends are unbearable.

- 7.11 Of course, if one is a retail/wholesale establishment operating within the confines of a major shopping complex whether in a large urban city or in regional Australia, a retail establishment may have no alternative but to operate because of lease requirements.

What should happen?

- 7.12 The Commission in 2.5 of Issues Paper 2 posed two policy approaches to penalty rates namely, accept the principle of regulated penalty rates or that penalty rates should be a choice for individual enterprises with less or no role by the regulator.

- 7.13 AMIC's view is that:

- (i) *there is a place for an arbitral body to be involved in regulating penalty rates. It might still be the FWC however, if it was still the FWC there would need to be substantial changes to the 2009 legislation as detailed i.e. the MAO in s134 to start with. The problem with the FWC being involved, with respect, is that very few members have business or hands-on industry experience. A trade union or legal background should not suffice for the important task of setting proper penalty rates. Some sort of precedent for this approach was set in relation to setting the federal minimum wage and the stalled modern award superannuation review.*
- (ii) *The preferred position of AMIC is that a penalty rates body would be made up of non-FWC members with relevant and meaningful business and industry experience. It must be fully independent. That body would set the bare minima based on relevant economic and social criteria for industry. The minima may vary from industry to industry depending on circumstances.*
- (iii) *Over and above the minima, market forces dictate individual enterprises choosing to apply the minima or increasing premiums for weekend, public holiday or overtime work to attract labour.*
- (iv) *AMIC is not in favour of the statutory setting of penalty rates for the similar reasons as to why we are not in favour of extending the NES.*

8. ENTERPRISE AGREEMENT MAKING

- 8.1 In Issues Paper 3, the Commission raises many questions on the subject matter. We do not detail each and every one of them.
- 8.2 The subject has been a contentious one ever since the 1996 Act allowed for Statutory Individual Agreements and for Agreements (direct) with employees.
- 8.3 The union movement does not represent anywhere near the majority of Australian workers nor probably anywhere near the majority of employees covered by the modern awards: see *Report of the Fair Work Review Panel*. It has been remarked that union membership of the private sector is barely into double figures. Union membership in small business (Small Business Code) is near non-existent. In the last 30 odd unfair dismissal claims where the employer was represented by AMIC not one applicant was represented by the union. We could go on.
- 8.4 The point is this. Why should a minority interest group be allowed the rights that have been bestowed upon employee organisations by the 2009 legislation? That is not a philosophical response. Just a statement of fact. At this important, perhaps critical phase, of the Australian economy and private industry going forward, the 2009 legislation needs to be overhauled concerning agreement making. We are not submitting that employee organisations truly representing employees should have no rights however, not to the extent presently provided in the 2009 legislation.
- 8.5 In AMIC's view, discussion/changes to Agreement Making are needed and urgently as follows:
- (i) *The 2009 legislation of this part of the 2009 legislation appears too restrictive. The whole of Part 2-4 of Ch 2 needs to be reviewed.*
 - (ii) *Allowable matters should be limited – union dues, paid union meetings, non-working shop stewards, union delegates' rights (to name a few) should all be non-allowable matters. These have absolutely nothing to*

do with productivity or flexible work arrangements. S.172 to be re-drafted

- (iii) Default bargaining representative provisions should be abolished. S.174 to be overhauled. Employers, during bargaining, have little idea of knowing the support for a position adopted by a union official acting as a bargaining representative. The representative support should be transparent.*
- (iv) Good faith bargaining provisions in ss.228 – 232 need to be reviewed. The Federal Court in Endeavour Coal [2012] FCA 764 detailed the scheme. The tests are far too stringent and bureaucratic. An employer should have the right to say 'I do not want to bargain' or 'I am happy with the modern award terms' or 'I am happy with the present Agreement'.*
- (v) The Enterprise Agreement approval process is too bureaucratic and needs to be reviewed.*
- (vi) Commission should review the Boot test given the cases determined by the tribunal since 2010 and comment whether it is too stringent. Consider the BOOT test relative to monetary and non-monetary benefits the case for distinguishing them ;*
- (vii) But for the provisions of the 2009 legislation, protected action – by its very name – would lose the immunity status. One understands that the aim of industrial action is to harm/persuade the employer. However, ss.423 to 430 need to be drastically reviewed given the high bars. We cite the Toyota debacle.*

Note: the meat processing sector is particularly concerned and disturbed (as an example) that every 3 years the meat inspectors and vets (not employed by meat processors but by the Cth) threaten or undertake protected industrial action as part of a CPSU campaign. It is obligatory under Cth legislation for meat inspection services to be undertaken at meat processing workplaces during production and if the inspection services are not available production cannot proceed.

9. GENERAL PROTECTIONS

Unfair dismissals

- 9.1 The Commission posed a number of questions in section 4.3 of Issues Paper 4 dealing with unfair dismissal arrangements. We do not repeat them all nor do we intend to comment on each and every one.
- 9.2 Since unfair dismissal provisions became part of federal legislation, AMIC has represented members in hundreds of claims. Most have settled at conciliation or even at the commencement of arbitration resulting in a discontinuance of the claim. Obviously then, a minor number have not settled. In subsequent arbitration proceedings, sometimes the applicant was successful and either reinstated and/or compensated. In some not successful.
- 9.3 Since 1 January 2010, AMIC has represented many members who have been the subject of unfair dismissal claims. Most settled. A minor number did not settle. AMIC's view is that the majority of matters that settled contained little merit. In some cases, the employer might have been procedurally deficient but the dismissal was completely warranted.
- 9.4 In the majority of the cases that AMIC settled since 2010 it was never about reinstatement. Representation of the applicants was mostly by specialist dismissal lawyers or consultants versed in presenting an argument (no matter how tenuous) and seeking to extract some money, any money and perhaps a withdrawal of the termination letter and the right to resign. There was never, in such cases, the remotest chance the matter would go to arbitration. We repeat that in most cases it is simply just about money be it a week's pay or two week's pay. For five cases in the last three months where AMIC has represented four settled for two week's pay or less. In the fifth the applicant did not proceed. In one recent case, the AMIC member (quite rightly) offered nothing at conciliation and the applicant's lawyer stated at the end they would be not be appearing for the applicant and would file the appropriate documents. The matter never proceeded to arbitration and the matter should never have been filed if proper instructions were given because it was completely devoid of merit. It cost the company time and use of resources to defend the claim.

- 9.5 It is far too easy for a person to file a Form F2 alleging unfair dismissal. The filing fee is (intentionally) far too-low. Once filed, the respondent is forced to embark on a time consuming and in most cases a costly and unproductive path to defend the claim. There needs to be a balance between an incentive to file and a corresponding incentive not to file. Although not a superior court, filing in the tribunal should attract a much higher fee than currently set. The whole process is not cost effective or balanced for employers.
- 9.6 We cannot be critical of conciliators who have presided over matters where AMIC has represented. In many ways, the phone conciliation quickly gets to the ‘nub’ of the issues and deals with the matter efficiently and in a non-technical manner on the material made available by the parties.
- 9.7 When (and if) a matter proceeds to arbitration the provisions of Part 3-2 of Chapter 3 of the legislation are far too technical and restrictive.

Actions needed concerning unfair dismissal

- 9.8 AMIC is of the view that consideration should be given to the following:
- (i) *increasing the filing fee;*
 - (ii) *amending s.387 so that it is less prescriptive with added emphasis on weight on whether there was a valid reason irrespective of a deficiency in procedure – some decisions of FWC since 2010 do not make (common) sense;*
 - (iii) *Repealing s.389 (1)(b) and s.389 (2) of the 2009 legislation – the latter interferes unfairly with management prerogative and is unproductive. Concerning the former we understand there are award obligations concerning consultation but if a person’s job is no longer required that should be the end of the unfair dismissal issue;*
 - (iv) *Increasing the period on employment time for bringing an application so that if a person (in whatever category) is employed for 12 months or less an unfair dismissal claim cannot be lodged;*
 - (v) *Part 3-2 of Chapter needs to be re-visited and simplified.*

Adverse action

9.9 The 2009 legislation introduced this provision as a new form of protection under the heading of ‘General Protections’. It is a dangerous and costly provision for employers who find themselves on the end of a claim – even where the claim has little merit. Before the Full Court of the Federal Court decision in *Bendigo Tafe* was overturned by the High Court, employers were downright petrified.

9.10 AMIC represented one member the subject of a similar claim by three people. The persons were terminated because the positions had been abolished and re-deployment was not an issue. The three persons (represented by a very large legal practise) lodged claims. The three persons claimed discrimination on the ground of race and the matter was the subject of conciliation. These people were the only persons working in a particular section of the plant and management made a decision to permanently close the section for economic reasons. Re-deployment could not occur and consultation occurred. The claim did not settle at conciliation and the persons filed in the Federal Court where it was referred to mediation. They were outrageous claims devoid of merit and should never have been entertained.

What needs to happen?

9.11 AMIC strongly believes that:

- (i) *The reverse onus of proof should be swiftly removed. There is little justification for its inclusion and resulted in the types of claims referred to in 9.8 above. The onus should be on the employee to prove any adverse action was taken as a result of a prohibited reason;*
- (ii) *The bullying provisions of the Act refer to reasonable management prerogative. The legislation should make it very clear that any claim in relation to a workplace right is negated if the action concerned reasonable management prerogative.*

10. OTHER ELEMENTS

Right of entry

10.1 The Commission posed the following question in Issues Paper 5 at 5.7:

Do the existing rights of entry laws sufficiently balance the interests of employees and employers, and if not, what are the appropriate reforms?

Comments

10.2 Right of entry, relative to all the issues the subject of the Commission's Inquiry, might not be the major issue. However, it is an issue in the context of day to day operations at the workplace. The larger the workplace, the greater the problem. The issue has a tendency to disrupt the workplace.

10.3 The AMIC services members and represents them in courts and tribunals across Australia. Regularly, we are called upon to advise members in relation to disputes including disputes with unions concerning right of entry.

10.4 For decades, AMIC (on behalf of members) has been involved in numerous disputes and arbitral proceedings involving right of entry matters under federal legislation - meaning the legislation of 1904 – 1987, 1988, 1996, 1996 Amending Act and 2009. AMIC and members have faced hostility from members of Tribunals over the years concerning right of entry disputes. AMIC has provided submissions to various Inquiries dealing with the right of entry provisions under federal legislation.

The Act

10.5 Part 3-4 of Chapter 3 of the Fair Work Act 2009 (Cth) (*the Act*) deals with right of entry provisions. S.478 of the Act states the Part “...*is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State and Territory OHS laws.*” S.480 states that the object of the Part is to establish a framework that balances the rights of organisations, employees and occupiers (our emphasis).

- 10.6 We state here quite clearly - Part 3-4 of Chapter 3 does anything but provide a balance.
- 10.7 We are of the view, as are others, that allowing permit holders to enter premises concerning State and Territory OHS laws should be removed from the 2009 Legislation. Permit holders should lose their right to act as 'pseudo' inspectors and the role continuing with the proper relevant authorities.
- 10.8 Concerning permit holders entering work premises "...for purposes related to their representative role under the 2009 legislation, the purposes are twofold:
- (a) Entry to investigate suspected contravention;
 - (b) Entry to hold discussion with employees who wish to have discussions.
- 10.9 Considering there are now compliance bodies in existence with ample powers, entry of permit holders onto Occupier's premises to investigate suspected contravention should be removed from the 2009 legislation.
- 10.10 It is 10.8 (b) above then that is primarily the subject of our comments below to demonstrate the lack of balance in the legislation.

Holding discussions

- 10.11 The Fair Work Amendment Bill 2013 substantially amended the 2009 legislation in relation to permit holders entering work premises for the purpose of holding discussions.
- 10.12 Prior to the 2013 amendment, s.492 read as follows (and we do not need to :

'SECT 492

Conduct of interviews in particular room etc.

(1) The permit holder must comply with any reasonable request by the occupier of the premises to:

(a) conduct interviews or hold discussions in a particular room or area of the premises; or

- (b) take a particular route to reach a particular room or area of the premises.

Note: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

- (2) *Without limiting when a request under subsection (1) might otherwise be unreasonable, a request under paragraph (1)(a) is unreasonable if:*

(a) the room or area is not fit for the purpose of conducting the interviews or holding the discussions; or

(b) the request is made with the intention of:

(i) intimidating persons who might participate in the interviews or discussions; or

(ii) discouraging persons from participating in the interviews or discussions; or

(iii) making it difficult for persons to participate in the interviews or discussions, whether because the room or area is not easily accessible during mealtimes or other breaks, or for some other reason.

- (3) *However, a request under subsection (1) is not unreasonable only because the room, area or route is not that which the permit holder would have chosen.....” (our emphasis)*

10.13 Relevantly, s.492 of the Act, after the 2013 amendments, reads:

‘492 Location of interviews and discussions

- (1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.*

- (2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.*

- (3) The permit holder may conduct the interview or hold the discussions in any room or area:*

(a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and

(b) that is provided by the occupier for the purpose of taking meal or other breaks.

Note 1:

The permit holder may be subject to an order by the FWC under section 508 if rights under this section are misused.

Note 2:

A person must not intentionally hinder or obstruct a permit holder exercising rights under this section (see section 502).....”

Comment on the 2013 amendment

10.14 The effect of the 2013 amendment was that if there was no agreement as to the place to hold discussions it defaulted to the lunchroom or meal area. AMIC has never been introduced or seen a permit holder who does not demand to enter the lunchroom, even before the 2013 amendments. Other sections of the Act in Part 3-4 of Chapter 3 were also amended in 2013.

10.15 Prior to the 2013 amendments EWC had the power to deal with a dispute about the operation of the Part: see s.505/506 of 2009 legislation prior to amendments. The Fair Work Amendment Bill 2013 (after enactment) took away that right so that FWC did not have the power to deal with a dispute concerning the appropriate place for interviews or discussions to occur. FWC was left with the token power to deal with the route the permit holder took to reach the default area.

10.16 We note as follows:

- (i) The 2013 amendment resulted in a near unfettered right for permit holders entering premises to hold discussions that has never been in federal workplace/industrial legislation dating back as far as 1904. Further, the amendment disallowed the Fair Work Commission from resolving disputation on this aspect of right of entry – a power FWC had prior to the amendment.

(ii) The 2013 amendments:

- were unnecessary, foolish and a recipe for disputation at the workplace;
- can only be described as a backward and retrograde step in terms of fairness to employees (especially) and employers;
- cannot be described as even-handed balancing approach to right of entry for the purpose of interviewing or discussing;
- cannot be described as providing proper balance;
- seem to imply that all workplaces are similar in geography in every respect i.e. one hat fits all
- were enacted to satisfy the long held paranoia of the trade union movement that seems to believe it has an almost unfettered right to be allowed into meal rooms where employees are consuming their meals;
- give no right to the vast number of employees who wish to consume meals and take breaks without interruption;
- run counter to the dicta of previous case law and tribunal decisions;
- clearly took away the power of the arbitral body and courts to determine what is fair and reasonable i.e. the umpire has been excluded from the equation.

10.17 In a submission to the Senate Education and Employment Committee, dated April 2014, concerning proposed 2014 right of entry amendments (not yet passed) AMIC submitted:

“Since the introduction of the 2013 amendments – 1 January this year – members of AMIC have encountered difficulties with respect to the default amendments. In the short four months, some AMIC members:

- *have experienced visits from union permit holders once a month;*
- *have no recourse to the FWC where all or a vast majority of the employees do not wish to be disturbed in the lunch room or meal area during breaks;*
- *have been unable to rely upon a reasonable alternative venue for interviews or discussions because the permit holder refuses to agree;*
- *have had to endure permit holders parading around the lunchrooms when employees wish to be left alone which has led to disputation;*

- *have had to ask union permit holders not to disturb employees who do not wish to have discussions;*
- *have had to devote unnecessary and wasted resources to permit holder visits to premises.*

No reasonable balance of the rights of the employees, employer and union permit holders exist under the present scheme of the Act...”

(AMIC submission numbered 21 to Senate Education and Employment Committee Inquiry into Fair Work amendment Bill 2014.)

10.18 We note that s.500 of the legislation Act states that the permit holder must not hinder or obstruct. However, nowhere is there a right of the employer or employee to dispute the right of the permit holder to enter the lunchroom or meal area if a substantial majority of the employees do not wish for the permit holder (or anyone for that matter) to enter.

10.19 Because there are no ‘parties bound’ clauses in modern awards AMIC members have had to confront situations where permit holders from any number of employee organisations seek entry to have discussions irrespective:

- (i) an Enterprise Agreement applies to the workplace, or
- (ii) the organisation to which the permit holder is attached has never been involved in the enterprise Agreement.
- (iii) That the eligibility rule of the organisation to which the permit holder is attached does not the whole of the workplace.

What needs to happen?

10.20 The scheme of the Act concerning right of entry provisions prior to the 2013 amendments was hardly ideal. It still opened the way to disputation and adversarial contests. This was because employers still had to devote unnecessary and wasted resources where permit holder visited premises. Rightly or wrongly, it was the employer or AMIC (representing the employer) who had to protect the interests of the employees: see generally *AMIEU v Fair Work Australia* [2012] FCAFC85 and *AMIEU v Goodchild Pty Ltd* [2011] FWA 8228

10.21 If the Commission is not persuaded to recommend a complete overhaul of right of entry provisions then at least:

- (i) *the pre-2013 amendment framework concerning entering for discussions provided for a slightly more even balance than currently exists.*
- (ii) *Subdivisions A and AA of Part 3-4 of Chapter 3 to be deleted and likewise the whole of Division 3 of the same Part. There would need to be consequential amendments.*
- (iii) *The legislation should prescribe that entry for discussion is dependent upon a written request of employees (we do not put forward a numerical figure or percentage at this point)*
- (iv) *If an Enterprise Agreement applies to the workplace and an organisation is named as a party then a permit holder, unconnected to the named organisation, should have no right to hold discussions with employees covered by the Enterprise Agreement during breaks at the workplace.*
- (v) *If with an Enterprise Agreement there is no union is named as a party and it was not involved in the agreement making process a permit holder should not be allowed to enter the premises during a meal break to hold discussions unless (iii) above applied.*

Sponsored foreign workers

10.22 The Commission posed the following questions concerning this issue.

How does the WR system affect the use of sponsored foreign workers?

Does any element of the WR system affect the incentives of employers either towards or away from the use of sponsored worker visas?

10.23 The sub-class 457 visa system has its problems. The larger employers in the meat industry round Australia have used and do utilise 457 visa labour. We are primarily talking about the meat processing and meat manufacturing sectors of the meat industry.

- 10.24 Over the last decade AMIC has undertaken studies and surveys concerned with why attracting and retaining labour in the meat industry in regional Australia is difficult. Many times during this period it has been near impossible to attract labour to workplaces. This includes attempting to source labour from other regions and states. Over the last decade the problem has been exacerbated by the 'mining boom'. The meat industry cannot compete for labourers who were offered in excess of \$100,000 per annum to work in remote areas.
- 10.25 Generally, production employee classifications at a processing establishment are not regarded as skilled persons for the purpose of the Australia/NZ skilled classification structure. For the meat industry only retail butchers and smallgoods makers fall within those categories. Therefore, under the provisions of the Migration Act 1958, if a meat industry employer in meat processing or meat manufacturing wished to sponsor an overseas worker onto the 457 visa program one needed to contractually enter into a Labour Agreement under the Act. The Labour Agreement is entered into with the Commonwealth and allows the employer to sponsor non-trades 457 visa employees. The Agreement is a negotiated document with minimum employment terms and conditions. The terms and conditions are generally, having regard to immigration orders and regulations, far in advance of what would be applicable to local employees under the Workplace Relations system instruments. Meat industry employers, like those in the meat processing or meat manufacturing sectors, face the dilemma that if local labour is not available for a variety of reasons and if they turn to sponsoring 457 workers, the costs are prohibitive.
- 10.26 Over the past twelve months inquiries have been taking place at federal government level relating to the integrity and efficiency of the 457 visa program. Hence, the issues posed above are not really the problem issues. It is not the WR system that causes the problems. It is the Migration Act/Regulations/Orders.

10.27 Similar arguments per 10.26 relate to 417 visa workers, permitted for a limited time period to work.

10.28 The issue for the meat industry relates to the additional excessive employment conditions imposed on employers under migration law to sponsor 457 workers.

Action needed

10.29 Unless the Commission agrees to consider the Migration Act in the context of the workplace relations framework and the issues discussed concerning 457 and 417 visa holders, we make no further comment at this point.

Australian Meat Industry Council