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To the Fair Work Act Review Panel

Re: Fair Work Act Review

On behalf of the board of the Australian Human Resources Institute (AHRI), I would like to thank you for the opportunity to make a submission to the 2012 review of the Fair Work Act.

Background to the Submission

I have read the 'Fair Work Act Review Background Paper' and note the request that submissions be concise and that propositions advanced within the submission be supported by evidence. This submission will attempt to meet both of those requests.

As the representative organisation of human resources practitioners in Australia, AHRI has a membership of approximately 18,800 members. Human resources practitioners are the people in business charged with the responsibility to implement the provisions of the Fair Work Act and are therefore well placed to report on their observations and perspectives of the way in which the Act is operating. The responsibilities of the HR function take into account operational matters such as compliance as well as matters of strategy so that the provisions of legislation can best be used by the business for the achievement of business objectives. In the HR context, that means creating an appropriate environment and work practices that enable the positive engagement of people in their work and that is also conducive to achieving productive business results.

Late last year, in association with Deakin University, AHRI surveyed the membership database on the workplace impact of the Fair Work Act with a detailed questionnaire consisting of 75 questions, many of which contained sub-sets of questions so that the number of questions asked was well in excess of 100 (for example, question 37 asked respondents to report on 32 separate outcomes of the Fair Work Act within their organisation).

To answer the questions, respondents would need to be familiar with the workplace relations legislation and the environment and people practices in their organisation. While respondents reported on their own organisation in answering the survey, they were asked to respond anonymously on their own behalf, not that of their organisation. The 2012 survey reports on the answers of 691 respondents. The questions consisted in the main of questions that were also asked in a comparable survey on the Act in 2010 and another on the former Work Choices legislation in 2007. Links to all three survey findings are set out below for the information of the panel.

The submission draws for evidence on the AHRI report of the 2012 survey findings titled 'The Fair Work Act: Its Impact within Australian Workplaces'

The report of the 2012 survey findings can be viewed here:
resource.ahri.com.au/press/downloads/downloader.php

The report of the 2010 survey findings can be viewed here:
http://www.ahri.com.au/MMSDocuments/comms/news/media_rel/ahri_fwa_report_november_2010.pdf

The report of the 2007 survey findings can be viewed here:
<http://www.ahri.com.au/scripts/cqiip.exe/WService=AHRI-LIVE/ccms.r?PageId=10955>

I note also that submissions should address the review's terms of reference and, where appropriate, consider the operation of the Act with respect to the object in Section 3, the extent to which the Act is operating as intended, and areas in which the Act could be improved.

Though the discussion and recommendations that follow will use evidence from the 2012 AHRI-Deakin University research report to focus on relevant parts of the object, as requested, the Panel is invited to exercise its own discretion in referring to and making use of other parts of the AHRI-Deakin survey findings.

Discussion and Recommendations

With respect to the seven recommendations in this submission, I have couched each recommendation in terms of a general principle and a desired outcome supported in each case by evidence from our research data. I leave it to the discretion of the Review Panel as to how the substance of each recommendation can be converted into an amendment to the Act, should the Panel decide that is the course they wish to follow.

For the purposes of this submission, I will focus on four parts of the object of the Act with respect to the findings of the AHRI-Deakin University research: parts (a), (d), (f) and (g). In most cases the data will be signified by reference to a Table number in the report. Where the data vary significantly from the 2010 to the 2012 reports, the discussion may refer back to the 2010 data for comparative purposes.

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

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements

Employee flexibility, employer flexibility and productivity

A sample of quantitative survey findings that have a bearing on part (a) and (d) of the object are as follows:

- 33% of respondents report number of parental leave days has increased under the Fair Work Act (20% reported that in the 2010 survey). Table 37 (xxvi)

- 31% of respondents report number of personal carer days has increased under the Fair Work Act (20% reported that in the 2010 survey). Table 37 (xxvi)
- 15% report number of sick days allowed per annum has increased under the Fair Work Act (8% reported that in the 2010 survey). Table 37 (xxvii)
- 90% report flexible working arrangements are being applied in their organisation (83% reported that in the 2010 survey). Table 63A
- The main flexible working arrangements being applied in respondent organisations are part-time work (91%), flexible start and finish times (84%), time off in lieu/RDOs (72%), job sharing (49%) and additional year off after maternity leave (49%). Table 64
- 43% report an increase in flexible employee working arrangements under the Fair Work Act, 18% report a decrease and 38% report 'no change' (that question was not asked in the 2010 survey). Table 37 (xxxii)
- 29% report productivity has decreased under the Fair Work Act (13% reported that in the 2010 survey). Table 37 (xxxii)
- 77% report that the Fair Work Act has increased the need for legal advice (74% reported that in the 2010 survey). While 51% believe the need for legal advice in one year's time will increase, 40% believed that in the 2010 survey. Tables 28 & 29
- 63% report that the level of record keeping has increased (58% reported that in the 2010 survey). Table 37 (xvi)
- 35% report financial flexibility to determine pay rates has decreased under the Fair Work Act (25% reported that in the 2010 survey). Table 37 (vi)
- 32% report functional flexibility to determine allocation of labour has decreased under the Fair Work Act (21% reported that in the 2010 survey). Table 37 (vii)
- 20% report numerical flexibility to determine employment numbers has decreased under the Fair Work Act (14% reported that in the 2010 survey). Table 37 (viii)
- 47% believe that operating under the Fair Work Act will decrease their organisation's willingness to employ people over the next three years. Table 70
- 58% believe that operating under the Fair Work Act will decrease their organisation's productivity over the next three years. Table 71A
- 31% believe an amendment to the Fair Work Act enabling the inclusion of individual labour contracts subject to a 'better off overall test' will improve productivity. Table 72A
- 31% believe an amendment to the Fair Work Act enabling the allowance for a choice between union and non-union agreements will improve productivity. Table 72B
- While 40% believe an amendment to the Fair Work Act enabling greater flexibility in use of contractors and labour hire firms would positively impact productivity, 43% believe such an amendment would have 'no impact'. Table 72 C
- 24% report their organisation has sought or considered outsourcing (or insourcing) part of its operations which involves the transfer of employees from one employer to another (14% reported that in the 2010 survey). Table 65

While the sample of findings listed above indicate that there has been a significant increase in employee flexibility under the Fair Work Act, the respondents to the survey also indicate significant increases in the need for employer record keeping and legal advice, and indicate their belief that the need for the latter will increase in a year's time. They also indicate decreased flexibility in the employer determination of pay rates, allocation of labour and determination of employment numbers compared to the 2010 survey. In addition, a greater proportion of respondents than in 2010 report a reduction in workplace productivity.

Recommendation 1

That the Fair Work Review Panel considers proposing amendments to the Act that have the effect of redressing the imbalance in availability of flexible employment arrangements between employees and employers as indicated in the data set out above.

Contractors, Labour-hire firms and productivity

Asked directly whether an amendment to the Act enabling greater flexibility in the use of contractors and labour hire firms would positively impact on productivity, a significant minority of respondents reported it would improve or greatly improve productivity (40%) and a similar proportion reported such an amendment would have 'no impact' (43%). The qualitative data in answer to this question include comments such as the following:

"The rules around engaging casuals and contractors are very restrictive. The fact that individuals can agree in writing to terms and then later claim for entitlements that they agreed to forgo is particularly unfair."

"We are wary of taking on short term contractors who work regular and systematic hours as we are concerned when it comes time to end their contract they will be seen as 'permanent' staff and could claim unfair dismissal etc. especially if we finish them up earlier than was expected."

"Our projects are cyclical and in two years' time we may face a different situation (to the one we face now). Working with contractors is attractive to cater for these peaks and troughs".

"As long as the introduction of these initiatives did not encourage the exploitation of employees they would work well. At present, there is a strong sense of transparency and fairness with our enterprise agreement, so the use of other employment instruments or tools needs to be carefully planned."

Recommendation 2

That the Fair Work Review Panel proposes an amendment to the Act that takes into account the principles of fairness and equity but enables greater flexibility in employers' use of contractors and labour hire firms.

Transfer of Business

While an increased resort to the Transfer of Business provision of the Act is still not significant with only a quarter of respondent organisations either taking action or considering the outsourcing or insourcing of employees, the 68 qualitative responses included only one respondent in support of the provisions. The comments of the others indicate that the provisions restrict the flexibility of businesses in those circumstances so much so that many companies jettison plans to proceed because the transfer of inappropriate instruments to the new entity is too much of a deterrent and is effectively an anti-employment provision. Qualitative data include the following comments:

"Other businesses are very reluctant to take on employees in a 'transfer of business' manner - prefer to have them resign and then take up with them."

“My company has subsidiary businesses, making like role transfers across subsidiaries a lengthy process to try to get exemptions. It is not feasible for employees covered by an instrument to take that instrument to another subsidiary, especially when the employee has voluntarily elected to apply for the role in the other business. Very frustrating.”

“We are in the business of providing managed services to other large companies. The new transfer of business test is a huge impediment to our business that at the very least means that we no longer offer employment to people who may become redundant from the company which has outsourced their roles to us.”

Recommendation 3

That the Fair Work Review Panel proposes appropriate amendments to the Transfer of Business provision of the Act that enables greater flexibility in the extent to which employers are required to transfer employee entitlements in their entirety to a new business entity.

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:

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action

Bargaining, negotiating and general protections

A sample of quantitative survey findings that have a bearing on part (f) of the object are as follows:

- 36% of respondents report that under the Fair Work Act the level of industrial disputes has increased (23% reported that in the 2010 survey). While 60% report ‘no change’ in industrial disputes, 73% reported ‘no change’ in the 2010 survey). Table 37 (xv)
- 56% report the Fair Work Act has made employment arrangements more complex (49% reported that in 2010). Table 31
- 47% report spending more time bargaining over employment contracts (40% reported that in 2010). Table 20
- 47% report overall remuneration has increased (30% reported that in 2010). Table 37 (xxix)
- 46% report the negotiation of employment contracts is more difficult (38% reported that in 2010), but 38% also believe negotiating employment contracts will become more difficult in 12 months’ time (25% believed that in 2010). Tables 24 & 25
- 65% report taking more time to formulate employment contracts (down marginally from 68% in 2010). Table 18
- 47% report the importance of managing union relations has increased (39% reported that in 2010). Table 32
- 39% report an increase in union involvement in bargaining (29% reported that in 2010). Table 37 (xvii)
- 40% report an increase level of union involvement in settling employee grievances (26% reported that in 2010). Table 37 (xix)

- 51% report it is more difficult to manage workplace disputes (30% reported that in 2010). 41% believe it will be more difficult in a year's time (25% believed that in 2010). Tables 26 & 27
- 41% report the number of union visits to work sites has increased (29% reported that in 2010). Table 37 (xxviii)

As the above sample of findings indicates, respondents to the 2012 AHRI-Deakin University study report that more time is spent bargaining and negotiating employment contracts. It also finds an increase in industrial disputes that are more difficult to manage against a general background of more complex employment arrangements. Taking the qualitative feedback into account, a significant minority do not see the increasing union involvement in bargaining or settling employee grievances in a positive light, though around 60% report 'no change', a figure that is down from around 70% in the 2010 study. A sample of relevant respondent comments is set out below:

"I am concerned that I am no longer able to negotiate directly with staff but feel obliged to bring outsiders in (unions) which do not understand our culture or are not concerned about my employees."

"More caution is being taken with decisions, necessary changes take significantly longer [to] implement due to increased formality and documentation needed to ensure that all decisions can be defended in FWA."

"I believe our employment management practices have become more risk averse. Many times we are 'afraid' to make the decision which is right for the business, based on the ramifications it may have under the Fair Work Act. Sometimes we ultimately take the action, but it takes a lot longer to get to the end result - due to being more cautious."

"The ability to claim adverse action is acting as a vehicle for people without legitimate claim to pursue unfair dismissal."

"The adverse actions provisions are a minefield for employers and we are beginning to see the creative use of them by unions to undermine the capacity of management to manage. The management of employee under-performance and poor conduct, with the onus on the employer to demonstrate they have done everything possible to support the employee to improve, requires very tight and time consuming practices. We have reviewed all our counselling, disciplinary, induction, probation and grievance processes to ensure these are robust."

"The unions have become bullish in how they interact with employers. Bully boy tactics abound."

"You can't terminate underperforming employees and they know it. Management and other employees look at it and say, 'HR does not have the balls to do anything!' However, we are unable to."

Recommendation 4

That the Fair Work Review Panel proposes appropriate amendments to the good faith bargaining provisions of the Act that reduces the complexity of employment arrangements and enables businesses to manage the employment arrangement without untoward or unnecessarily negative intervention of union representatives.

Recommendation 5

That the Fair Work Review Panel proposes appropriate amendments to provisions of the Act relating to general protections and adverse action claims on the basis that they are open to abuse by some under-performing and non-performing employees, and are not operating in accordance with the spirit of the Act.

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:
(g) acknowledging the special circumstances of small and medium-sized businesses.

Employment deterrents: costs and unfair dismissal

A sample of quantitative survey findings that have a bearing on part (g) of the object are as follows:

- 24% of the respondents to the survey are from organisations with fewer than 100 employees. Table 4
- 62% report industrial relations costs have increased (53% believed that in 2010). Table 16
- 51% believe industrial relations costs will increase in a year's time (37% believed that in 2010). Table 17
- 58% report labour costs have increased (45% believed that in 2010). Table 37 v
- 35% report that under the new unfair dismissal threshold it has been harder to make jobs redundant (26% reported that in 2010). 53% report 'no change', down from 65% reported in the 2010 survey). Table 51
- 26% report an increase in claims under the new unfair dismissal threshold (16% reported that in 2010). While 61% report 'no change', that figure is down from 72% in the 2010 survey. Table 49
- 15% report the new unfair dismissal threshold has discouraged the employment of more people (8% reported that in 2010). While 73% report 'no change', that figure is down from 83% in the 2010 survey. Table 50

With only a quarter of the survey respondents coming from businesses with fewer than 100 employees, the AHRI- Deakin University survey findings offer a more robust assessment of larger organisations. However, with less by way of financial and human resources, small businesses suffer from a greater exposure to time-consuming and costly compliance requirements and regulation than their larger counterparts. And because small businesses make up the majority of employers in Australia, there are good reasons for the legislation that governs employment arrangements to pay regard to matters of fairness and equity but also to minimise provisions that deter small businesses from employing people. Some of the evidence emerging from the survey findings relating to costs of employing people and the unfair dismissal provisions in the Act, are seen as disincentives to employ, as the sample of findings listed above suggest.

Recommendation 6

That the Fair Work Review Panel proposes appropriate amendments to provisions of the Act that relate to regulation and red tape mindful of the imperative to encourage small businesses to fearlessly enter into employment arrangements.

Recommendation 7

That the Fair Work Review Panel proposes a revisiting of the unfair dismissal provisions of the Act with a view to minimising the opportunities for underperforming or non-performing employees to seek 'take-away' money by initiating unwarranted unfair dismissal claims.

Conclusion

In concluding, apart from referring the Panel members to the seven recommendations in this submission, I would like to refer the members to the sample qualitative answers to the final question 75 from the survey on pp.49-50 of the research report. Those answers consist of a sample written commentary from 432 respondents and indicate in general that, while there are a number of concerns about whether the Fair Work Act is operating as intended for the general betterment of Australia's economic prosperity, there are also indications that the Act is operating well in a number of ways.

However, one thing that is strikingly apparent, by way of summary, is that the respondents to the AHRI-Deakin University study are consistently less optimistic and positive about the Fair Work Act than they were a year ago.

That is an outcome which is not good for Australian employees, nor is it good for business.

The principles of legislation like the Fair Work Act should be to:

- Maximise employment and productivity growth
- Contribute materially to a fairer workplace
- Cause employment and bargaining costs and outcomes to be both efficient and effective.

I look forward to seeing how the Panel can assist in achieving these three objectives, and also to changing the problems and shortcomings identified in the operations of the current Fair Work Act.

Yours sincerely,



Peter S Wilson AM
National President and Chairman