

Creating opportunities for Cooperation

Australian Council of Trade Unions response to the
Cooperative Workplaces Discussion Paper arising from the
Attorney General's Industrial Relations Review.

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Introduction

The ACTU, formed in 1927, is the peak body for Australian unions and is the only national union confederation in Australia. For more than 90 years, the ACTU has played the leading role in advocating for the rights and conditions of working people and their families. The ACTU is made up of 39 affiliated unions and trades and labour councils, and we represent almost 2 million working people across all industries. As the peak body for working people, we welcome the opportunity to provide a response to the Government's discussion paper.

We must however note our surprise at the Government's sudden interest in cooperative and collaborative relations between employers and employees, particularly given the Government's attitude towards the employees over which they have direct authority – Australian Public Service workers. If this paper represents a signal of a change in government behaviour away from privatisation and outsourcing, restrictive bargaining rules, pay caps & hiring freezes, and policies to lock workers out of bargaining, then it is most welcome. If not, it seems odd for Government to request that private sector employers embrace a level of cooperation that the Government itself has thus far proven incapable of providing.

This submission will outline how the Australian union movement believes the current industrial relations (IR) system is failing workers and the impact that has on workplace cooperation. It is failing workers because it cannot deliver the basic objectives of an IR system, i.e. to provide for a countervailing legal framework that protects the interests of workers in an otherwise fundamentally uneven power relationship with employers. Additionally, the current system's failings create needless conflict between employers and employees and has resulted in a series of conditions within the system that serve to both reduce opportunities for collaboration and to actively deter cooperation between employers and employees.

The outcome of this process must be the redesign of a system which both delivers on the fundamental purpose of the IR system and which also maximises the opportunities for employers and employees to collaborate on an even playing field. To not do so would be to squander yet another opportunity to address the growing power imbalance between workers and employers and to further entrench the insecure work, inequality and wage growth crises in which we find ourselves.

The Purpose of the Industrial Relations System

At the most fundamental level, the objectives of our industrial regulation system are based on a broad and enduring social consensus that workers' interests must be protected in an otherwise uneven power relationship. The outputs of this consensus have positive social and economic effects, both within the workplace and beyond it.

Labour and capital are in perpetual contest for the income generated by their productive endeavour. Capital seeks profit maximisation, labour seeks real wages growth. Regulatory intervention is necessary to ensure a more equitable distribution of income between these factors of production.

While the purpose of the IR system has remained largely unaltered over time, Government's willingness to allow it to achieve those purposes has waxed and waned. The Fair Work Act was introduced before the GFC and had the primary purpose of ridding Australia of the deeply unpopular WorkChoices legislation of the Howard era. The economy has changed significantly since then and the Act has not kept pace with the changes needed to fulfil its fundamental purpose of protecting workers' interests in an unequal power relationship with capital. The capacity of the system to meet those objectives has deteriorated over time due to deliberate concessions to the interests of business and also because of insufficient responses by regulators to changes in the nature and organisation of work and the behaviour and organisation of capital. The steady decline in the ability of the IR system to deliver these outcomes has reduced the ability for workers and employers to collaborate to produce mutually beneficial outcomes for employers and employees. The opportunity for collaboration is significantly reduced when the playing field is fundamentally unbalanced.

The failings of the current system

The current IR system is, as outlined above, failing to deliver on its main purpose and as a result, is a direct limitation on the ability of employees and employers to collaborate. It has also failed to deliver secure jobs or wages growth for workers. It has allowed the perpetuation of inequality and it has had a stultifying impact on productivity. Not only has it failed to facilitate productivity increases, but it has overseen a drift towards a fundamental misunderstanding of the term productivity. This has occurred due to the enterprise-level focus of the system, which allows for, and promotes competition between companies on the basis of labour cost. This not only injects significant needless conflict into workplaces, as employers and employees are required to try to solve industry-wide problems at the workplace level, but it has led to employers believing that productivity can be increased simply by reducing unit labour costs. The conventional definition of productivity is as the measure of the quantity of outputs achieved per unit of input and yet this idea would surprise many employers. This is part of the reason why the public debate about

productivity and the role of industrial relations has been so misleading.,- employers have been busy competing to see how cheaply they can produce the same amount of goods (or services), by driving down labour costs, rather than investing in their business and adopting innovative and efficient production processes to produce more goods (or services) with the same number of inputs. It is important that as this discussion continues and as we consider what a different IR system might look like, that we consider how true productivity might be increased – something which can likely only occur once the opportunity to race to the bottom on labour costs is removed.

In addition to the relentless focus on cutting costs, the current IR system has produced a number of negative outcomes which are both symptoms of an inability for workers to collaborate with their employers and active inhibitors of collaboration.

Insecure and precarious work

Australia has one of the highest rates of non-standard work in the OECD.¹ Millions of Australian workers are working casually with limited rights, stuck on short-term contracts, languishing outside the norms of the industrial system in the gig economy, operating in sham ‘independent’ contracting arrangements or legally ‘quarantined’ from their real workplace through labour hire arrangements. More than a million workers are underemployed, wanting more hours of work each week than their boss is willing or able to give them.

Much of the reliance on non-standard forms of work currently endemic to our economy can be traced back to the desire to compete on labour cost identified above. It has been made possible by the inability of the IR system to respond to this desire and to give workers the power to push back on employer imposition of reduced job security. Insecure and precarious work also actively prevents cooperation in workplaces as it reduces workers’ attachment to their place of work and their ability to influence its direction. It also emphasises the power imbalance between employer and employee and makes it harder for the two to realise their mutual interests.

Wage theft

It is undeniable that wage theft is fast becoming a crisis across the economy, with some conservative estimates showing that \$1.35 billion in wages are stolen from workers each year.² Wage theft occurs because market forces offer an inducement to non-compliance through windfall profits or the view that it’s necessary because direct competitors are engaging in the same practice and the likelihood of being caught and the consequences, are perceived to be low.

¹ OECD, “In it together: Why less inequality benefits all”, May 2015, Figure 4.1

² PWC, Navigating Australia’s industrial relations, 2019.

Workers' representatives, their unions, have been tightly constrained in their legal capacity to fully engage in the wage-checking process since right of entry laws were significantly changed in 1996 and again in 2005. The central role of unions in the enforcement process must be fully recognised. The Fair Work Ombudsman will never have enough resources to monitor compliance on its own. As a consequence, the impact of higher penalties for non-compliance will be diminished if employers still think that they are unlikely to be caught.

It is inconceivable that workers should be asked to cooperate with those who are actively stealing from them – as long as wage theft continues, workplace cooperation will be unattainable in thousands of workplaces across Australia.

The gender wage gap

As at August 2019 the full-time gender pay gap in Australia was 15.5%, with women working full-time earning \$15,176.00 less a year than men.³ Much of this gap is created through the undervaluing of work done by women in traditionally female industries such as health and personal services and childcare. The enterprise-level focus of the current IR system, which prevents the workers in these industries from acting in their collective interests beyond the enterprise in which they are employed is a primary factor in the continuation of this issue.

In addition to the wage gap, female workers are affected by a number of other issues such as the lack of a decent paid parental leave scheme under the modern awards and the limitations in the NES on Family Friendly Working Arrangements. These issues combine with the gender pay gap to contribute to a reality in which, for women particularly, cooperative workplaces are illusory at best.

Sexual Harassment in the Workplace

The evidence over many years has been consistent: sexual harassment is both prevalent and grossly under-reported in Australian workplaces.

In 2018, the ACTU Survey conducted a survey to which over 9,600 people from a range of industries responded. Sixty eight percent of respondents were female. More than half of all respondents (54.8%) had experienced sexual harassment at their most recent workplace or at a previous workplace, and 64% had witnessed sexual harassment at their most recent workplace or at a previous workplace.⁴

³ Workplace Gender Equality Agency, *The Gender Pay Gap*, <https://www.wgea.gov.au/topics/the-gender-pay-gap>

⁴ ACTU, 'Sexual Harassment in Australian Workplaces: Survey results' (Report 2018)

The data suggests that sexual harassment may in fact be increasing in prevalence in Australia. For example, the 2018 AHRC Report found that in the last five years, one in three people - almost two in five women (39%) and just over one in four men (26%) - have experienced sexual harassment in the workplace: 'a marked increase' in the prevalence rate recorded by previous AHRC surveys.⁵

The evidence consistently suggests that the majority of sexual harassment incidents are never formally reported. The 2018 AHRC Report finds that only 17% made a formal report or complaint about the harassment in the last 5 years, compared with 20% in 2012 survey.⁶ Almost one in five people who made a formal report or complaint reported that they were 'labelled as a troublemaker', or ostracised, victimised or resigned. The ACTU survey shows that only 27% of those who had experienced sexual harassment ever made a formal complaint, and just over 40% told no one at all.⁷ The two most common reasons given for this were a fear of negative consequences (55%) and a lack of faith in the complaint process (50%).⁸ More than a quarter of those who did complain reported less favourable treatment by their employer, including being forced to leave or resign, being bullied, or having their hours or shifts reduced.⁹ Of the 27% of people who did complain, 56% were 'not at all satisfied' with the outcome, 43% said their complaint was ignored or not taken seriously, and 45% said there were no consequences for the harasser.¹⁰

These statistics clearly demonstrate the failures of our current regulatory framework. Our laws fail to encourage employers to take steps to prevent sexual harassment in the workplace. Instead, our IR system forces workers subjected to sexual harassment through adversarial, time-consuming, costly and risky complaints processes that often end in negative consequences for the complainant. There is a serious breakdown of trust between employees and employers when workers subjected to sexual harassment see their complaints dismissed or locked in no-win scenarios. When workers are unable to trust that their employer will take proactive steps to prevent sexual harassment or effectively address it when it does occur, they are fundamentally less likely to participate in cooperative workplace initiatives.

There is much to be done to address the sexual harassment epidemic in our society and workplaces and creating an IR system that is able to effectively and efficiently prevent and address workplace based sexual harassment must be part of that solution – that it

⁵ Australian Human Rights Commission, 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces' (2018) 7-8

⁶ Ibid

⁷ ACTU, 'Sexual Harassment in Australian Workplaces: Survey results'

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

will also work to allow for greater workplace cooperation is yet another reason to undertake this reform project.

Young people

Young people bear the brunt of the failings of the current IR system. They are unemployed at nearly double the rate of the rest of Australia, are more likely than any other age group to be in non-standard work, are more likely to be subjected to wage and superannuation theft and have experienced the slowest wage growth since World War II for the majority of their careers. These realities have ensured that young people are unable to participate in their workplaces as equals.

The issues outlined above are indicative of an IR system that is failing to deliver on its primary purpose to protect the interest of workers in a fundamentally unequal power relationship with employers. They are also significant factors in reducing the opportunities for meaningful cooperation inside Australian workplaces. We must build a system that delivers on the purpose of an IR system and which allows the creation of truly cooperative workplaces.

The ABCC

The reintroduction of the ABCC represents an extreme case of government policy working against harmonious workplaces. Throughout its history, the ABCC has actively worked against the resolution of disputes at the workplace level. Rather than fostering workplace cooperation, the ABCC has instead:

- Initiated litigation as a first resort, including in cases where there is no public interest in bringing proceedings before the courts;
- Unfairly focused their resources on pursuing unions and workers
- Limited the capacity of the parties to agree to the terms and conditions that govern their workplace;
- Been caught out actively misleading workers about their workplace rights.

The construction industry is plagued with phoenixing companies, sham contracting arrangements, unscrupulous labour hire operators, tax avoiders and dodgy directors. Rather than support the unions as they try to curb these bad actors, the Government has instead chosen to crack down on employees and their representatives, stripping them of basic civil rights in the process. It is telling that the Government's most recent discussion paper on the Code for Tendering and Performance of Building Work 2016 is directed to measures that will extend managerial prerogative and unilateralism and used the federal procurement budget to reinforce these measures. There is nothing in that paper that suggests the Government is serious about cooperative workplaces.

Certainly nothing that the ABCC does promotes harmonious relations. It is a combative, one-sided agency that was created to drive an extreme anti-worker agenda.

What is a 'cooperative workplace'

It is of note that the discussion paper, despite setting much store by the importance of building cooperative workplaces, makes no meaningful attempt to define the term. The paper does however canvas a number of initiatives which it claims could produce such a workplace, many of which have no evidential basis and all of which reflect the Human Resources (HR) approach to employer/employee relations. This is concerning. The HR system was introduced predominantly to represent employers within their own business while maintaining the illusion of protecting workers interests. It has been one of the most effective tools that avaricious employers have used to alienate employees from their rights and from their representatives. The HR approach cannot be the vehicle that is used to build cooperative workplaces.

Given that there is no rationale in the discussion paper to explain why the inconclusive list of HR type features are included in the paper or even how they might be linked to cooperative workplaces, we will not seek to address each of them in this response.

It is concerning that the discussion paper offers no definition of the term while simultaneously leaning heavily on HR approaches to workplace management. The paper makes no distinction between a cooperative workplace where cooperation occurs on an equal basis between employers and employees, with the inherent power imbalance addressed effectively by the IR system, and a workplace that is only 'cooperative' because the unaddressed power imbalance means that employees must acquiesce to any demand made of them. The government must commit to producing cooperative workplaces through workplace democracy, not HR-assisted workplace dictatorship. A truly cooperative workplace will have the following settings and features:

- A supportive IR system which is most effective at reducing or solving points of conflict between workers and owners/management.
- A levelled playing field between workers and owners/managers created by the IR system protecting the rights of employees
- Confidence that the system can deliver secure jobs, fair pay and workplace equality, through a collective bargaining system that has been altered in the workers' favour to a degree that employees and owners/managers are able to work collaboratively toward a common goal.
- All employees have access to a robust, efficient and effective conflict-resolution system with an independent arbiter.
- Employee representatives like union delegates, HSRs and other consultative structures are present and involved in management decisions. Workers have access to their unions without the current limitations on right of entry.
- A lack of arbitrary restrictions on workplace culture or bargaining such as are applied by the ABCC.

Building cooperative workplaces

It is clear that the current IR system is not fit for purpose, particularly in terms of creating truly cooperative workplaces. It is equally clear that significant reform will be required in order to address the failings of the current system. There are a number of changes that can be made to reduce manufactured conflict within workplaces, encourage collaborative behaviour and streamline workplace collaboration between workers and employers. However, the ACTU believes that one change that epitomises the key failings of the current system is enterprise-only bargaining.

Enterprise-only bargaining forces the workers and employer in each business to attempt to solve issues of wage-setting and standard conditions which often could be better done at the industry, sector or supply chain level. Even worse, this system is constrained by restrictions about what can be discussed in bargaining – and even more so in the construction industry. In many cases the system is totally incapable of achieving an equitable settlement because, as occurs in supply chains, workers are unable to negotiate with the entity which actually has the power to set their wages and conditions.

The OECD's Employment Outlook Report 2018 highlights the fact that Australia's focus on enterprise level bargaining is uncommon amongst OECD nations and that coordinated industry and sector level bargaining in other OECD countries promotes stronger employment outcomes, reduces wage inequality and strengthens the resilience of these economies to economic downturns.¹¹ Sector bargaining is more reflective of the modern organisation of industries and allows wages and conditions to be set without individual employers and employees being brought into needless conflict. We must follow the OECD in moving away from enterprise-only bargaining, to reduce needless conflict in the workplace, to end the unproductive 'race to the bottom' on labour costs and to allow employers and employees to focus on building productive workplaces that deliver wages growth, jobs growth and a stronger, more robust economy. Workers and business could focus on capacity building, skills development, and innovation to ensure long term viability of particularly vulnerable sectors, as well as encouraging new technologies and industries. We expand on some of the empirical evidence below.

¹¹ OECD, 2018 *Employment Outlook*, OECD.

Industry level collective bargaining reduces wage inequality and produces better labour market outcomes

In July 2018 the OECD released their flagship publication the “Employment Outlook”. A key chapter of this new publication reports on the results of a comprehensive study examining how different collective bargaining systems impact on the economy.

Based on new economic evidence the OECD has abandoned its previous support for enterprise level collective bargaining and individual contacts. Instead the OECD is now strongly supporting coordinated industry and multi-employer collective bargaining and measures to ensure the maximum number of workers are covered by a collective agreement that is negotiated with a trade union.

The OECD concluded that widening income inequality is a serious economic and political challenge. They have advanced a number of policy recommendations to boost wages and prevent further increases in inequality. Industry level collective bargaining and stronger trade unions are among their key recommendations.

The OECD examined the impact of collective bargaining systems in 35 advanced economies over the period 1980 to 2015. They find that industry level bargaining systems, that allow trade unions and employers to coordinate outcomes across a sector, significantly out-perform countries with either enterprise only level bargaining or no collective bargaining.¹² According to the OECD countries with these types of bargaining arrangements:

“... are shown to be associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralized systems.”¹³

Countries that had industry level and coordinated bargaining systems in 2015 include Austria, Denmark, Germany, the Netherlands, Norway, Sweden, Belgium and Finland.

Countries that are classified as having “fully decentralized collective bargaining systems” include the USA, United Kingdom and New Zealand. Countries in this category performed worse than the three categories of countries that had variations of industry level bargaining in terms of the employment rate; unemployment rate; youth unemployment; gender equality in the labour market; the integration of low skilled workers into jobs; and, in respect of wage inequality.

Australia was grouped in the category that had the second worst economic performance (described by the OECD as “largely decentralized collective bargaining systems”). The group that contains

¹² Ibid

¹³ Ibid

Australia performs significantly worse in terms of employment and unemployment than the three groups of countries that use variations of industry level bargaining. The group containing Australia also performs worse than all three industry level bargaining groups when it comes to integrating youth, women and low skilled workers into employment.

Wage inequality in the group containing Australia is greater than in the groups of countries that have access to industry level collective bargaining.

To realise the potential for economic improvements through coordinated bargaining systems will require the abolition of laws that currently inhibit and prevent industry or multi-employer bargaining and restoring various powers that the industrial umpire had prior to the 1990s.

The OECD strongly supported enterprise level collective bargaining in the 1990s. In the past, its recommendations were often cited by conservative Australian Governments who wanted to abolish trade unions, introduce individual contracts and weaken the industrial umpire. Now the OECD has thoroughly reviewed the economic evidence and acknowledged that the attack on collective bargaining and labour market institutions is misconceived.

It is time to revise our labour laws and strengthen our institutions to support industry level bargaining and stronger trade unions. The OECD has argued that this makes economic sense. It is also the sound social and political strategy at this time.

In summation

Our IR system has not kept pace with the needs of the post-GFC economy. The result of this is an IR system that is failing to deliver on its aims and, more importantly for the current discussion, represents a significant barrier to the development of cooperative workplaces which can deliver productivity, equality, wage and jobs growth.

In order to build truly cooperative workplaces, which requires the barriers to cooperation outlined above to be removed, Australia's IR system must shake off its focus on enterprise-only solutions. By building an IR system that can operate effectively at the workplace, enterprise, industry, sector and national level we can allow workers and employers to build cooperative workplaces without the unreasonable expectation that they must solve all challenges at the enterprise level, regardless of the capacity of the enterprise to achieve the desired results.

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