

BRICKWORKS LIMITED

**PRODUCTIVITY COMMISSION INQUIRY INTO THE
WORKPLACE RELATIONS FRAMEWORK
SUBMISSION**

MARCH 2015

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1. EXECUTIVE SUMMARY

The Productivity Commission has been given the task to assess the performance of the current workplace relations system including the *Fair Work Act 2009*, focussing upon a number of key indicators that are crucial to Australia's future. The Inquiry is an important opportunity to consider how the workplace relations framework can better assist Australian employers to be competitive, productive and create opportunities for Australian employees in the fast changing economic landscape of the twenty-first century. The framework should be clear, easily understood and be an efficient and effective regulator of work so that it positively contributes to creating jobs with an appropriate safety net and allows businesses to grow and compete.

To this end Brickworks Limited as the leading manufacturer of building products within the Australian economy has sought to provide the Commission some specific information regarding the limitations of the current workplace relations framework as well as making suggestions for improvement. The current concerns with the Fair Work Act 2009 (Cth) (FW Act) should be addressed and opportunities to create a better system considered and recommended.

2. CONTEXT OF THE COMPANY

Brickworks Limited is an Australian-owned group of companies with a long, successful, and proud history stretching back to the days of the Great Depression. It was in 1934 that a group of leading Sydney brick manufacturers formed a company to ensure the ongoing viability of the local brick industry. The expansion of the company was rapid and its success assured through technological innovation and strong management.

Brickworks today is one of the nation's leading providers of building products employing over 1500 staff across Australia. Brickworks has manufacturing operations located not only in major cities but also in regional areas in North Queensland, East Gippsland in Victoria and the Southwest of Western Australia. Brickworks Limited is a dynamic and innovative group of Australian-owned companies.

With products from bricks to precast concrete panel, pavers, roofing tiles and timber products, Brickworks is helping Australians build their homes.

There are three main parts to the Brickworks business model:

1. The Building Products Group
2. The Land & Development Group, and
3. Investments

The Building Products Group consists of the following brands:

- Austral Bricks
- Austral Masonry
- Austral Precast

- Bristle Roofing
- Auswest Timber
- Bowral Bricks
- Daniel Robertson
- Nubrik and
- GB Masonry.

The Land and Development manages and develops surplus land created by the Building products business.

Investments represent 43% interest in Washington H. Soul Pattinson.

3. WORKPLACE RELATIONS CURRENT COMPANY PROFILE

The Building Products Group of Companies has some 32 manufacturing sites spread across Australia.

These manufacturing sites have mixture of union and non union collective agreements, and common law contracts and award covered employees. The Building Products Group regularly deals with the following unions:

- AMWU (Australian Manufacturing Workers' Union)
- AWU (The Australian Workers' Union)
- ETU (Communications, Electrical, Electronic Energy, Information, Postal, Plumbing and Allied Services Union of Australia)
- CFMEU (Construction, Forestry, Mining and Energy Union)

4. BARGAINING FRAMEWORK - ISSUES

The Building Products Group has a long history with enterprise bargaining under the FW Act and its predecessor Acts. In this context these submissions have been prepared to reflect on the additional complexity introduced by the FW Act that in our experience has made bargaining more complicated.

In particular an important issue is that there is a lack of choice in agreement making. The FW Act appears to be under-pinned by a view that one type of agreement 'fits all'. This approach does not reflect the interests expressed to us by our workforce.

4.1 Direct Bargaining with Individual Employees

First, there is almost no workable opportunity to make individual agreements with employees. The opportunities provided by the individual flexibility arrangements are limited. The flexibility agreements are restricted to a number of specific areas, and either party can terminate an agreement on 28 days notice. Plainly, these flexibility arrangements do not have the same business certainty as previous arrangements under the *Workplace Relations Act 1996* and do not provide the legal standing as an enterprise agreements approved by the Fair Work Commission under the FW Act.

In any event, individual flexibility arrangements are typically much more limited than provided in the FW Act when they appear in a union (as bargaining representative) negotiated enterprise agreement. While an employer can stand its ground on what it will concede to in an enterprise agreement, this can create significant disruption and delay in reaching any agreement when a union bargaining representative will simply not make any concession on 'principle'. Union bargaining representatives often will not make concessions around individual flexibility because of their role as the default bargaining representative across literally thousands of places of employment and in thousands of negotiations. This role acts against them making specific concessions tailored to a workplace. Instead they take the 'thin edge of the wedge' view that a concession for one enterprise agreement will be used against them in other unrelated negotiations. This means intransigent positions are common.

In this context the lack of alternatives becomes very important. The restriction in section 172(6) of the FW Act means there is no scope for individual agreements. Further, the Modern Award flexibility provisions do not allow for the same flexibility compared to the individual agreements under the previous legislative regime.

An example where individual employees and the employer have been able to achieve individual agreements is replicated at The Austral Bricks Wollert site where there is a mixture of transitional individual agreements and common law contracts. Recent attempts by the unions to negotiate an enterprise agreement at this site the union have sought to nullify the flexibility clauses with clauses that restrict the flexibilities already in place. The FW Act operates to limit the discussion to how to place controls on flexibility in a time when the focus should be on how to make work more flexible and productive and afford employees choices around how they want to work. Individual Agreements under the previous workplace relations framework that operated from 1996 to 2006 gave employers and employees with Brickworks the capacity to negotiate benefits to all parties. This can be exemplified the following:

- Flexibility with the starting and finishing times especially in North Queensland to by-pass the hottest parts of the day.
- The easy ability of employees to transfer and to work at different sites without the restrictions of the transfer of business provisions of the FW Act.
- The ability to have the terms and conditions that addressed the whole of the employment relationship rather than be restricted to specific issues as outlined in the modern awards

All the company agreements have at all times met the requirements of the previous legislative tests and if Individual Agreements were allowed once again using the BOOT test or a no disadvantage test this would not be an issue to ensure compliance.

4.2 Flexibility with the Spread of Hours

The submission by Brickworks Limited and the Masonry Association to Fair Work Commission review of Modern Awards, re the Concrete Products Modern Award was supported by written evidence that the flexible hour's provision should allow production and maintenance to be scheduled in ordinary hours so that they do not face penalty rates of Saturday and Sundays. This option should be available for staff to work a flexible work pattern where an employee can work five days in any seven days where there are no penalties for Saturday or Sunday work. Employees will be paid overtime after 38 hours worked. Under such an arrangement it is important that employees be given the choice to participate in the flexible work arrangement. However, if they want to work these patterns they should have the choice to do so.

This issue highlights the importance of Individual agreements which can reflect individual preferences. Some entitlements are more important to an employee than another. There are different views and these are typically not accommodated in an enterprise agreement. Individual agreements are an important form of agreement making and should not be vilified by loose generalisations concerning their use. Where there is a strong safety net and a strong compliance test to ensure fairness there is simply no basis to remove this option from the workplace relations framework. Australian Workplace Agreements were part of the workplace relations framework from 1996 to 2006 and operated in a largely unremarkable manner, but did provide significant flexibilities that have since been lost to employees, employers and the system.

4.3 Matters Pertaining only to the Employment Relationship

Brickworks submits that only those matters that pertain to the employment relationship should be part of the enterprise bargaining and only insofar as they do not unduly cross over and interfere or limit the managerial prerogative needed to manage a business in a modern economy.

Enterprise agreements should not extend to matters that pertain to unions. Enterprise agreements are technically agreements made between an employer and their employees, yet the FW Act allows for terms that are directed to the interests of the union bargaining representatives who are not parties to the agreement. These interests should be clear and part of the legislative scheme, but they should have no place in an enterprise agreement.

Therefore, it would assist if the framework made clear what matters could and what could not be included in an enterprise agreement. It should not require sophisticated advice on what is and is not allowable and we accept it is difficult to have a black and white list. However, it should be clear what matters relate to the employment relationship and what are being introduced for other reasons. It would assist if:

- The legislation made it clear that only matters pertaining to the employment relationship between the employer and the employees who are to be covered by the enterprise agreement.
- As part of the FWC approval process the Commission should be satisfied that the enterprise agreements only contains permitted matters.
- Unlawful terms (as provided for in s194 of the FW Act) should include non permitted matters such as union training arrangements, shop stewards amenities, restrictions on outsourcing or the engagement of independent contractors.

4.4 Right of Entry Provisions

The current right of entry provisions allow the unions to have the ability to enter onto places of employment to conduct meetings in lunchrooms with employees who are not their members. At times this has led to workplaces being the subject of external disputes between unions over who should cover a site, even when neither union has any members at the site.

Brickworks does not have an issue with individual employees pursuing their rights to join a union but this should be accommodated in a manner that also respects the rights of all those employees who are non union members and do not want to be, to enjoy their lunch breaks without forcibly being required to participate in union meetings. Many workplaces have limited spaces to accommodate meal breaks and it is simply not workable in many spaces to meet the needs of a union official who wants to conduct discussions with potential members and also allow other employees to have the quiet enjoyment of that same space to eat their meal. The issue is highlighted by the examples in Western Australia that show that it may not simply be a once a year event and can instead be something that arises weekly or daily.

4.5 Bargaining Representative

The provisions of the FW Act with regards to the default appointment of bargaining representatives have been misused by unions resulting in unproductive use of resources and management time.

An example of this is the situation at the Austral Bricks site in Golden Grove, South Australia. At this site the majority of the wages employees had entered into transitional individual agreements (AWA/ITEA) or common law contracts. There were three employees still working under an enterprise agreement made under the *Workplace Relations Act 1996*. These employees had chosen not to accept individual agreements and the company had made a decision not to pursue a new enterprise agreement in circumstances where the overwhelming majority of employees were content to remain on their individual terms. The FW Act however, allows the small minority to pursue bargaining through a majority support determination before the Fair Work Commission.

The Fair Work Commission granted the AWU the right to bargain but again no agreement was made with the three employees.

5.0 OTHER ISSUES

5.1 Unfair Dismissal

There is a need to effectively ensure applicants seeking a remedy before the Fair Work Commission indicate the outcome sought whether it is compensation or reinstatement at the time of lodging their applications. This would give the employer the opportunity to assess the applicant's position, whereas currently employers can attend a conciliation hearing without any concept of what the applicant is really seeking.

Recently this Company participated in a conciliation hearing where the applicant eventually admitted, after presentation of arguments before the conciliator, that he was seeking a statement of service from the Company and wanted his 'day in court'. If this was noted on the applicant's form it would have avoided the costs incurred by attending a conciliation hearing and the consequential time spent at the conciliation hearing plus the preparation time. Also many of the conciliation hearings have led to a negotiation for a monetary settlement where the conciliators seem to have focus upon settling the issue quickly.

5.2 The Transfer of Business

The transfer provisions relating to employees within the FW Act inhibit the ability of the Brickworks Group to transfer employees where plants operate in close proximity, especially where the opportunity presents itself in situations where employees could be transferred following plant shut downs or restructuring of operations resulting in surplus labour requirements. The growth and success of many businesses in Australia has come from acquisitions. Acquisitions have created better businesses and better jobs. However, the FW Act operates to make the flexibilities that should follow an acquisition more difficult to obtain.

The difficulty occurs is when transferring employees to another site the employee's award or agreement covering conditions and pay from the previous operations may vary markedly and cause a situation where employees undertaking a similar role have different rates of pay and conditions. Where employees voluntarily want to transfer there is no reason to make this choice restricted because of the operation of the transfer of business provisions in the FW Act. The transfer of business provisions cause considerable complexity and have the potential to restrict career opportunities. Section 311(6) of the FW Act, which deals with associated entities, should be deleted.

6.0 CONCLUSION

The Company has identified a number of issues that it has faced while pursuing its manufacturing operations. Brickworks is seeking the Productivity Commission to assess the ability of the workplace relations framework to allow greater flexibility for the economy of the future while recommending removing many of the impediments in the FW Act that presently restrict and hamper the productivity in Australia.

We appreciate the opportunity to provide our view. We would be happy to provide further information if required.