PRODUCTIVITY AND THE FUTURE OF INDUSTRIAL RELATIONS IN AUSTRALIA

VITAL ISSUES FOR YOUR BUSINESS NOW AND INTO THE FUTURE

HARMERS WORKPLACE LAWYERS, SYDNEY
30 August 2013
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2. THE SYSTEM AND THE PRODUCTIVITY DEBATE
3. THE PENDING FEDERAL ELECTION AND LIKELY AREAS TO CHANGE
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7. UNION STATUS AND REGULATION
8. WORKPLACE CULTURE –EMPLOYER AND EMPLOYEE WORKPLACE RIGHTS AND RESPONSIBILITIES
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2. THE SYSTEM AND THE PRODUCTIVITY DEBATE
The Productivity Debate – A Brief Survey of Some Views
“We believe that it is fundamentally important to make sure that the Fair Work laws work for everyone and will task the Productivity Commission with undertaking a comprehensive and broad review of the laws. The Productivity Commission is independent and has previously conducted reviews, such as in relation to the NDIS, that have been adopted by Labor. This will be an important development and everyone will be given an opportunity to have a say.”

Eric Abetz delivered at the 7th Annual Workplace and Industrial Relations National Conference, Sydney on 17th June 2013.

“And the medal for idiocy goes to….”
"We are a high-wage country with low volumes"
"We have to work a lot harder . . . to ensure we get the new investments needed to modernise our factories, to modernise our products and ensure we have long-term, high-skill, high-wage jobs."

Bob Carr, 2013
“The sad truth is that productivity growth has stalled under this Government. GDP per hour worked fell over the 18 months to September quarter 2011. Australia has been producing less for a given effort.

The Coalition has a compelling strategy to help lift productivity.”

Joe Hockey (12 March 2012)
“What I have discussed with the BCA, the ACTU and (former employment) minister (Bill) Shorten is how we can harness a greater spirit and practice of industrial cooperation to produce better outcomes for us all”.

Kevin Rudd
IR dithering putting productivity at risk

THE call by Kevin Rudd for employer groups and unions to sit down with the government and agree on a “new productivity pact” should not become another excuse to avoid or delay implementing necessary changes to the industrial relations system.

Innes Willox, CEO, Australian Industry Group
The Australian  July 22, 2013
“Hawke and Keating pursued an ambitious and unapologetic program of economic modernisation. Their reforms internationalised the Australian economy, removed protectionist barriers and opened it up to greater competition.”

Kevin Rudd Essay, The Monthly
“… Productivity is a marathon. It's a never ending race and it’s something that we need to continually strive to improve.

… What we've seen is a sort of decade and a half of overall declining activity in productivity while our labour costs have gone up so there has been a differential there and that's impacting on our competitiveness generally.”

Innes Willox (Australian Industry Group)
The World Today - December 2007
“You will not improve productivity if you have a low trust, high stress workplace.

If we can engage at an industry level with employers, unions and governments working together … where we can talk about the areas that make a real difference which is about investment in infrastructure, investment in innovation and research and development.”

Dave Oliver (Australian Council of Trade Unions)
The World Today - December 2007
“The solution to productivity slowdown requires a new national focus on innovation and productivity that recognises the need for a new focus on the workplace, and a particular focus on the quality of management”.

Peter Gahan, Founding Director of the Centre for Workplace Leadership
“Productivity ultimately doesn't hinge upon where the regulatory pendulum sets in a law passed in Parliament, certainly nowhere near as much as what happens at the enterprise level.”

The Hon Bill Shorten, then Minister for Employment and Workplace Relations, Financial Services and Superannuation
"industrial relations is arguably the most crucial to get right".

"...if we are to secure Australia’s productivity potential into the future, the regulation of labour markets cannot remain a no-go area for evidence-based policy making".

Gary Banks, Productivity Commission Chairman, December 2012
“The [Fair Work] review’s terms of reference seem similarly skewed without any reference to productivity, the plight of small business and the need for genuine flexibility. The terms of reference studiously avoid the increase in industrial disputation and decrease in productivity as shown by the Government’s own figures.”

Senator Eric Abertz
“Tony Abbott has confirmed that unfair individual contracts will be back under a Liberal government.”

“Buried at the back of their policy document, the Liberal Party opened the door wide open to undermining the Better Off Overall Test… allowing ‘non-monetary benefits’. What that means is, pizza for penalty rates.”

Bill Shorten
“Australia's productivity performance has a major influence on our national income growth and consequently on the well-being of all Australians. Productivity growth requires that impediments to innovation, technological improvement and reorganisation of production are continuously reviewed and removed. This is how, over the medium term, we best cope with structural changes such as rapid exchange rate movements, our ageing population and potential global economic shocks.”

Peter Harris, Chairman of the Productivity Commission
13 June 2013
“…if one is actually concerned about the future of our nation, and the long term interests of individual workers, then productivity must genuinely be front and centre in any workplace relations system…”

Senator Eric Abetz
“[Australian workers] remember all too well what it was like to have to survive on individual contracts and Australian Workplace Agreements and they remember our campaign around it. The reason we are seeing such a thin policy being presented by the Coalition is … because they know it is political poison to go back to Work Choices”

Ged Kearney – ACTU
“Any ‘productivity pact’ or ‘new competitiveness agenda’ that fails to seriously engage with essential industrial relations reforms will clearly be deficient and incomplete; will fail to attract the ‘support of industry’ and will not deliver the productivity improvement Australia so urgently needs”.

Steve Knott, CEO, AMMA
16 July 2013
“It’s time to refocus the productivity debate on the things that matter: innovation, infrastructure, training, collaboration and better management”.

Dave Oliver, ACTU Secretary
24 July 2013
“It is one thing to chart the productivity mantra. It is quite another to deliver it.”

Senator Eric Abertz
Productivity -
A multi-factored thing
Factors impacting Productivity

- General education levels
- Vocational education and training effort
- Capital investment
- Technological, systems and process change [innovation]
- Managerial effectiveness including human resources management
Factors Impacting Productivity

- Workplace culture
- Industrial relations and practices
- Enterprise capacity and willingness to innovate
- Adequacy of infrastructure
- Access to efficient financial services
Areas of the System of potential impact on Productivity

- Systemic Stability
- Workplace Regulation and Flexibility
- The Bargaining Process
- Union Status, Regulation and Rights
- Workplace Rights and Workplace Culture
  - Unfair Dismissal
  - General Protections
  - Bullying Regime
  - Consultation Requirements
  - Scope for Self Regulation and Workplace Culture
    - Contract
    - Policy procedure
    - Management ability
3. THE PENDING FEDERAL ELECTION AND LIKELY AREAS OF CHANGE
4. PRODUCTIVITY AND THE ROLE OF STABILITY OF THE SYSTEM

- The benefits of stability
- A brief survey of political football
“That is what Work Choices is all about – securing the future prosperity of Australian individuals and families.”

~ Kevin Andrews, Minister for Employment and Workplace Relations, Speech from Launch of Work Choices
2 November 2005
(Work Choices): “The greatest backward step, the most systematic attack on the Australian way of life and Australian values, the most systematic attack that we have seen in a century [in this parliament of the Commonwealth of Australia].”

~ Kim Beazley, Leader of Opposition, Second Reading Speech, 3 November 2005
(Work Choices) “This legislation fails the Government’s own test of fairness, simplicity and choice.”

~ Rachel Siewert, Greens Senator, Australian Greens’ Dissenting Report, Employment, Workplace Relations and Education Legislation Committee, November 2005
“The Work Choices bill is the most extraordinary bill I have read, and no other comparable country has even suggested putting in place this kind of regime”

~ Ron McCallum, “A unique attack on workers’ rights”, Sydney Morning Herald, 18 November 2005
(Work Choices) “It is another example of this government putting the interests of the free market ahead of the interests of families.”

~ Steve Fielding, Family First Senator for Victoria, Second Reading Speech, 1 December 2005
(Work Choices) “Any redeeming features of the bill are overwhelmed by negatives.”

Andrew Murray, Senator for the Australian Democrats, “Parliament in uproar as IR bill tabled”, Sydney Morning Herald, November 2, 2005
(Work Choices) “It will lift employment. It will lift productivity… [l]t is the best reform that our industrial relations system can have”

~ John Howard, Prime Minister, Second Reading Speech, 9 November 2005
“It is very close to fascism”

~ Hon John Della Bosca, NSW Industrial Relations Minister,
Quote from Employment, Workplace Relations and
Education Legislation Committee, November 2005, p.41
(Work Choices) “These laws will remove basic rights for working people, cut the take home pay of workers, reduce their job security and hurt families.”

“The changes announced by the Howard Government represent the destruction of the foundations of the system that has underpinned equality and fairness in the Australian workforce”

~ AMWU, “100 Years of Fairness and Equality for Workers Destroyed by Howard, www.amwu.asn.au, 10 October 2005
(Work Choices) “It is not morally acceptable to reduce the scourge of unemployment by allowing wages and conditions of employment to fall below the level that is needed by workers to sustain a decent standard of living.”

(Work Choices) “Australia is finally about to abandon the horse and buggy era of workplace relations, which was set up on a model for the 1890s, and move to a model for the 21st century.”

~ Peter Hendy, Chief Executive of Australian Chamber of Commerce and Industry, “Bosses in chorus of welcome IR Revolution”, The Australian, 3 November 2005
(Work Choices) “The Government’s changes are the next logical step in a long process of reform which continues to be essential to securing the future prosperity of all Australians.”

~ Ron Silberberg, Managing Director of Housing Industry Association, “Bosses in chorus of welcome – IR Revolution” The Australian, 3 November 2005
(Work Choices) “Look, I’m no political genius. I’m not a doctor or a lawyer or flying them jet planes, but something I know – I know shit when I see it.”

“Under Labor, non-union collective agreements would be a thing of the past. It will open up a million small businesses to potential union control … the unions will have a seat at the table for every negotiation as long as one employee in the workplace is a member”

~ Joe Hockey, Minister for Employment and Workplace Relations, 30 August 2007
“We welcome Federal Labor’s commitment to getting rid of Work Choices, and while we believe that the transitional arrangements are too drawn out, rights of work for Australian workers will be restored under Labor”

~ Sharan Burrow, President, ACTU, 28 August 2007
“A workplace relations system that works for all Australians should be fair and flexible, simple and productive. It will not jeopardise employment, will not allow for industry wide strikes or pattern bargaining and it must not place inflationary pressures on the economy.”

“The ball is in Julia Gillard's court and we will scrutinise any changes she proposes in the national interest, but I repeat WorkChoices is dead”

~ Hon Malcolm Turnbull MP, 28 September 2008
“The more details we hear of the Government's industrial relations legislation, the clearer it becomes that they are delivering Work Choices-Lite”

~ Senator Rachel Siewert, The Australian Greens

6 November 2008
“Business owners in key service sectors will need to get used to union officials knocking on their doors.”

~ Bill Healey, CEO, Australian Hotels Association, quoted in *The Weekend Australian*, 15 November 2008
“The global economic crisis has intensified the risks for the economy and that this legislation will be implemented in an environment of increasing not reducing unemployment.”

~ Heather Ridout, CEO, Australian Industry Group, quoted in The Sydney Morning Herald, 15 November 2008
“The global financial crisis completely alters the debate around workplace relations and employment in ways that will become apparent over time.”

~ Michael Keenan MP, Opposition spokesman for Workplace Relations, Speech to IR Society of Victoria: The Opposition's Approach to Industrial Relations, 31 October 2008
“Almost three months ago the Australian people voted for change. They voted for a change of Government. And in doing so, they voted for a change to our workplace relations laws.”

~ Hon Julia Gillard MP, Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008: Speech on the Second Reading, 13 February 2008
“... Work Choices’ place in the pantheon of things un-Australian is now unchallengeable ...”

~ Jeff Lawrence, ACTU Secretary, Address to the National Press Club - Building a fairer Australia: the role of unions and workers’ rights, 12 March 2008
“Record low levels of industrial action experienced in 2007 will be challenged by this new regime.”

~ Steve Knott, CEO, AMMA, Workplace Express,
17 September 2008
“The addition of arbitral provisions will undermine good-faith bargaining and turn the clock back to the days of centralised wage fixing.”

~ Bill Healey, CEO, Australian Hotels Association, quoted in The Weekend Australian, 15 November 2008
“Arbitration as a last resort will be a key means of ensuring Labor’s new IR system operates efficiently to deliver productivity gains as well as better wages and that the integrity of the collective bargaining system is upheld.”

~ Jeff Lawrence, ACTU Secretary, Media Release: Arbitration as a last resort will protect workers and deliver better wages and productivity, 14 November 2008
“We will give commonsense a seat at the table. And commonsense would dictate flexibility and reject the centralised one size fits all strait-jacket from Labor”

~ Eric Abetz, Opposition Workplace Relations Spokesman, speech to the HR Nicholls Society, 17 April 2010
“If we have reasonable individual agreement arrangements, if we keep the unfair dismissal monkey off the back of very small business, if we have a strong cop on the beat, like the ABCC, I think we’ll have a productive, a fair and a free workplace”

~ Tony Abbot, Opposition Leader, comment on ‘Q&A’ (ABC TV), 5 April 2010
“Whatever he calls it, that’s Work Choices. The reality here is that if it walks like a duck and talks like a duck, then it is a duck. If it’s got individual contracts and unfair dismissal it is Work Choices, whatever spin Mr Abbott might put on it”

~ Julia Gillard, Workplace Relations Minister, comment on ABC Radio, 16 February 2010
“Mr Abbott is a staunch believer in WorkChoices and his track record shows that he cannot be trusted by Australian workers…Egged on by big business, he and Ms Bishop will reintroduce the Liberals’ hardline industrial relations laws if they get the chance.”

~ Sharan Burrow, ACTU President, ACTU Media Release 3 December 2009
“Expect the truth to emerge from the clash of differing opinions”

~ Dorothy Marcic
“You can never solve a problem with the same kind of thinking that created the problem in the first place”

~ Albert Einstein
5. WORKPLACE REGULATION AND FLEXIBILITY
Workplace Regulation

- General Fair Work Act Provisions
- National Employment Standards (NES)
- Modern Awards
- Transitional Instruments
- Enterprise Agreements
- Contracts
- Policy and Procedure
Modern Awards

- Award Modernisation (1760 → 122)
- Modern Awards commenced operation from 1 January 2010 save for...
- Transitional arrangements from 1 July 2010 for:
  - minimum wages
  - casual and part time loadings
  - penalties (eg weekend and public holidays)
  - Shift allowances
Modern Awards
Pay Transitional Provisions

**Difference** between existing award minimum entitlement and modern award is the “transitional amount”

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<tr>
<th></th>
<th>Existing minimum higher</th>
<th>Existing minimum lower</th>
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<tbody>
<tr>
<td><strong>Pay Modern Award rate plus:</strong></td>
<td></td>
<td></td>
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<tr>
<td>PPF 1/7/10 – 80% of the difference</td>
<td>80% of the difference</td>
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<tr>
<td>PPF 1/7/11 – 60% of the difference</td>
<td>60% of the difference</td>
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<tr>
<td>PPF 1/7/12 – 40% of the difference</td>
<td>40% of the difference</td>
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<tr>
<td>PPF 1/7/13 – 20% of the difference</td>
<td>20% of the difference</td>
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<tr>
<td>PPF 1/7/14 – 0% of the difference</td>
<td>0% of the difference</td>
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Modern Awards
Pay Transitional Provisions

Example: No existing award penalty or loading

Pay the following percentage of the new modern award loading:

<table>
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<tr>
<th>Date</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>PPF 1/7/10</td>
<td>20%</td>
</tr>
<tr>
<td>PPF 1/7/11</td>
<td>40%</td>
</tr>
<tr>
<td>PPF 1/7/12</td>
<td>60%</td>
</tr>
<tr>
<td>PPF 1/7/13</td>
<td>80%</td>
</tr>
<tr>
<td>PPF 1/7/14</td>
<td>100%</td>
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</tbody>
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Overview of methods for flexibility across modern award obligations

1. Guarantee of annual earnings
2. Individual flexibility agreement
3. Specific Award Clause Arrangements
4. Annualised salaries
5. Common law contracts
6. All Up Rates
7. Award Variation
8. Enterprise Agreements and IFA’s
Overview of methods for flexibility across modern award obligations

1. **Guarantee of annual earnings**
   - Governed by the *Fair Work Act*
   - Undertaking or “guarantee” by an employer to maintain a certain wage level for an employee for a period of time
   - Modern award continues to apply but does not cover employee
   - Only available in respect of high income employees (ie over $129,300 p/a)
   - Various formal requirements

2. **Individual flexibility agreement (IFA)**
   - Governed by the *Fair Work Act* / modern award
   - Mechanism under the modern award whereby the effect of certain terms can be varied by agreement
   - IFA becomes enforceable as a term of the modern award
   - Available in respect of all modern awards/employees
   - Various formal requirements
   - Issues re scope/termination
Overview of methods for flexibility across modern award obligations

3. **Specific Award clause arrangements**
   - Governed by terms of the Modern Award
   - Clause individual or majority arrangements provisions
   - Meet the requirements of the specific clause

4. **Annualised salary arrangements**
   - Governed by the specific modern award
   - Provision under a modern award whereby certain terms won’t apply to employees earning over a certain threshold
   - Only available under some modern awards
Overview of methods for flexibility across modern award obligations

5. **Common law contracts**
   - Outside of the *Fair Work Act* modern award system
   - Sits on top of the modern award
   - Can be used to alter arrangements on an above award basis

6. **All up Rates**
   - Specific contractual arrangement for an all up rate
   - Must specify all award clauses satisfied by the rate

7. **Award Variation**

8. **Enterprise Agreements/IFA’s**
Enterprise Agreements: A means to enterprise flexibility

<table>
<thead>
<tr>
<th>AGREEMENTS UNDER WORK CHOICES</th>
<th>AGREEMENTS UNDER THE FAIR WORK ACT</th>
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</thead>
<tbody>
<tr>
<td>1. Focus on individual bargaining – AWAs</td>
<td>1. Focus on collective bargaining – no individual statutory agreements</td>
</tr>
<tr>
<td>3. Maximum 5 year term</td>
<td>3. Maximum 4 year term</td>
</tr>
<tr>
<td>4. Fairness Test</td>
<td>4. Better Off Overall Test (BOOT)</td>
</tr>
<tr>
<td>5. Prohibited content</td>
<td>5. Matters pertaining, unlawful content</td>
</tr>
<tr>
<td>6. Unilateral termination after 90 days (after nominal expiry date)</td>
<td>6. No more unilateral termination. Must apply to FWA – public interest</td>
</tr>
</tbody>
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Enterprise Agreements

Types:
- Single Enterprise
- Multi-Enterprise
- Greenfields Single Enterprise
- Greenfields Multi-Enterprise

Required Content:
- Nominal expiry date
- Dispute settlement term
- Consultation term
- Flexibility term

Wide scope to regulate matters pertaining to the employment relationship
Flexibility within Enterprise Agreements

Agreement Flexibility

- All enterprise agreements will be required to include a **flexibility term**

- Under this clause, an employer and employee can enter into an “individual flexibility arrangement”

- Employee must be better off overall

- Arrangement must be in writing
6. THE BARGAINING PROCESS
Enterprise Bargaining

- Tailor your scope
- Plan Good Faith Bargaining
  - Bargaining Frameworks
- Commencing Bargaining
  - Employer agreement
  - Employee Majority Support Determination
- Scope Orders
- Good Faith Bargaining Orders
- Industrial Action
  - Secret Ballot Applications
  - Employer Responses
- General Protections and Employer Rights
- Delays to a vote
Enterprise Bargaining

KEY ACTIONS

- Assess optimal scope and content
- Take a clean sheet approach to flexibility
- ‘Sink the BOOT’ into your draft
- Plan for Bargaining in Good Faith
  - set your timetable
  - consider a Bargaining Framework
- Strategise your bargaining
- Plan to risk manage industrial action exposures
- Do your pre-work for Fair Work Commission Approval
- Quality relationships are key
7. UNION STATUS AND REGULATION
8. WORKPLACE CULTURE – EMPLOYER AND EMPLOYEE WORKPLACE RIGHTS AND RESPONSIBILITIES
THE PARADOX OF OUR AGE

“We have more degrees, but less sense; more knowledge, but less judgement”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“We have bigger houses but smaller families; more conveniences, but less time”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“We have more experts, but more problems; more medicines, but less healthiness”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“We’ve been all the way to the moon and back, but have trouble crossing the street to meet the new neighbour”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“We built more computers to hold more information to produce more copies than ever, but have less communication”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“We have become long on quantity, but short on quality”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“These are times of fast foods but slow digestion”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“Tall man but short on character”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“Steep profits but shallow relationships”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

“It’s a time when there is much in the window, but nothing in the room”

~ His Holiness the 14th Dalai Lama
THE PARADOX OF OUR AGE

Where does Australian workplace culture stand in this context?
How well does this country perform in an area so vital to workplace health, morale, productivity and efficiency?
Australia’s working men and women are enduring endemically unhealthy workplace cultures
Instead of being a world leader in people management, Australia is lagging behind on major indicators of workplace culture according to international benchmarks.
Australia is not the land of the long weekend and the endless sickies as our mythology tells us. We are working longer and harder than anyone else in the world…Australians seem driven to work excessively at great cost to their health and personal relationships”

Clive Hamilton, Executive Director of the Australia Institute
A comprehensive study of Australian organisational cultures found these were more passive/defensive and aggressive/defensive, rather than constructive.
Bullying and unfair treatment is not isolated to the schoolyard but is rife in many Australian workplaces
Stress-related presenteeism and absenteeism are directly costing employers $10.11 billion a year
All facets of a person’s physical and mental health are impacted by their place of work
There is compelling evidence to suggest that workplace culture can either aid or diminish a person’s physical and mental health
More people die from stroke or heart attack on Monday morning than at any other time
A person’s risk of heart attack doubles from job stress
Poor workplace culture is recognised as a key risk factor for cardiovascular disease which is the leading cause of death for Australians, affecting over 3.2 million Australians.
Workplace stress, conflict and other negative by-products of poor workplace culture are responsible for the proliferation of mental illness affecting 1 in 5 Australians.
One in four Australian children live with a parent who has a mental illness
Workers compensation claims for mental health problems have more than doubled in the past ten years
Health problems such as obesity, alcoholism, depression and drug addiction stem, in part, from poor workplace culture and can be improved through better workplace culture.
Improved workplace culture is a vital step in preventative health
People management processes and solutions are a vital part of healing
When employers actively invest in workplace culture, there are significant improvements in business performance, workplace health, morale, productivity and efficiency.
“Be the change you want to see”

~ Ghandi
Areas of the System of potential impact on Productivity

- Systemic Stability
- Workplace Regulation
- The Bargaining Process
- Union Status, Regulation and Rights
- Workplace Rights and Workplace Culture
  - Unfair Dismissal
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  - Consultation Requirements
  - Scope for Self Regulation and Workplace Culture
    - Contract
    - Policy procedure
    - Management ability
Culture/Contract/Policy and Procedure

- CBA - v – Barker (6/8/2013)
- implied term of trust and confidence
  - can be breached by pre-dismissal departure from company policy and procedure
  - eg: – consultation re redeployment;
    – staff behaviour modification or disciplinary process
KEY ACTIONS

Culture/Contract/Policy and Procedure

- policy and procedure can assist in enforcing workplace culture
- policies are unilateral employer statements
- carefully assess which policies you seek to enforce at contractual level eg: safety requirements vs conferral of benefits
  - audit policies
  - contractual vs aspirational language
  - express incorporation or exclusion in contracts
  - breach and commensurate penalty
  - consistent comprehensive and fair application
- in context of your comprehensive policy framework, consider express exclusion of the implied term of trust and confidence
9. CONCLUDING COMMENTS

- Join us for informal questions and discussions
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VITAL ISSUES FOR YOUR BUSINESS NOW AND INTO THE FUTURE

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