

2012 Review Panel of the Fair Work Act 2009 (Cth)

By email: fairworkactreview@deewr.gov.au

Submission

Dear Sir/Madam,

Thank you for the opportunity to make a submission in relation to the review of the 2012 Fair Work Act 2009 (Cth).

Glenn Patmore makes this submission in his capacity as a Senior Lecturer in Law and member of the Centre of Employment and Labour Relations Law at the Melbourne Law School, The University of Melbourne.

Paul Gollan makes this submission in his capacity as a Professor of Management Associate Dean (Research), Faculty of Business and Economics, Macquarie University and as a Visiting Professor, London School of Economics.

We are solely responsible for its content.

If you have any questions relating to this submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

Glenn Patmore and Paul Gollan.

Dr Paul Gollan, Professor of Management Associate Dean (Research), Faculty of Business and Economics, Macquarie University.

Mr Glenn Patmore, Senior Lecturer in Law, member, Centre for employment and Labour Relations Law, the Melbourne Law School.

Submission to the 2012 Review Panel on the Fair Work Act 2009 (Cth)

This submission addresses the Fair Work Act 2009 (Cth) reinstatement of legal support for procedures over “consultation, representation and dispute settlement” as terms in employment contracts. The Act provides that a term must be included in an enterprise agreement requiring consultation of representatives about major workplace change¹. If an enterprise agreement does not include a consultation term, then the model term is taken to be a condition of the agreement. The model consultation term for enterprise agreements is prescribed in the regulations, which require consultation of relevant employees and appointment of employee representatives².

While this submission does not address one of the listed questions provided in the background paper³ it does address other issues raised by the terms of reference of the Review. We note that the Review Panel “is to be an evidence based assessment of the operation of the Fair Work legislation and the extent to which its effects have been consistent with the object set out in Section 3 of the Fair Work Act.”⁴

There is relatively little publicly available research into the procedures over “consultation, representation and dispute settlement” provided for in the *Fair Work Act 2009* (Cth) s 205 and Fair Work Regulations 2009 (Cth) Schedule 2.3.⁵ Hence, it is difficult to assess how effective the statutory consultation requirements have been in terms of meeting the key objects of the Act. We urge the Review Panel to recommend further research into the consultation requirements provided for in the legislation and regulations.

The Review Panel has also been asked “to examine and report on areas where the evidence indicates that the operation of the Fair Work Act could be improved consistent with the objects of the legislation”⁶. Accordingly, we compare the consultation provision in the Fair Work Act with evidence from comparable European laws and best practice. Improvements to the model term would enhance the operation of the Act consistent with its objects.

We highlight for the Review’s consideration the objects specified in Section 3 (a) and (e). Section 3 provides:

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
(b) businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations; and ...

¹ See *Fair Work Act 2009* (Cth) s 205.

² *Fair Work Regulations 2009* (Cth) Schedule 2.3.

³ See Fair Work Act Review, ‘Fair Work Act Review Background Paper’ (Background Paper, Australian Government Department of Education, Employment and Workplace Relations, January 2012) Appendix B.

⁴ Fair Work Act Review, ‘Fair Work Act Review Background Paper’ 1.

⁵ See B Creighton and A Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 315; Amanda Pyman, Peter Holland, Julian Teicher and Brian K. Cooper ‘Industrial Relations Climate, Employee Voice and Managerial Attitudes to Unions: An Australian Study’ (2010) 48(2) *British Journal of Industrial Relations* 460.

⁶ Fair Work Act Review, ‘Fair Work Act Review Background Paper’ 2.

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms

The model term provides:

- a right to representation at work;
- a procedure for addressing grievances; and
- a self-regulatory compliance mechanism.

The model term could be improved if the consultation provisions better addressed other objectives of the Act, including co-operation and productivity. There are other ways in which the model term could also be enhanced.

First, the topics for consultation in the model term are far more limited than in comparable European laws. Under the model term, consultation is required where a major change is likely to have a significant effect on employees if it results in:

- (a) the termination of the employment of employees; or
- (b) major change to the composition, operation or size of the employer's workforce or to the skills required of employees; or
- (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
- (d) the alteration of hours of work; or
- (e) the need to retrain employees; or
- (f) the need to relocate employees to another workplace; or the restructuring of jobs.⁷

Professors Creighton and Stewart note that the term: "is similar (in the extent of information provision and consultation it requires and the range of issues in respect of which these processes are to occur) to the consultation clauses that were commonly inserted in awards and collective agreements following the Termination, Change and Redundancy Case in 1984"⁸. Since the mid-1980s, the European Union has developed new directives requiring all member states to adopt information and consultation procedures that extend beyond those provided for in the model term. For instance, the European Union Directive requiring the establishment of employee information and consultation procedures in undertakings in each of the member States⁹ provides a more general list of topics to be discussed by employers and employees. These include:

- the future development of the enterprise's activities and its economic situation¹⁰;
- employment, particularly where there is a threat to employment within the business¹¹; and,
- issues likely to lead to substantial changes in work organisation or contractual relations, especially issues directly affecting job security such as collective redundancies and business transfers¹².

Thus, the topics to be discussed include firm performance, continuance of employment and job security. Most importantly, discussion of the economic situation of the firm would include consultation over

⁷ *Fair Work Regulations 2009* (Cth) Schedule 2.3 (9).

⁸ B Creighton and A Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 315.

⁹ Council Directive 2002/14/EC, 2002 O J (L 080): ('ICED, 2002').

¹⁰ ICED 2002: art 4(2)(a).

¹¹ ICED 2002: art 4(2)(b).

¹² ICED 2002: art 4(2)(c).

productivity. The topics discussed by Works Councils in the Netherlands and Germany are also far more extensive than in the model term.¹³

Turning from the topics of consultation to the form of consultation required by the model term, the term specifies that it must allow for the employee to be represented during the consultation¹⁴ and the Explanatory Memorandum¹⁵ notes that the representative could be an 'elected employee or a representative from an employee organisation'¹⁶. However, the model term provides no mechanism for election of representatives.

The model term requires the employer to consult employees or their representatives, but provides no structure for ongoing consultation. For instance, there is no reference to a committee structure, such as those provided for by the European Works Councils Directive¹⁷ and the Works Councils legislation in Germany and the Netherlands.

The model term does not provide an effective model for information and consultation procedures for a developed 21st century economy. Improved consultation mechanisms are required to address skills development to provide greater employability; and to address global competitive pressures faced by Australian businesses to enhance productivity and flexibility. It is notable that enhancement of employability, job security and competitiveness underpin the policies of EU directives regarding informing and consulting employees¹⁸.

Thus, effective implementation of a consultation procedure may not only enhance job security, but also employability, flexibility and productivity. We also note from Europe that there is very considerable evidence that joint consultation and/or works councils enhance productivity outcomes¹⁹.

Finally, there has been considerable scholarly research and government reports chronicling the need and the benefits of an effective information and consultation procedure for Australian employees.²⁰ We would

¹³ See Works Councils Act (WCA) (*Wet op de Ondernemingsraden*), the Netherlands; Betriebsverfassungsgesetz 1972, Works Constitution Act, Germany.

¹⁴ *Fair Work Act 2009* (Cth) s 205(1)

¹⁵ Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [876]

¹⁶ Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [876]

¹⁷ European Parliament and Council (EWC)(1994) 'European Works Council', Council Directive 94/45, 1994 OJ (L 254); European Parliament and Council (EWC) (1997) 'European Works Council', Council Directive 97/74, 1998 OJ (L 010); The Transnational Information and Consultation of Employees Regulations (1999) UK Statutory Instrument 1999, 3323.

¹⁸ Key aims mentioned in the preamble of the ICED 2002 are: to promote social dialogue between management and labour; to strengthen dialogue and promote mutual trust within undertakings; to increase employee availability to undertake measures and activities to increase their employability, promote employee involvement in the operation of the future of the undertaking and increase its competitiveness.

¹⁹ See for example, A. Wilkinson, P.J Gollan, M. Marchington, and D. Lewin, 'Conceptualizing Employee Participation in Organizations' in A. Wilkinson, P.J. Gollan, M. Marchington, and D. Lewin (eds.) *The Oxford Handbook of Participation in Organisations* (Oxford University Press, 2010) 3-25; S. Wood, 'High Involvement Management and Performance' in A. Wilkinson, P.J. Gollan, M. Marchington, and D. Lewin (eds.) *The Oxford Handbook of Participation in Organisations*, (Oxford University Press, 2010) 407-425.

²⁰ See for example, P J Gollan and G Patmore 'Transporting the European Social Partnership Model to Australia' (2006) 48 *The Journal of Industrial Relations* 217, 217 - 256; P J Gollan, G Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy: Labor Essays* (Pluto Press Australia,

urge the Review Panel to recommend to the government that they revise the model term to more effectively implement the objects of the Act.

2003); R MacCallum, G Patmore, 'Works Councils and Labor Law' in I Ross, R Markey and P Gollan (eds), *Works Councils for Australia: Future Prospects and Possibilities* (Federation Press, 2002) 74-100; P.J.Gollan, 'Nonunion Forms of Employee Representation in the United Kingdom and Australia', in B.E. Kaufman and D.G. Taras (eds), *Nonunion Employee Representation: History, Contemporary Practice, and Policy* (M.E. Sharpe, 2000) 410-449; P.J.Gollan, R. Markey and I. Ross, 'Additional forms of employee representation in Australia', (Working Paper no. 64, Australian Centre for Industrial Relations Research and Training, 2001 .