HR Nicholls Society XXXIII Conference

Cost, Loss and Disruption: Another Year of the Fair Work Act

1:00pm – 5:00pm
Tuesday 12 June 2012

Travelodge Docklands
66 Aurora Lane
Docklands, Melbourne

SPEAKING NOTES

Mr Doug Williams

A Federal Registrar's Perspective

SPEAKING NOTES: Mr Doug Williams

Opening Remarks

- GOOD AFTERNOON AND THANKYOU FOR THE INVITATION TO CONTRIBUTE TO THE PUBLIC DEBATE ON WORKPLACE RELATIONS

- I HAVE BEEN GIVEN TO UNDERSTAND THAT THE SOCIETY IS SEEKING TO RE-POSITION ITS PARTICIPATION IN PUBLIC POLICY DEVLOPMENT TO A MORE MAIN STREAM PERSPECTIVE, ENHANCING ITS INFLUENCE: THIS IS LAUDABLE AND A KEY ELEMENT IN MY AGREEMENT TO PARTICIPATE

- MY ASSIGNED TASK IS TO REFLECT ON WORKPLACE RELATIONS REGULATION, DRAWING ON MY TIME AS AUSTRALIA'S 14TH (AND FINAL) FEDERAL INDUSTRIAL REGISTRAR OVER 104 YEARS

- IN THE SPIRIT OF BEING A CATALYST FOR DEBATE, DO TAKE UP KEY POINTS AS YOU WISH DURING THIS DISCOURSE, BUT PLEASE NOTE, OTHER THAN BROADEST PRINCIPLES, BECAUSE OF PENDING COURT ACTIONS, I DO NOT INTEND TO COMMENT ON THE HSU MATTER

- IN ANY CASE THERE ARE BIGGER AND MORE ENDURING INSTITUTIONAL ISSUES TO CONSIDER

Critical Caveat

- CRITICAL TO APPRECIATING MY PERSPECTIVE AS A FORMER FEDERAL STATUTORY OFFICER, IN PUBLIC SERVICE, BUT NOT A PUBLIC SERVANT, IS THAT A REGULATOR MUST ACCEPT THE ROLE OF EXECUTIVE GOVERNMENT IN DETERMINING POLICY AND FRAMING LEGISLATION AND REGULATION

- THE STATUTORY REGULATOR'S TASK IS TO OPERATE WITHIN THE POLICY, LEGISLATIVE AND REGULATORY FRAMEWORK SET BY EXCUTIVE GOVERNMENT. A REGULATOR'S COMMENT ON THESE SETTINGS SHOULD BE LIMITED TO EFFECTIVENESS AND BE SPARING, OTHERWISE REGULATORY INDEPENDENCE IS LIKELY TO BE COMPROMISED, AT LEAST IN PERCEPTION

- HAVING SAID THIS, IT IS TIME THAT WORKPLACE RELATIONS IS APPROACHED AS JUST ONE ELEMENT IN THE MIX IN MANAGING BUSINESS AND IN PARTICULAR CEASES TO BE SOME SORT OF POLICY SACRED COW. SPECIFICALLY, IT SHOULD NOT BE REGULATED MATERIALLY SEPARATE FROM OTHER BUSINESS AND COMMUNITY IMPERATIVES

Begin at the Beginning

- SOME CONTEXT MIGHT BE USEFUL: WHEN THE FIRST TRIBUNAL WAS ESTABLISHED IN 1904, THE BACK NOTE WAS A DECADE OR MORE OF INTRACTABLE DISPUTES IN THE WOOL AND MARITIME INDUSTRIES

- THIS WAS CRIPPLING THE ECONOMIC AND SOCIAL DEVELOPMENT OF A STILL FLEDGLING COLONIAL NATION AND LED TO A HISTORIC CONCENSUS BETWEEN POLITICIANS, THE COMMUNITY, BUSINESS AND LABOUR MOVEMENTS TO FIND NEUTRAL TERRITORY IN THE FORM OF AN INDEPENDENT ARBITRATION AND CONCILIATION COMMISSION

- LOOKING BACK, AUSTRALIA WAS A WORLD LEADER, NOW MUCH COPIED, IN CONCEIVING AND CREATING SUCH A BODY. IN THE SUBSEQUENT JOURNEY TO FWA, WHAT HAPPENED TO THE INGENUITY OF THE TIME?

- THE ORIGINAL INTENTION CLEARLY WAS TO FOCUS ON THE PRACTICAL RESOLUTION OF SEMINAL DISPUTES AND CERTAINLY NOT TO MICRO-MANAGE WORKPLACE RELATIONS; COMMERCIAL ENTITIES

AND OTHER ORGANISATIONS SHOULD DO THIS AND THEIR EXECUTIVES, MANAGERS AND STAFF SHOULD INVEST IN THE SKILLS TO DO SO. ITS TIME TO SELF-MANAGE AT THE WORKPLACE

- SOME HOW THIS HAS BEEN LOST SIGHT OF AND THE CURRENT TRIBUNAL HAS METAMORPHISED INTO A PRESCRIPTIVE AND DETAILED REGULATORY BODY

- IT HAS ALSO TAKEN ON A STRONG JUDICIAL CHARACTER WHICH ARGUABLY PROMOTES ADVERSARIAL BEHAVIOURS AND INSTITUTIONALISES WHAT IS POPULARLY LABELLED '*THE INDUSTRIAL RELATIONS CLUB*'

- IN AN IMPORTANT SENSE OF COURSE, SUCH A LABEL IS A MISNOMER, BUT IT DOES CAPTURE HOW THE INSTITUTIONS AND THEIR OPERATING PROCESSES ARE SERVING TO MYSTIFY AND ACT AS A BARRIER TO LAY PRACTITIONERS

- THIS MEANS THAT THE TRIBUNAL DOES NOT UNDERTAKE SUBSTANTIVE ANALYSIS AND RESEARCH TO DISCOVER THE CENTRAL ELEMENTS OF INDUSTRIAL DISPUTES, BUT LARGELY LIMITS ITS ADJUDICATION TO THE VIEWS OF THE ADVOCATES WHO APPEAR BEFORE IT

- AS A CONSEQUENCE, DELIBERATIONS TEND TO BE MORE PONDEROUS, PROTRACTED, COSTLY AND OPAQUE. CRITICALLY, NON-PRACTICIONERS ARE EFFECTIVELY LOCKED OUT OF PROCEEDINGS

- AS A CONSEQUENCE, THE TRIBUNAL IS PERENNIALLY AT RISK OF FORM SUBJUGATING FUNCTION, INCLUDING BY UNDERMINING THE ABILITY TO BE CREATIVE ABOUT PROCESS; OR EVEN HAVING THE CAPACITY TO QUESTION THE ONGOING RELEVANCE OF LONG-STANDING PROCESSES

- WHEN MY APPOINTMENT CONCLUDED, THE VAST VOLUME OF THE BUSINESS OF THE TRIBUNAL, SOME 20,000 MATTERS, WAS UNFAIR DISMISSALS, INVARIABLY INVOLVING PEOPLE WITH NO PRIOR ENGAGEMENT WITH, OR UNDERSTANDING OF THE TRIBUNAL

- THE AVERAGE COST TO THE TRIBUNAL BUDGET OF THESE CASES WAS SOME $5,OOO EACH. AS A COUNTER EXAMPLE, NZ MANAGED SUCH CASES AT AROUND $NZ800 EACH. WE KNOW THIS BECAUSE A TRIBUNAL AND REGISTRY DELEGATION VISITED NZ IN EARLY 2009

- FWA'S 'LAY MEDIATOR' FIRST STAGE MEDIATION PROCESSES FOR UNFAIR DISMISSALS ARE LAUDABLE, BUT BEG THE QUESTION OF WHY A SUBSTANTIAL SHARE OF UNFAIR DISMISSALS STILL PASS THROUGH TO TRIBUNAL MEMBERS, OR FOR THAT MATTER WHY MEDIATED AGREEMENTS NEED TO BE RATIFIED BY MEMBERS AT ALL?

Some Principles

- ANY REVIEW OF THE LEGISLATIVE AND REGULATORY SETTINGS SHOULD BE ASSESSED AGAINST PRINCIPLES SUCH AS: TRANSPARENCY, EQUITY & FAIRNESS, PRACTICALITY, SIMPLICITY, CONSISTENCY, PREDICTABILITY, EFFICACY AND NATURALLY, VALUE FOR MONEY

- EFFICACY PARTICULARLY MATTERS BECAUSE REGULATED ENTITIES HAVE THEIR OWN BUSINESS TO MANAGE AND SHOULD NOT BE INTERMINABLY DISTRACTED BY THE REGULATOR

- THE COST OF A DRAWN OUT INVESTIGATION IS MUCH MORE THAN THE REGULATOR'S DIRECT RESOURCE COST, OR THE RISK OF MUDDYING ISSUES AS MINOR MATTERS BECOME SWEPT UP WITH CORE ISSUES, BUT THE DEADWEIGHT LOSSES TO REGULATED ENTITIES AND THOSE THEY HAVE SUPPLY CHAIN CONNECTIONS WITH

- THIS IS ALSO WHY THE REGULATOR IS NOT AND SHOULD NOT BE PERMITTED TO GO ON 'FISHING EXPEDITIONS'

- THE NOTIONS OF OPERATIONAL TRANSPARENCY AND IMPECCABLE GOVERNANCE TOO, ARE ESPECIALLY IMPORTANT, RECOGNISING THAT ALL REGULATORS ARE AT RISK OF BEING 'CAPTURED' BY THEIR CONSTITUENCY; OVER TIME IT IS OFTEN NOT A QUESTION OF 'IF', BUT 'WHEN'… AND PERCEPTIONS MATTER AS MUCH AS ACTUALITY

- ABOVE ALL, THOUGH, IT IS THE LEADERSHIP STYLE OF THE HEAD OF THE ORGANISATION THAT SETS AND INSTITUTIONALISES THE OPERATING CULTURE

- THE FWA PRESIDENT'S REPORTED CALL BOTH TO RE-ESTABLISH SEPARATION OF THE TRIBUNAL AND ADMINISTRATIVE ARMS OF FWA AND FOR A NEW NAME, IS EFFECTIVELY A CALL FOR RE-CREATION OF THE INSTITUTIONAL ARRANGEMENTS PRIOR TO THE *WORKPLACE RELATIONS ACT* REFORMS

- THIS AMOUNTS TO FURTHER CONSOLIDATION OF THE INDUSTRIAL RELATIONS CLUB – 'BACK TO THE FUTURE' IF YOU LIKE

- IF MATERIAL REPUTATIONAL DAMAGE HAS OCCURRED TO FWA BY RECENT EVENTS AND PRACTICES, IT HAS BEEN SELF-INFLICTED. ANY SUCH EFFECTS REALISTICALLY WILL BE CORRECTED BY UNWAVERING, TRANSPARENT AND EXPEDITIOUS OPERATIONAL EXCELLENCE, NOT NAME CHANGES

- RELATEDLY, IT IS TIME FOR PROPER PERFORMANCE MEASUREMENT AND OUTCOMES ACCOUNTABILITY FOR TRIBUNAL MEMBERS; THE SUGGESTION THAT THE QUASI-JUDICIAL CHARACTER OF THE ORGANISATION MITIGATES AGAINST PERFORMANCE MEASUREMENT IS

FALLACOUS AND OUTMODED IN TODAY'S INTERNATIONALY COMPETITIVE ENVIRONMENT

- THIS REMAINS SO EVEN IF YOU ACCEPT THAT QUASI-JUDICIAL PROCESSES ARE A SOUND OPERATIONAL MODEL

- EVEN MORE SPECIFICALLY WHY, AS HAS BEEN PROPOSED, WOULD WE WANT TO DRAW THE TRIBUNAL FURTHER INTO THE FEDERAL COURT JURISDICTION BY INCORPORATION IN THE BILLS COVERING FEDERAL COURT JUDICIAL COMPLAINTS AND MISBEHAVIOUR?

- SURELY THERE CAN BE NO INTENT TO BUTRESS THE SUPERANNUATION PROVISIONS FOR TRIBUNAL PRESEIDENTS, VICE PRESIDENTS, SENIOR DEPUTY PRESIDENTS AND DEPUTY PRESIDENTS THAT ARE ALREADY LINKED TO FEDERAL COURT JUDICIAL PENSIONS?

- PERFORMANCE ASSESSMENT AND SOUND OPERATING POLICIES TOGETHER WITH EXISTING APPEAL MECHANISMS WOULD OBVIATE BOTH THE NEED FOR NEW COMPLAINTS HANDLING REGULATION AND ANY RISK THAT COMPLAINTS HANDLING IS PERCEIVED TO BE OPAQUE AND INADEQUATE

- IN OTHER WORDS, LIKE ANY OTHER ORGANISATION, JUST FUNCTION IN A TRANSPARENTLY BUSINESS-LIKE MANNER

Was FWA A Game Changer?

- TO PUT THESE OBSERVATIONS IN CONTEXT, ORGANISATIONALLY, FWA IS LITTLE DIFFERENT FROM THE COMMISSION IT REPLACED IN 2009

- WITH ONE KEY EXCEPTION, IT COMMENCED WITH THE SAME STAFF IN THE SAME ROLES AND OPERATIONAL STRUCTURE AND BUDGET, INCLUDING TAKING ACCOUNT OF THE RE-ABSORPTION OF THE MINIMUM WAGE FUNCTION

- THE KEY EXECPTION WAS THE ABOLITION OF THE REGISTRAR'S INDEPENDENCE; INSTEAD OF ACCOUNTABILITY TO THE PARLIAMENT, THE FWA GENERAL MANAGER IS ACCOUNTABLE TO THE PRESIDENT. IN A MATERIAL WAY, THE NATURAL GOVERNANCE CHECKS AND BALANCES BETWEEN THE TRIBUNAL MEMBERS AND THE ADMINISTRATIVE FUNCTIONS HAS BEEN LOST

- EVEN IF THIS HAS NOT AFFECTED THE INHERENT INTEGRITY OF THE ORGANISATION, WHICH ITSELF IS ARGUABLE, IT HAS CREATED THE PERCEPTION OF WEAKENING GOVERNANCE; WITNESS THE PERCEPTION IN SOME CIRCLES THAT THE HSU INVESTIGATION MAY HAVE BEEN INFLUENCED BY THE TRIBUNAL

- IF THE ORGANISATIONAL STRUCTURE OF FWA IS TO BE REVISITED, AS HAS REPORTEDLY BEEN SUGGESTED BY THE PRESIDENT, THEN THE ACCOUNTABILITY ARRANGEMENTS FOR THE GENERAL MANAGER SHOULD BE TOP OF THE LIST, INCLUDING AND PARTICULARLY IN REGARD TO THE REGISTERED ORGANISATIONS FUNCTION

Wither Industrial Organisations Regulation

- BETTER STILL, WHY NOT JUST GIVE THE FUNCTION TO ASIC; AFTER ALL IT HAS CRITICAL MASS, TRACK RECORD AND SEASONED INVESTIGATORY CAPABILITY. THE CORE PURPOSE OF THE REGISTERED ORGANISATIONS PROVISIONS IS TO ENSURE THAT SUCH ENTITIES, BOTH UNIONS AND EMPLOYER BODIES OPERATE WITH THE SAME GOVERNANCE DISCIPLINES AS ANY OHER COMPANY; FOR PROFIT, OR OTHERWISE

- THIS IS PRECISELY THE FUNCTION OF ASIC

- IT WOULD OBVIATE ANY NEED TO RUSH TO YET MORE PIECEMEAL LEGISLATIVE AND REGULATORY AMENDMENTS, POWERS AND

OPERATING COSTS, INCLUDING ON THE REGISTERED ORGANISATIONS IN MEETING MORE 'RED TAPE'

- EQUALLY IT MUST BE SAID, THE OPPOSITION'S NOTION OF ANOTHER OMBUSMAN IS ALSO A CURIOUS POLICY PROPOSAL

- NOTABLY, THE REGISTERED ORGANISATIONS PROVISIONS WERE CARRIED OVER UNCHANGED FROM THE COMMISSSION TO FWA IN 2009 ON THE BASIS THAT THEY WOULD BE REVIEWED IN 2010. TO MY KNOWLEDGE, THIS HAS NOT OCCURRED AND IS LONG OVERDUE

- WHAT THE REGULATOR NEEDS IS 'END-TO-END' AUTHORITY TO PROSECUTE MATTERS EXPEDICIOUSLY TO A NATURAL CONCLUSION, INCLUDING BY REFERRAL TO OTHER AGENCIES

- FURTHER IN MY EXPERIENCE, MOST REGULATED ORGANISATIONS ARE DILIGENT ABOUT MEETING THEIR REGULATORY OBLIGATIONS AND DO NOT NEED TO BE EVER MORE PRESCRIPTIVELY REGULATED

- PERVERSELY, THE MORE REGULATORS MICRO-MANAGE, THE MORE SUCH RESOURCES ARE SPREAD TOO THINLY TO BE EFFECTIVE AND THE LESS EFFICACIOUS IS THE SCRUTINY OF THE RELATIVE HANDFUL OF ENTITIES THAT THUMB THEIR NOSES TO THEIR GOVERNANCE OBLIGATIONS AND THE GREATER THE COST OF RED TAPE TO THOSE ATTEMPTING TO BE 'GOOD CORPORATE CITIZENS'

And Now To Modern Awards

- THE FINAL TASK OF THE COMMISSION IN 2009 WAS TO COMPLETE THE OVERHAUL OF THE EXISTING MYRIAD OF AWARDS TO A RELATIVE HANDFUL OF SO-CALLED 'MODERN AWARDS'

- THIS WAS AN ASTOUNDING ADMINISTRATIVE AND ORGANISATIONAL SUCCESS, AS IT SIMPLIFIED DECADES OF LAYERED AGREEMENTS WITH

THEIR INEVITABLE INCONSISTENCIES AND TENUOUS RELEVANCE TO CONTEMPORARY COMMERCE, TRADE AND SOCIETAL NORMS

- ALL PREVIOUS ATTEMPTS HAD INSTANTLY BECOME MYRED IN ACRIMONIOUS EXCHANGES AND THEATRICAL GRANDSTANDING, INCLUDING TO KEEP AGRENDAS OPAQUE AND ARGUABLY TO PRESERVE VESTED INTERESTS

- IN 2009, THE 'EXPERTS' PREDICTED THAT THE BRIEF WAS IMPOSSIBLE, THE TIMELINE PREPOSTEROUS AND THE RESOURCES MINISCULE. EVEN THE SENATE REPEATEDLY EXPRESSED DOUBT THAT THE MANDATE COULD BE FULFILLED EVEN WHEN PUBLISHED MILESTONES WERE COMPREHENSIVELY MET

- AND IN DECEMBER 2009, A FULL SET OF MODERN AWARDS WAS PRESENTED ON SPEC, ON TIME AND ON BUDGET. IT WAS AN UNAMBIGUOUS TESTAMENT TO THE LEADERSHIP OF THE TRIBUNAL, ITS INHERENT ORGANISATIONAL CAPACITY AND THE UNRESERVED COMMITMENT AND DEDICATION OF THE STAFF. REMEMBER TOO THIS WAS AGAINST A BACKDROP OF THE CONFUSIONS AND UNCERTAINTIES ARISING FROM THE CREATION OF FWA AND ITS STAGED COMMENCEMENT IN THE SECOND HALF OF 2009

- OF COURSE THERE WERE SOME WRINKLES, BUT THESE ARE MEANT TO BE ADDRESSED IN THE TIME-TABLED REVIEW OF MODERN AWARDS

- HOWEVER ONE KEY ASPECT THAT SEEMS TO NOT BE GAINING TRACTION IS THE PLACE OF DEFAULT SUPERANUATION FUNDS IN MODERN AWARDS

- THE INSTITUTIONAL ISSUE IS THAT A QUASI-JUDICIAL WORKPLACE RELATIONS TRIBUNAL IS INHERENTLY ILL-EQUIPPED TO ADJUDICATE ON SUPERANNUATION. ADVOCATES APPEARING BEFORE THE

TRIBUNAL WILL ALWAYS BE REPRESENTING SECULAR VESTED INTERESTS AND THE TRIBUAL HAS NO MEANINGFUL CAPABILITY TO INFORM ITSELF

- IF SOUND DECISIONS ARISE FROM THE TRIBUNAL'S ADVOCACY PROCEDURE IT WOULD INDEED BE SERENDIPITOUS, BUT UNLIKELY

- AND IT DOES NOT ASSIST EMPLOYEES TO MAKE INFORMED DECISIONS ABOUT SUPERANNUATION PLATFORMS OR PROMOTE COMPETITION IN THE SUPERANUATION FUNDS MANAGEMENT SECTOR

- ANY MOVE TO RAISE SUPERANNUATION CONTRIBUTIONS FROM 9 PER CENT JUST RAISES THE BAR ON ENSURING THAT DEFAULT SUPERANNUATION FUNDS ARE DETERMINED ON A SOUND AND COMPETITIVE FUNDS MANAGEMENT BASIS; PLENTY OF AUSTRALIANS WILL NEED TO RELY ON THIS

An End Word

- SO THERE YOU HAVE IT, SHOULD A MODERN WORKPLACE RELATIONS REGULATOR BE SO PRESCRIPTIVELY INVOLVED?; OR MAINTAIN ITS JUDICIAL STYLE?; ARE THE OPERATONAL GOVERNANCE ARRANGEMENTS SUITABLE?; IS ACCESSABILITY ACCEPTABLE FOR LAY PRACTICIONERS?; ARE RESEARCH AND ANALYSIS, INQUIRY AND INVESTIGATION CAPABILITIES ADEQUATE?; HOW SHOULD DEFAULT SUPERANNUATION IN MODERN AWARDS BE DETERMINED?; AND SO LONG AS INDUSTRIALLY REGISTERED ORGANISATIONS EXIST, SHOULD THEY BE PRUDENTIALLY OVERSIGHTED BY ASIC?

- THANK YOU FOR YOUR TIME AND INTEREST AND MAY THE POLICY DEBATE CONTINUE ….