

11 August 2015

NAT 013/15

Draft Report – Productivity Commission Review of the Workplace Relations Framework

SUMMARY

The Productivity Commission has released a draft report and recommendations during its review into Australia's workplace relations framework.

Ai Group is heavily involved in the review on behalf of Members and is pursuing changes that would make a real difference in improving productivity, competitiveness and employment growth.

Ai Group is preparing a detailed submission in response to the Productivity Commission's draft report and Members are encouraged to express their views.

As explained in Member Advice [NAT 003/15](#), the Productivity Commission is conducting a review of Australia's workplace relations framework. The Federal Government has stated that any recommendations made by the Productivity Commission which it supports will be taken to the 2016 federal election before implementation.

In March 2015, Ai Group filed a detailed [submission](#) arguing that the workplace relations system is imposing barriers to productivity improvement, competitiveness and investment, and is not providing the adaptability that employers and employees need.

Ai Group's submission makes the case that to remain competitive in global markets, Australian businesses need to be nimble and flexible. Our businesses need to be in a position to rapidly respond to market changes and to take advantage of opportunities that present themselves.

Ai Group's submission focussed on the key problems that employers have identified with the current workplace relations framework and changes that would make a real difference in improving productivity, competitiveness and employment growth, while preserving fairness for employers and employees.

On 4 August, the Productivity Commission released a draft report of nearly 1,000 pages setting out its draft findings and recommendations. The draft report also seeks further input in several areas.

A summary of the draft report is **attached**.

Ai Group will make a detailed submission in response to the draft report which needs to be lodged by 18 September 2015. Members are urged to advise Ai Group of their views.

The Productivity Commission is due to release its final report in November 2015.

Ai Group's media release in response to the draft report

In its media release in response to the draft report Ai Group stated that the draft report lays the groundwork for a community discussion about the shape of Australia's workplace relations system and the changes that are needed to remove barriers to productivity improvement, competitiveness and investment.

Several of Ai Group's proposals have been adopted in the draft recommendations, including the following:

- It would be unlawful for enterprise agreements to contain restrictions on independent contractors, labour hire and casuals;
- Enterprise agreements would be prohibited from restricting the terms of individual flexibility arrangements;
- Employers would have more protection against frivolous and vexatious general protections claims;
- The current system of 4 Yearly Reviews of Awards would be abolished;
- Lower penalty rates would apply on Sundays in the retail, hospitality, café, restaurant and entertainment industries;
- A cap on compensation under the general protections would be implemented;
- The Fair Work Commission would have more power to deal with unfair dismissal matters which do not meet jurisdictional requirements "on the papers";
- An employer would have the option of having a greenfields agreement approved for a new project where agreement has not been reached between the employer and union/s after a period of negotiations;

- Protected industrial action would be banned until the commencement of bargaining by mutual consent or through a Majority Support Determination; and
- Enterprise agreements would not become binding on the new employer in a transfer of business situation if the employee initiated the transfer of employment to the new employer.

Member input sought

Submissions on the Productivity Commission's draft report and recommendations need to be lodged by **18 September 2015**.

Ai Group is preparing a detailed submission on behalf of Members. Members are encouraged to provide feedback on the draft report and recommendations to Ai Group. Feedback can be provided by contacting Stephen Smith, Head of National Workplace Relations Policy of Ai Group on stephen.smith@aigroup.com.au or 02 9466 5521 by 11 September 2015.

Ai Group will also participate in the public hearings before the Productivity Commission in September 2015.

The Productivity Commission is due to release its final report in November 2015.

Do you require further advice?

For further information or assistance, please contact Ai Group's Workplace Advice Service on **1300 78 38 44**.



Stephen Smith
Head of National Workplace Relations Policy

Summary of the Productivity Commission's Draft Report on Australia's Workplace Relations Framework

Overview

On 4 August, the Productivity Commission (PC) released a draft report of nearly 1,000 pages setting out its draft findings and recommendations. The draft report also requests further input from interested parties in several areas.

The draft report expresses the view that despite some significant problems and occasional peculiarities, Australia's workplace relations system needs to be repaired not completely replaced.

Fair Work Commission

The draft report recommends substantial changes to the structure of the Fair Work Commission (FWC). The FWC would be split into two Divisions. A Minimum Standards Division would have responsibility for minimum wages and modern awards. The other functions of the FWC would be carried out by a Tribunal Division, including dispute resolution, enterprise bargaining and unfair dismissal matters.

FWC Members would be appointed for five year terms with the possibility of re-appointment at the end of the term.

The Fair Work Act (FW Act) would specify eligibility criteria for FWC Members. Members of the Minimum Standards Division would be required to have well-developed analytical capabilities and experience in economics, social science or commerce. Members of the Tribunal Division would be required to have broad experience and drawn from a range of professions, including law.

An independent expert appointment panel would prepare a shortlist of suitable candidates for appointment as FWC Members with the Federal Government selecting Members from the shortlist.

Minimum wages

The FWC would have additional powers to make temporary variations to awards to address exceptional circumstances in

particular industries which justify a lower wage increase than the general increase awarded during an Annual Wage Review.

The draft report recommends a major review into apprentice and trainee arrangements. The report also seeks views from interested parties on whether junior wage rates should be based on age, or on experience and competency, or a combination of these criteria.

The PC has sought input on the feasibility, merits and optimum design of an earned income tax credit in Australia, and what the implications would be for future minimum wage increases.

Awards

The draft report recommends the retention of awards. However, 4 Yearly Reviews of Awards would be abolished. The Minimum Standards Division of the FWC would be able to vary awards as necessary. The Minimum Standards Division would identify and prioritise award issues for assessment based upon robust analysis and public consultation.

Penalty rates

The draft report supports the overall retention of penalty and overtime rates, but recommends that Sunday rates be aligned with Saturday rates in the retail, hospitality, restaurant, café and entertainment industries.

The report recommends that the FWC remain responsible for determining penalty rates.

Public holidays

The draft report expresses the view that State Governments should not be able to unilaterally trigger costs for employers by creating new public holidays. The report recommends that employers not be required to pay for leave or penalty rates for any newly designated State and Territory public holidays. The report also recommends that every award should permit an employer and employee to agree on a substitute day for a prescribed public holiday.

Long service leave

The PC is not convinced of the need for a national long service leave (LSL) standard. The draft report expresses some support for all employees deriving their LSL entitlements from State and Territory legislation rather than through the LSL provisions of former federal awards (e.g. Metal Industry Award) which now operate as terms of the National Employment Standards (NES).

The PC is not convinced of the merits of portable long service leave schemes, as sought by the unions, but has called for more submissions on the topic. The PC has also called for submissions on the idea of granting employees additional annual leave (e.g. two days per year) in lieu of long service leave entitlements.

In addition, the PC has called for submissions on whether casual workers should be permitted to exchange part of their loading for additional entitlements (e.g. annual leave or personal/carer's leave) if they wish.

Unfair dismissal

The draft report recommends that the current emphasis in the FW Act on reinstatement be removed consistent with the reality that in most cases compensation is preferred by both parties.

The FWC would have greater discretion to determine matters "on the papers", or be given the power to conduct a more detailed, merit-focused conciliation process.

Procedural errors by an employer in dismissing an employee would not lead to reinstatement or compensation if there was a valid substantive reason for the dismissal, but procedural errors could lead to counselling or education by the FWC, or the imposition of a financial penalty.

If the above changes are implemented, the draft report recommends that the Small Business Fair Dismissal Code in the FW Act and the associated unfair dismissal exemption for small employers who comply with the Code, be abolished.

General protections

The draft report recommends tightening the definition of a "workplace right" in respect of complaints or inquiries about a person's employment.

A cap on compensation would be introduced as well as exclusions for claims that are frivolous or vexatious.

Anti-bullying

The draft report does not recommend any changes to the anti-bullying laws.

Enterprise bargaining

It would be unlawful for enterprise agreements to contain restrictions on independent contractors, labour hire or casuals.

The better off overall test would be replaced with a no disadvantage test, and tighter requirements would be implemented for bargaining representatives.

Enterprise agreements would be able to have a nominal term of five years (rather than the existing four year limit) or even longer for greenfields projects that have a longer life.

The FWC would have wider discretion to approve agreements which do not meet technical requirements, e.g. those which do not meet the precise prescribed wording for the Notice of Employee Representational Rights.

After three months of unsuccessful negotiations with a union over a greenfields agreement, an employer would be able to either request that the FWC undertake "last offer" arbitration, by choosing between the last offers of the employer or the union, or submit the agreement to the FWC for approval with a 12 month nominal expiry date. Also, bargaining representatives for greenfields agreements would be subject to the good faith bargaining requirements in the FW Act.

The PC has not recommended the abolition of pattern bargaining but has sought views on how it could be restrained where it is imposed through excessive leverage or is likely to be anticompetitive.

Individual flexibility arrangements

The draft report recommends a number of changes to Individual Flexibility Arrangements (IFAs). Enterprise flexibility terms in enterprise agreements would be required to permit IFAs to be made dealing with all matters listed in the model flexibility term in the *Fair Work Regulations* in addition to any other matters agreed by the parties. The maximum default notice period required for termination of an IFA would remain at 13 weeks but this could be extended to 12 months by agreement between the employer and the employee.

The draft report recommends that the Fair Work Ombudsman provide more detailed guidance on IFAs, including template arrangements.

The enterprise contract

The PC's draft report proposed a new form of statutory agreement called an enterprise contract (EC).

An EC would follow a template applicable to a class or group of employees. The EC would apply on an individual basis to an employee within that class/group. The EC would need to be made available to all the employees in the specified class/group and could be offered as a condition of employment to new employees.

An EC would need to conform to a standard form specified within the *Fair Work Regulations*. Sample templates could be made available on the FWC website. An employer would not be required to use a template but any alternative form would need to meet the requirements specified in the FW Act and Regulations.

Comprehensive employee protections would apply including: a prohibition on the coercion of existing employees to enter into an EC, the EC would be subject to the NES and a no-disadvantage test, and the base wage rate for an employee covered by an EC would never be able to fall below the relevant award rate or the national minimum wage.

An EC would operate for a specified term. An employee would have the option to return to an existing arrangement after 12 months or at the expiry of the EC (whichever was shorter).

An EC would be able to override an enterprise agreement or award.

The employer would be required to lodge the EC (as it applies to the class/group of employees) with the FWC but would not need to identify the individual employees covered by it. The EC would commence at the time of lodgement by the employer.

The FWC would be required to periodically publish the ECs lodged.

Ballot orders and industrial action

The draft report recommends that maximum penalties for unlawful industrial action be increased.

The FWC would only have the power to grant a protected action ballot order once bargaining had commenced by mutual consent or through a Majority Support Determination.

The PC has sought further input on how protected action ballot procedures could be simplified including:

- Potentially removing the requirement that ballots specify the types of industrial action; and
- Amending or removing the requirement that industrial action be taken within 30 days of the ballot results being declared.

The draft report recommends that the FWC have the power to suspend or terminate industrial action under s.423 of the FW Act where the action is causing or threatening to cause significant harm to the employer or the employees, rather than both parties as is currently the case.

The PC has sought input on how "significant harm" should be defined when the FWC is deciding whether to exercise its powers under s.423 (significant harm to the bargaining parties) and s.426 (significant harm to third parties) of the FW Act.

Where an employer has implemented a reasonable contingency plan in response to a notice of industrial action, the employer would have the right to stand down the relevant employees without pay for the duration of the contingency response if the

employees have withdrawn their notice. Also, the FWC would have the discretion to refuse to issue a ballot order for up to 90 days, where a group of employees has repeatedly withdrawn protected action as an industrial tactic.

Where employees take a short period of industrial action of less than the shortest time increment used by the employer for payroll purposes, the existing prohibitions on strike pay would be relaxed to enable an employer to pay employees for the period of industrial action or make a deduction of up to 15 minutes of pay.

The PC has sought further input on whether employers should be permitted to deduct a minimum of 25 per cent of normal wages for the duration of partial work bans, and further input on what forms of graduated employer industrial action should be permitted.

Right of entry

The draft report recommends giving the FWC more powers to make orders limiting entry rights for union officials during disputes about the frequency of entry.

Where a union does not have any members and is not negotiating an enterprise agreement at an enterprise, the union would only have a right to enter to hold discussions with employees on up to two occasions every 90 days.

Migrant workers

The *Migration Act* would be amended so that employers could be fined by at least the value of any unpaid wages and conditions to migrants, in addition to the existing penalties.

The Fair Work Ombudsman would be given additional resources to conduct audits and investigate employers suspected of underpaying migrant workers.

Transfer of business

The draft report recommends amending the FW Act to prevent enterprise agreements becoming binding on the new employer in a transfer of business situation if the employee initiated the transfer of employment to the new employer.

Competition policy and workplace relations

The PC has sought more information from interested parties on whether the secondary boycott provisions in the *Competition and Consumer Act 2010* should be amended, and whether Fair Work Building and Construction should be given a shared jurisdiction with the Australian Competition and Consumer Commission (ACCC) to investigate and enforce secondary boycotts.

Next steps

Submissions on the PC's draft report and recommendations need to be lodged by **18 September 2015**.

Ai Group is preparing a detailed submission on behalf of Members. Members are encouraged to provide feedback on the draft report and recommendations to Ai Group. Feedback can be provided by contacting Stephen Smith, Head of National Workplace Relations Policy of Ai Group on stephen.smith@aigroup.com.au or 02 9466 5521 by 11 September 2015.