

PRODUCTIVITY COMMISSION RECOMMENDS SWEEPING CHANGES TO AUSTRALIA'S WORKPLACE RELATIONS SYSTEM

The Productivity Commission has now handed down its final report on Australia's workplace relations framework, with the report being publicly released by the Federal Government on 21 December 2015.

We have reviewed the 1,229 page final report assessing Australia's workplace relations framework so that you do not have to, and we have summarised the sweeping changes which have been recommended by the Productivity Commission in this article.

The Productivity Commission has expressed the view that many of those recommendations should be relatively simple to implement, although most require legislative amendments. Unfortunately in our experience, changes in this area are never simple. In any event, while not all of those recommendations will become law, many of those recommendations will ultimately be implemented and dramatically change the Australian workplace relations landscape. Watch this space!

WORKPLACE RELATIONS INSTITUTIONS

The Productivity Commission's general view is that contrary to perceptions, Australia's labour market performance and flexibility is relatively good by global standards, and many of the concerns that pervaded historical arrangements have now abated - strike activity is low, wages are responsive to the economic cycle, and there are multiple forms of employment arrangements that offer employees and employers flexible options for working. In that context, Australia's workplace relations system is not seen as being broken, but simply in need of repair ...

In relation to the main workplace relations institutions, the Productivity Commission:

- considers that the Fair Work Commission undertakes many of its functions well, but that at times it adopts a legalistic approach to award determination that gives too much weight to history, precedent, and judgments on the merits of cases put to it by partisan interest groups;
- recommends that an independent Workplace Standards Commission be set up with responsibility for reviewing and varying the national minimum wage and modern awards;
- recommends altering the appointment processes for members of the Fair Work Commission so as to use an independent expert appointment panel, the shortlisting of appropriate candidates, and avoid appointing people with recent significant representational involvement; and
- says that all other functions should continue to be performed by the Fair Work Commission and the Fair Work Ombudsman in accordance with current arrangements.

MINIMUM WAGES, JUNIOR RATES AND ARRANGEMENTS FOR APPRENTICES AND TRAINEES

Australia's national minimum wage is high by international standards, having risen in real terms over the last decade. The Productivity Commission accepts that there is an economic rationale for a regulated minimum wage that lifts the incomes of low paid workers above the levels they would

otherwise receive, to counter imbalances in bargaining power, as well as for equity reasons.

While not definitive, the Productivity Commission's view is that modest increases in Australia's minimum wage are unlikely to measurably affect employment, but that large increases in minimum wages will reduce employment levels.

The Productivity Commission believes that lower minimum pay rates for juniors should be retained given the risks to employment from raising wages, but that there could be merit in restructuring age based junior pay rates to give more emphasis to experience and/or competency. They also acknowledged the important pathway that apprenticeships and traineeships provide for many young people and as a retraining option for older workers, and have suggested the need for a separate review into those arrangements.

MODERN AWARDS

While accepting that modern awards are an idiosyncratic feature of the Australian workplace relations system (and have been for over 100 years) with some undesirable inconsistencies and inflexibility, the Productivity Commission notes that they are an important safety net and a useful benchmark for many employers. Around 19% of all employees have their wages and conditions set at exactly those contained in the relevant award.

The Productivity Commission considers there are two broad policy options for awards - to replace them or repair them. Replacement is not considered practical because the costs of transition would be significant, the current system does not produce highly adverse outcomes (with some exceptions), and few participants suggested a complete shift away from awards.

In order to repair the award system, the Productivity Commission recommends that the responsibility for award reform should transfer to the Workplace Standards Commission and that this new body should be required to review awards on an ongoing basis (rather than four yearly), focussing on aspects of awards that are the source of greatest problems - what the Productivity Commission calls the "hotspots".

ENTERPRISE CONTRACTS?

The Productivity Commission believes that there is scope for a new form of employment arrangement, the "enterprise contract", which would provide for variations to awards suited to the circumstances of individual businesses.

They note that some employers seeking to modify award wages and conditions lack real options for agreement-making. Where enterprise agreement negotiations are seen as too daunting (such as for small businesses), individual flexibility arrangements or more often common law contracts are used to modify those conditions, but these can be ineffective.

The Productivity Commission proposes that an enterprise contract be introduced which:

- could be used to vary awards for classes of employees, as nominated by the employer;
- would not vary the National Employment Standards or minimum wage;
- would not make any employee worse off compared with any relevant award, as the enterprise contract would be required to pass a no disadvantage test (as would also apply to enterprise agreements);
- could not be used to vary enterprise agreements;
- would be offered on a "take it or leave it" basis to new employees; and
- would not involve risks to employees as there would be a comprehensive set of protections, including a clear written statement to employees of the implications of award variations, a no disadvantage requirement, the right to revert to the award or to initiate enterprise bargaining, and continued coverage by the National Employment Standards.

PENALTY RATES

Long hours and night work

Many Australians work long hours and during nights, with around 2.8 million Australian employees working more than 40 hours per week and over 1.5 million working 50 hours or more per week. In addition, almost 1.2 million Australian employees work schedules likely to involve night

work. The regulation of those longer working hours and night work are set out in both the National Employment Standards and modern awards.

The Productivity Commission considers that the current restrictions on maximum hours worked (with a capacity to vary these when reasonable) and premium rates of pay for long hours or work at night are justified given the strong evidence of the impact of these patterns of work on employees' health.

Selected consumer services

Penalty rates for weekend day work vary substantially across industries, with around half of all modern awards not containing such rates. The Productivity Commission notes that many employers are concerned about high penalty rates on Sundays in industries such as hospitality, entertainment, retail, restaurants and cafes where weekend consumer demand is strong.

The Productivity Commission acknowledges that penalty rates are a longstanding feature of the Australian workplace relations system, and were introduced to act as a deterrent against asocial working times and to compensate employees for working at inconvenient times, but that the economic environment and community attitudes that provided the original basis for penalty rates have changed. Submissions made to the Productivity Commission point to a growing demand for consumer services over weekends (with some arguing that Sunday has become the new Saturday). It was also submitted that automation and online shopping are likely to dramatically affect the demand for weekend workers if their wage rates are too high.

While accepting that penalty rates have a legitimate role in compensating employees for working long hours or at asocial times, the Productivity Commission recommends that Sunday penalty rates for hospitality, entertainment, retailing, restaurants and cafes should be aligned with those on Saturday, creating one weekend rate (though this may vary across the respective industries).

NATIONAL EMPLOYMENT STANDARDS

The Productivity Commission notes that there is still no national standard for long service leave, meaning that national employers continue to have

to deal with different State-based qualifying periods and entitlements, and the complexity this creates. While noting that the last review recommended the development of a uniform national approach, the Productivity Commission acknowledges that there remains some uncertainty about the net benefits of moving to a uniform system and an appropriate transition mechanism.

The Productivity Commission also notes that some stakeholders have argued for two new workplace entitlements, to support employees experiencing family and domestic violence, and to facilitate breastfeeding in the workplace. No specific recommendations were made in relation to either of these entitlements, although the Productivity Commission referred to the Fair Work Commission's consideration of a family and domestic violence leave clause to be included in modern awards as part of its periodic award review.

UNFAIR DISMISSAL CLAIMS

The Productivity Commission recognises that unfair dismissal laws provide an important protection for employees, but that those laws are capable of misuse. The Productivity Commission rejects calls for removing those laws entirely, finding that there was no need for fundamental change. The Productivity Commission has, however, suggested some reforms in this area:

- removing the emphasis on reinstatement as the primary goal of the unfair dismissal provisions - this reflects, in part, the reported outcomes of applications conciliated and arbitrated by the Fair Work Commission;
- to prevent spurious cases from resulting in financial settlements, introducing a more effective upfront filter that focuses on the merits of claims, including giving the Fair Work Commission clearer powers to deal with unfair dismissal applications "on the papers";
- changing the legislative test for unfair dismissal and the penalty regime to ensure that procedural errors alone are not sufficient to award compensation or reinstatement in what would otherwise be regarded as a fair dismissal - this would be achieved by providing that employees can only receive compensation when they have been dismissed without reasonable evidence of persistent

significant underperformance or serious misconduct, and by ensuring that procedural errors only by an employer cannot result in reinstatement or compensation but rather may lead to either counselling and education of the employer; and

- removing the Small Business Fair Dismissal Code, with a reliance instead on improvements in education and related arrangements.

GENERAL PROTECTIONS (ADVERSE ACTION) CLAIMS

The Productivity Commission acknowledges that stakeholders have very different views on the effectiveness of the general protections provisions, including that many employers see those provisions as flawed including due to the unclear definition of what constitutes a "workplace right", and claims of jurisdiction shopping and speculative cases being commenced.

While recognising that many of the general protections have a strong justification, the Productivity Commission recommends various improvements including:

- that the right to make a "complaint or inquiry" needs to be better defined;
- that there needs to be better active management by the Fair Work Commission and the Courts of discovery processes in these matters; and
- that there should be greater powers to award costs against applicants in certain circumstances.

THE ANTI-BULLYING JURISDICTION

The Productivity Commission acknowledges that the anti-bullying provisions are a very recent innovation, and that as a result it is too early to determine the effectiveness of those laws or their impact on businesses and the economy.

The Productivity Commission acknowledges that while the Fair Work Commission's caseload has been relatively small to date, the jurisdiction itself is resource intensive as evidence provided by applicants can be extensive. Overall the Productivity Commission considers that the Fair

Work Commission's approach in this area is considered and effective.

INDUSTRIAL DISPUTES

While the credible threat of industrial action is an important negotiating tool for parties engaging in enterprise bargaining, it was recognised that this comes at a cost to society and needs to be regulated as a result.

The Productivity Commission acknowledges that strike activity in Australia is at low levels by historical standards, but that debilitating processes and problematic new forms of action should be fixed. The Productivity Commission recommends changes including:

- simplifying overly complex processes for secret ballots to authorise protected industrial action, including removing the requirement that protected action must be taken within a defined time period;
- modifying the threshold for the Fair Work Commission to intervene in some disputes;
- deterring the use of aborted strikes and brief stoppages that impose disproportionate costs on employers, on the basis that they are sometimes ingeniously used as bargaining leverage by employees - those stoppages include blocking access to work sites, delaying the delivery or use of materials, stopping the removal of waste, and placing "bans" on the use of critical equipment. This deterrence would include, for example, that where a group of employees have withdrawn notice of industrial action (before taking action), and an employer has implemented a reasonable contingency plan in response to the notice, the employer may stand down the relevant employees, without pay, for the duration of the employer's contingency response; and
- that employers should be given more graduated options for retaliatory industrial action other than locking out their workforce. Those options could include employers being permitted to institute limits or bans on overtime, directing employees to only perform a particular subset of their normal work functions and adjusting their wages accordingly, and/or reducing hours of work.

ENTERPRISE BARGAINING

Bargaining at the enterprise level over the terms and conditions of employment has become a mainstay of Australia's workplace relations system, with about 40% of employees working under some form of enterprise agreement.

General

While noting that enterprise bargaining generally works well (particularly for larger employers), the Productivity Commission made various recommendations to improve that process:

- while currently the Fair Work Commission is required to reject enterprise agreements for certain minor procedural defects during bargaining, they should have greater discretion to overlook such inconsequential defects;
- enterprise agreements should be limited in content to "employee–employer" issues only, and not include terms that pertain to the relationship between an employer and a union;
- "non permitted" terms that can now be included in an enterprise agreement but are not legally binding, should be excluded;
- while the "better off overall test" (BOOT) is cosmetically similar to the previous no disadvantage test, in practice the BOOT makes agreement making more costly and less efficient. The Productivity Commission has recommended a return to the "no disadvantage test", which would assess whether, at the test time, each class of employee and prospective employee would not be placed at a net disadvantage overall by the agreement, compared with the relevant modern award(s); and
- allowing parties to negotiate enterprise agreements with longer durations (up to five years), to reduce the costs associated with bargaining.

Greenfields agreements

The Productivity Commission accepts that bargaining arrangements for greenfields agreements pose risks for large capital intensive projects with urgent timelines. In relation to greenfields agreements, the Productivity Commission recommends:

- that a three month negotiation period for greenfields agreements be adopted, so that when that period has elapsed, greenfields stalemates should be resolved by Fair Work Commission using "last offer" arbitration, or an employer could seek approval of a 12 month agreement (subject to a no disadvantage test against the relevant award);
- project proponent greenfields agreements (made by a head contractor) should be available to subcontractors that do not wish to negotiate their own greenfields agreement; and
- those agreements should be allowed to match the period of the construction phase of the project, to avoid undue bargaining power by unions when a project is not completed at the expiry of a greenfields agreement.

Individual flexibility arrangements

Individual flexibility arrangements have many possible advantages, but their take-up is relatively low (only around 2% of all employees are covered). The Productivity Commission believes that this reflects, in part, ignorance of their existence, as well as perceptions around limitations and effectiveness. As a result, it recommends that more information be made available on their use, that there be an extension to the termination period for those arrangements, and to move to apply the no-disadvantage test (as for enterprise agreements).

RIGHT OF ENTRY

The Productivity Commission notes that, regrettably, relationships between some employers and unions have become so strained that highly prescriptive regulation is necessary to restrict and regulate the rights of union officials to enter worksites, and that those matters cannot be left to negotiation or common sense.

While noting that the provisions governing right of entry are mostly sound, the Productivity Commission considers that they can still be used for strategic or disruptive reasons by both sides. As a result, the Productivity Commission argues that there is a strong case for modifying the threshold for the Fair Work Commission to deal with disputes about the frequency of entry by employee representatives.

TRANSFER OF BUSINESS

Transfer of business provisions have been a consistent feature of Australia's workplace relations legislation for many years, and were introduced to protect employees from unscrupulous employers simply closing one business to re-open a new business the next day with the intention of avoiding employee entitlements.

The Productivity Commission notes that there is a balancing act at play:

- the potential for poorly performing businesses to be bought out and/or to transfer work to new businesses is important for productivity, innovation and structural change;
- when a business is transferred to a new owner, there can be pressures to reduce the pay and conditions of the existing workforce; and
- the provisions protect employees when a business changes hands; but
- protecting employee entitlements may reduce employment opportunities, not least because the new employer may be reluctant to take on employees under the same conditions that contributed to poor business performance for the old employer.

The Productivity Commission considers that some re-balancing needs to occur, by:

- giving the Fair Work Commission more discretion to order that an employment arrangement (such as an enterprise agreement) of the old employer does not transfer to the new employer, where that improves the prospects of employees gaining employment with the new employer;
- ensuring that any employment agreement transferred to a new business should automatically terminate 12 months after the transfer, except for transfers between associated entities; and
- making voluntary movements between associated entities, at an employee's initiative, exempt from the provisions entirely, with the transferring employee being automatically covered by the new employer's employment conditions only.

MIGRANT WORKERS

The Productivity Commission recognises that recent migrant workers (particularly those working illegally) are more vulnerable to exploitation and substandard working conditions than other employees, as a result of limited English language skills, a lack of knowledge about their workplace rights and entitlements, and dependence on their employer for their visa.

In order to deal effectively with these issues, the Productivity Commission recommends a mixed approach, combining more robust enforcement policies (and the Fair Work Ombudsman being given additional resources for monitoring and enforcement) and increased penalties for employers, with improved information provision by the Fair Work Ombudsman and the Department of Immigration and Border Protection.

INTERACTIONS BETWEEN COMPETITION POLICY AND THE WORKPLACE RELATIONS FRAMEWORK

The Productivity Commission notes that the workplace relations system is largely exempt from Australian competition law, other than in relation to secondary boycotts, anticompetitive contracts or understandings in the supply or purchase of goods and services, and resale price maintenance.

They accepted that there remains a strong policy rationale for the regulation of labour markets to be separate from the regulation of other markets for goods and services, and that concerns about anti-competitive behaviour in employment matters are mostly capable of being addressed through the workplace relations system itself, rather than through an expansion of competition policy.

The Productivity Commission does, however, recommend that Fair Work Building and Construction, as the industry regulator, should be given jurisdiction to obtain evidence of those competition-related matters in the construction industry, while sharing with the Australian Competition and Consumer Commission the ability to determine if action is then warranted.

MORE INFORMATION

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