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## **CLIENT ALERT**

### **PRODUCTIVITY COMMISSION DRAFT REPORT INTO IR SYSTEM**

**AUGUST 2015**

**To All of My Valued Clients,**

This Client Alert is to advise that the Productivity Commission has released a draft report as part of its Inquiry into Australia's Industrial Relations system.

The draft report has proposed sweeping changes to our industrial relations system, including changes to Sunday penalties. I predicted some months ago that this may be another step towards changes to week-end penalties. Only time will tell as to whether or not, and how much of these recommendations and proposals will be adopted by the Federal Government.

If you need further information in relation to this issue please do not hesitate to contact me.

**Greg Arnold**  
**Principal Consultant**

**Productivity  
Commission  
announces  
proposed sweeping  
changes to IR  
system**

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**Penalty rates in the  
spotlight**

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**EFFECTIVE WORKPLACE  
SOLUTIONS**

(02) 6676 3445

0407 920 840  
greg@ewsolutions.com.au

www.ewsolutions.com.au

# PRODUCTIVITY COMMISSION RELEASES DRAFT REPORT - RECOMMENDS SIGNIFICANT CHANGES TO AUSTRALIA'S IR SYSTEM

In recent Newsletters and articles I have advised of the current Productivity Commission (PC) Inquiry into Australia's Industrial Relations system, and you would no doubt be aware from news reports that the Commission has this week released a draft report which has, to say the least "raised a few eyebrows".

Probably the most notable (and controversial) of its proposed recommendations is the proposal to reduce Sunday penalties to Saturday rates in most private sector industries, including hospitality and retail. Employers have understandably applauded the draft recommendation, whilst again not surprisingly, the ACTU has taken opposition to the proposals, claiming of course that this will be a return to "WorkChoices".

In recent articles that I have published I have foreshadowed that there is light on the horizon in respect to the penalty rates issue. For employers it is another positive sign that a far more sensible consideration is being taken to this long considered impervious bastion of our industrial relations system and Awards.

The PC stated:

*"Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries.*

*"Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them.*

*"Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees."*

The PC recommends that these new penalty rates should be introduced with one year's advance notice as part of the current award review process.

The question is whether or not this current Government will have the intestinal fortitude to take on board all or some of the PC recommendations. Certainly in respect to the penalty rates issue, I think it is highly unlikely that the Abbot Government will create history by dealing with penalty rates through changes to legislation. Rather, I think it will take the softer option of "passing the ball" to the Fair Work Commission, and allow the relevant Award parties to argue for a reduction in penalty rates by using the PC recommendations as the basis of evidence for the argument.

Apart from the Penalty rates issue, the Productivity Commission has also posed some very interesting and innovative proposed recommendations. Here are some of the salient points of interest from the Draft Report:

### **New 'enterprise contract'**

The PC recommends a new form of agreement, to be called an 'enterprise contract', which would fill the gap between enterprise agreements and individual arrangements. This would be suitable for small businesses in particular as it would offer many of the advantages of enterprise agreements, without the complexities.

The PC is positioning the proposed new agreement as a “*collective individual flexibility arrangement, but with some further flexibility*”. Its main advantage would be to allow employers to vary an award for entire classes of employees, or for a group of particular employees, without having to negotiate with each party individually or to form an enterprise agreement

### **Enterprise agreements**

The nominal expiry dates of enterprise agreements should be extended to five years.

Unfortunately, the PC does not support the introduction of mandatory productivity improvement clauses in enterprise agreements, instead recommending these should be voluntary. This is in spite of the fact that this concept forms part of the current Bill to amend the *Fair Work Act* before Federal Parliament.

### **Labour Flexibility**

The PC unequivocally recommends that enterprise agreements not be allowed to contain terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement.

### **Better off overall test**

Along with a comment that enterprise bargaining can be “ill-suited” to smaller enterprises, the PC recommends replacing the 'better off overall test' (BOOT) used to assess whether an enterprise agreement leaves employees better off compared with the award, with a no-disadvantage test, supported by guidelines about the use of the test.

The same test would be applied to individual flexibility arrangements. Increased uptake of individual flexibility arrangements could be encouraged by providing information on their use, extending the termination period and by moving to a no-disadvantage test (see below).

### **Fair Work Commission**

Productivity Commission Chair Peter Harris says, the “*commission needs to become a different kind of body*”. One of the recommendations is to split the Fair Work Commission into two divisions: a minimum standards division, responsible for minimum wages and modern awards, and a tribunal division responsible for all remaining functions.

Appointments as members of the different divisions would be based on different criteria. The Minister for Employment would select members from the shortlist of suitable candidates.

All appointments to the role of commissioner and above should be only for five years, although reappointment would be possible after a merit-based performance review. Non-judicial members of the commission would also be subject to performance review based on the length of their current appointment.

In another recommendation going to the heart of the FWC's performance, the PC recommends an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.

### **Public holidays**

The PC took the view that more flexibility should be allowed in modern awards to allow for public holidays to be substituted for an alternative day. It also recommends the NES should be amended so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.

### **Leave entitlements**

The PC has also floated the idea of examining the possibility of extending the existing 20 days of paid annual leave in the NES, with a cash out option for any additional leave where that suits the employer and employee. Any such further leave would only be achieved "through a negotiated tradeoff between wage increases and extra paid leave".

It is also seeking information on the practicality of allowing casual workers to exchange part of their loading for additional entitlements such as personal or carers leave.

### **Unfair dismissal**

The PC makes draft recommendations around compensation for unfair dismissal, including enabling employees only to be compensated when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct.

It recommends removing reinstatement or compensation as remedies for procedural errors by an employer in relation to unfair dismissal. Instead the FWC could recommend counselling and education of the employer, or financial penalties.

The emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Fair Work Act should be removed. The PC comments that good legislation should not have as a primary goal an outcome that is rarely achieved.

The PC recommends restricting access to the FWC, focusing on the merit of a claim before it is automatically heard by the FWC. Higher lodgment fees are another mechanism, although the commission is seeking more views on this proposal.

The PC also recommends the Small Business Fair Dismissal Code should be removed, as it considers it is redundant if its other suggested reforms are implemented.

### **General Protections (adverse action) claims**

Complaints concerning the General Protections (adverse action) provisions in the Fair Work Act could be excluded if found to be frivolous or vexatious and a cap on compensation for adverse action should be introduced.

The PC also made recommendations that lengthy and expensive processes of discovery of documents (essentially “fishing expeditions”) should be reformed to be “proportional” to the actual matter at hand. The definition of a “workplace right” should be more clearly defined and there should be a requirement in the Fair Work Act that complaints must be made in good faith.

### **More information**

The draft report can be viewed on Productivity Commission website. Written submissions are to be made by Friday 18 September 2015 and the final Report is due at the end of this year.

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