



Effective Workplace Solutions

CLIENT ALERT

PRODUCTIVITY COMMISSION REPORT INTO AUSTRALIA'S WR SYSTEM

JANUARY 2016

To All of My Valued Clients,
Happy New Year

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

The Report has proposed changes to our industrial relations system, including changes to Sunday penalties and Unfair Dismissal laws. However the Productivity Commission commented that generally our WR system is in need of "repair not replacement". Time will tell as to whether or not, and how much of these recommendations and proposals will be adopted by the Federal Government in an election year. If you need further information in relation to this issue please do not hesitate to contact me.

Greg Arnold
Principal Consultant

**Productivity
Commission
releases Final
Report - "repair not
replacement" of our
WR system**

**Penalty rates and
Unfair Dismissal
laws in the spotlight**

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PRODUCTIVITY COMMISSION RELEASES A COMPREHENSIVE REVIEW OF AUSTRALIA'S WR FRAMEWORK

Just prior to Christmas, the Productivity Commission (PC) released the most anticipated report into Australia's workplace relations system. The report was tabled in Federal Parliament on 21 December 2015. This Report is the most comprehensive independent examination of our workplace relations framework arguably since the introduction of our industrial relations laws in the early 1900's.

What will happen in a practical sense is a matter for some debate. As I had predicted in August at the release of the draft report, the Federal Government will be loathed to make legislative changes to issues such as penalty rates which have always been prescribed in Awards and determined on an Award-by-Award basis, and the Government has already flagged that it will be a matter for the Fair Work Commission to address. However, these types of recommendations will surely assist with any such penalty rates argument in the FWC.

The timing of the next Federal election is also likely to play a role. In spite of the current calls for reform from within the LNP, I would suggest that the Government would be cautious in an election year to campaign on the basis of sweeping IR reform. To do so would invite a "WorkChoices" free kick for Labor. Therefore I don't expect too many wholesale changes from the Government until after an election. Regardless of timing and process, this Report will provide the "backbone" for workplace reform into the future.

Predictably responses to the PC's final report into the workplace relations system have focused on its recommendation to reduce penalty rates. However, this is just one of the many recommendations made by the PC in its two-volume, 1228-page report, which covers the structure of the workplace relations system, enterprise bargaining, wages, unfair dismissals and industrial action.

This article provides a synopsis of the PC's recommendations which are likely to have an impact on our clients.

1. The Workplace Relations Framework

The PC's report acknowledged most employer-employee relationships are "harmonious", and considers the Australian Workplace Relations framework is in need of "repair not replacement", it identifies a number of "major deficiencies" which it says needs addressing.

2. The Fair Work Commission: two new bodies needed

The PC was of the view that Fair Work Commission (FWC) is too "legalistic" in its approach to cases. It recommends that the FWC should be separated into two separate bodies – one focusing on wage regulation and the other focusing on tribunal and administrative functions.

It recommends that the wage regulation body should be called the Workplace Standards Commission (WSC) and it should use “different types of expertise” when determining minimum wages and award regulation.

3. Appointment of FWC members

The PC has called for an end to the Government of the day appointing members of the FWC to suit its own political philosophy – which, it says, leads to inconsistent decision-making. This is a position that has been called for from employer bodies and workplace relations practitioners for many years. The PC recommends that the FWC, and the new WSC, members should be appointed from a shortlist drawn up by Federal, State and Territory governments. The PC is accurate in suggesting that “political appointments” to the FWC leads to inconsistency in decision making and it’s this inconsistency which then leads to confusion for employers.

The PC recommends that Commissioners serve ten-year terms or until the age of 70, whichever occurs first, with no reappointments. It also recommends the FWC President should have greater scope to guide members, with an external judicial review available for members who have failed to perform.

The PC urges the FWC President to make use of the FWC’s existing capacity to “appoint more experts as advisors to its members” and the Australian Government to act as “a catalyst for change”.

4. Too Much Focus on Procedure

The report is critical of the *Fair Work Act* and at times the FWC for “giving too much weight to procedure and too little to substance” – it refers specifically to enterprise bargaining where minor procedural defects require the employer to start again from the beginning. *Effective Workplace Solutions* has had recent experience with this particular situation where a client had to “re-start” the voting process simply because one of the required documents simply had an out of date website address.

Further, the PC also cites unfair dismissal matters where employees who engage in serious misconduct still receive “considerable compensation” because of “procedural lapses” by the employer in the dismissal process.

5. Minimum Wages and Awards

The PC Report suggests that there is little evidence to support the view that existing minimum wage levels have a negative effect on employment levels; however, the PC is of the view that a significant increase in the minimum wage does pose this risk, particular if the labour market falters. It suggests consideration of other policies such as wage subsidies or earned income tax credits to help bolster lower paid workers’ incomes.

While our Award system is “an Australian idiosyncrasy with some undesirable inconsistencies and rigidities”, they continue to be an important safety net. The new WSC should “address specified troublesome hotspots on a thematic basis”.

6. Penalty Rates

For many, the most contentious of the PC's recommendations is that penalty rates for weekend work in hospitality, entertainment, retailing, restaurants and cafés should be standard across the weekend. The Sunday rate should be reduced to the Saturday rate. It is a move designed to embrace the seven-day economy and help increase entrepreneurship among smaller businesses who want to open on weekends.

Crucially, the PC also recommends that the current modern award objective be modified to remove the requirement to provide additional remuneration for: employees working overtime; or employees working unsocial, irregular or unpredictable hours; or employees working on weekends or public holidays; or employees working shifts.

Instead, it recommends an objective be replaced with one that promotes “the overall wellbeing of the community”, taking into account the needs of the employed, the need to increase employment, the needs of employers, the needs of consumers, and the need to ensure modern awards are easy to understand.

Given the extent and the importance of this issue to many of our clients, I shall issue a separate and more detailed Client Alert in relation to this contentious issue.

7. Enterprise Bargaining and Individual Flexibility Agreements

The PC recommends replacing the better off overall test (BOOT) with a no-disadvantage test (NDT), with guidelines, for all enterprise agreements and individual arrangements. It considers the latter to be less costly and more efficient.

The take-up of individual flexibility arrangements (IFAs) could be improved by “providing information on their use, extending the termination period of the arrangements, and by moving to a NDT.

I agree with the PC on this issue; this has been an avenue employment contracts which has been very much ignored by employers, in spite of the fact that this does provide a “no fuss” to approach to gaining flexibility beyond the Award provisions.

8. Enterprise Contracts

As indicated in the PCs August 2015 draft report, it recommends the introduction of a new type of employment arrangement, to be known as an “enterprise contract”, which will allow awards to be varied to suit individual enterprises. An enterprise contract would be less complex than an enterprise agreement and thus more suitable for smaller businesses.

Protections for employees would include 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 and employee protections. Just exactly what these Agreements would look like and how they are to be applied is yet to be determined. It is also unclear as to how these agreements would differ from EAs or IFAs.

9. Employer's Mix of Labour

The PC recommends that Enterprise agreements should not be allowed to contain terms that limit or regulate the engagement of independent contractors, labour hire workers and casuals and recommends that the *Fair Work Act* should state that enterprise agreement terms are not able to restrict an employer's prerogative to choose an employment mix suited to their business.

10. Unfair Dismissal

The PC recommends the removing reinstatement as a primary goal of the unfair dismissal laws, and the introduction of a fee to have an unfair dismissal matter arbitrated. It recommends the shifting of the balance away from procedural errors by the employer in the dismissal process; as well as awarding costs against adverse action applicants who proceed against the FWC's advice. This is a critical and often controversial area of employment law particularly for employers.

Again, this is an important issue for all of our clients and I shall issue a separate and more detailed Client Alert in relation to this contentious issue.

11. Industrial Action

There are three main recommendations in relation to industrial action:

- (a) The process for secret ballots authorising strike action should be simplified.
- (b) Employers should be able to stand down the affected employees if a strike is aborted, for the period where the employer has implemented a contingency response, and they can choose to avoid the administrative costs of deducting small amounts of pay for industrial action of less than 15 minutes.
- (c) Employers should be given more graduated options for retaliatory industrial action other than locking out the workforce.

12. Leave

The PC recommends that Awards should contain terms that allow an employer and an employee to agree to substitute a public holiday for an alternative day. Newly designated State and Territory public holidays should give entitlement to public holiday penalty rates or a paid day of leave.

13. Right of Entry

In relation to the frequency and abuse of union right-of-entry privileges the PC recommends the FWC no longer be required to consider whether the frequency of entry would require an unreasonable diversion of the occupier's critical resources. It also recommends the FWC must take into account the cumulative impact on an employer's operations of entries onto the premises; the likely benefit to employees of further entries onto the premises; and the employee representative's reason(s) for the frequency of entries.

Our Services

- Unfair Dismissal Matters
- Underpayment of Wages Claims
- Enterprise Agreements (EA's) and Individual Flexibility Agreements (IFA's)
- Policy Formulation and Staff Handbooks
- Dispute Mediation and Resolution
- Strategic Organisational Change
- Workplace Health and Safety – Advice and Auditing
- Injury Management and Workers Compensation
- Employment Contracts