

# *Inquiry into the workplace relations system*

## Submission by PwC

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# *Introduction*

This Productivity Commission Inquiry represents a significant opportunity to address impediments and ensure the Australian workplace relations system operates as effectively and flexibly as possible while continuing to play an important role in protecting minimum standards and ensuring that employee rights are clearly expressed and enforceable.

The Draft Report issued in August 2015 includes many pragmatic and sensible recommendations, which will take us some way to achieving the goals of the system.

However, we think the Productivity Commission can go further and recommend additional changes.

In this submission, we set out 15 extra proposals and a brief explanation of why we believe them to be sensible and beneficial having regard to the interests of all stakeholders.



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# 1 *Productivity, flexibility and innovation*

## 1.1 *Assist businesses to achieve productivity through bargaining*

### **Proposal 1 A larger role for the Fair Work Commission**

*The Fair Work Commission should be provided with the necessary funding and personnel to allow it to establish a third division charged with the development of best practice approaches. Industry education could help the Fair Work Commission and the Fair Work Ombudsman guide parties to achieve more productive approaches.*

### **Proposal 2 Reduced scope of agreements**

*The Productivity Commission should identify common enterprise agreement clauses that restrict productivity improvements (in addition to prohibitions of the use of contractors and labour hire arrangements), and recommend that they not be permitted.*

### **Proposal 3 Easier termination of enterprise agreements:**

*The grounds on which an expired enterprise agreement (or part of an agreement) can be terminated should be widened to include consideration of provisions that impede or restrict the productivity of the business.*

Enterprise bargaining should offer greater benefits to business however many employers and employees report little value in bargaining except certainty during the life of agreements. Common concerns are that productivity measures can only be adopted if traded off against costly remuneration and benefits, and enterprise agreements may lock in undesirable work practices. The bargaining system should promote innovative arrangements and help achieve enhanced productivity.

A change of focus within the Fair Work Commission may lead it to take a more proactive view on promoting greater workplace productivity and flexibility. The greater analytical capability proposed would be an important enabler.

The Fair Work Commission can play a more active role in promoting productive workplaces, as the 2012 Review of the Fair Work Act recommended.

At the very least, it is appropriate to prevent bargaining over matters which, regardless of context, will sap productivity. There are instances where bargains include restrictions that reduce the productive capacity of a business, with no or little compensating benefit; there is no public or national interest to be served by permitting parties to make such claims or take lawful action to force such claims. These should be prohibited matters.

Further, over time, agreements can stop being beneficial to achieving these outcomes. The framework should allow these matters to be addressed rather than the existing arrangements where the only effective way to get out of sub optimal arrangements (after they have expired) is to buy your way out with a new agreement.

## 1.2 Removing unnecessary regulation and red tape

### Proposal 4 Reconsider compliance impact of proposals

*The Productivity Commission should further consider initiatives that would reduce regulatory/compliance burden such as self-regulation for collective agreement certification (as proposed for enterprise contracts); streamlining redundancy-based dismissals; and simplifying transmission of business arrangements.*

### Proposal 5 More focus on small business

*The Productivity Commission should consider specific proposals such as small business schedules to awards, exempting or simplifying entitlements where possible, and establishing one stop shops for employment matters. Also, the Productivity Commission should consider scrutinizing the compliance costs for small business further as it proposes to do in relation to costs for unions.*

It is widely acknowledged that the regulatory burden of workplace relations falls disproportionately on small to medium-sized businesses. There are options to streamline the burden of red tape on this sector. The Small Business Code streamlined unfair dismissal processes for small businesses. This type of approach could be extended beyond unfair dismissals into areas such as general protection arrangements and award entitlement disputes.

While enterprise contracts will assist with bargaining, many small sized businesses are required to comply with very complex and confusing award standards. Relief from the labyrinth of awards is necessary. One option is to create a new award for small businesses. A better approach is to require each award to have a schedule (applicable to small businesses) that simplifies the application of the award, entitlements and streamlines processes.

Another approach to minimise compliance costs could be the better use of one-stop shop arrangements for all workplace issues affecting small sized business. This would allow simple access to advice, support and the services of the Fair Work Commission, the Fair Work Ombudsman and the Australian Human Rights Commission and encourage greater coherence in the way these agencies deal with small business.

The Productivity Commission seeks further information on compliance costs on unions and how these costs are likely to be affected by draft recommendations. This inquiry should be extended to consider small and medium sized businesses.

## 1.3 Facilitate use of alternative labour sources

### Proposal 6 A clear definition of “contractor”

*The Productivity Commission should work with stakeholders to develop a more straightforward distinction between employees and contractors. For example, if the arrangement involves the use of a corporate entity or ABN and the necessary workers compensation insurance arrangements are satisfied by the contractor, the default position could be that a legitimate contractor relationship is established.*

### Proposal 7 Better education and assistance for independent contractors

*Consideration should be given to how state and federal corporate business agencies can create certainty by developing user friendly tools and checklists which, once properly utilized creates a rebuttable presumption that contracting arrangements are appropriate.*



The status of contracting arrangements that have some elements of similarity to an employment arrangement is currently uncertain.

The Productivity Commission's recommendation to tighten the defences around sham contracting would make it harder to defend allegations of sham contracting. This will compound the concerns of businesses wishing to enter into legitimate contractor or labour hire arrangements.

Consideration should be given to a codified definition of independent contractor arrangements which deems arrangements which meet minimum conditions as legitimate contracting arrangements. An example, which already works satisfactorily in relation to superannuation, is that superannuation contributions are not required where there is a corporate entity functioning as the contracting party between the person performing the work and the person for whom the work is performed. This sort of approach could work more generally, especially if it is accompanied by a requirement that the company through which work is performed have workers' compensation insurance (or some similar personal injury insurance) in place in respect of all people performing work under this sort of arrangement.

In addition, dedicating resources to the education and assistance of those seeking to utilise such arrangements would be useful in dealing with definitional uncertainties and the bias towards traditional employment arrangements. This may include tools which are simple and which businesses could rely on to guide them as to the true character of a particular relationship.

## 2 Meeting individual needs

### 2.1 Allowing greater opportunity for individual agreements

#### Proposal 8 Providing certainty that agreements are legal

*Consideration should be given to providing employers the option of having enterprise contracts or IFAs vetted by the Fair Work Commission or Fair Work Ombudsman.*

One important issue with the Productivity Commission's recommendation for enterprise contracts and IFAs being easier to enter into is that parties will not be sure whether their arrangement will satisfy the no disadvantage test.

Compulsory scrutiny is not the answer. However, the legislation could provide the parties with a right to request a determination of the Fair Work Commission or Fair Work Ombudsman as to whether the no disadvantage test has been satisfied by a particular arrangement. This would give businesses the peace of mind they may require to take up this option.

### 2.2 Improving the bargaining process

#### Proposal 9 Promote better bargaining approaches

*That the functions and resources of the Fair Work Commission be expanded to promote better bargaining approaches through education.*

The Productivity Commission has made a range of recommendations intended to improve the operation of the enterprise bargaining process.

We generally agree with these recommendations.

However, while the Productivity Commission acknowledges that "...some strategic game playing is legitimate..."<sup>1</sup>, it fails to consider whether behaviour that is destructive of the relationship should be regulated by the good faith bargaining rules. It should be noted that the current Federal Government presently has a Bill before the Parliament that prevents employees from taking protected action in pursuit of claims that are manifestly excessive or have an adverse impact on productivity. The Commission should recommend that a further category of bad faith bargaining would be to advance claims that are not genuine.

Also, it ignores the fact that alternative bargaining styles can achieve good bargaining outcomes and have a broader public benefit. For instance, US experience with Interest Based Bargaining (IBB) shows that bargaining style is a key ingredient of an agreement's success.

Cornell University researchers have found that "transformative" labour relations initiatives using IBB are more likely to succeed than other approaches, particularly in the areas of job security, profit-share and gain-share arrangements, team based working, work rule flexibility and increased engagement through work committees and increased worker input. (See Cutcher-Gershenfeld, J and Kochan, T. *Taking Stock; Collective Bargaining at the Turn of the Century* (2004) Vol 58(1) ILRReview).

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<sup>1</sup> Draft Report p 558

The IBB approach focuses much more on understanding and building interests rather than asserting positions and seeking compromise; using problem solving tools to avoiding positional conflicts (as opposed to creating conflict to win a point) and creating high trust/open exchange (rather than low trust/positional relationships). A key enabler of such an approach is the active facilitation by skilled independent third parties to teach good bargaining skills, ensure commitment to the process and encourage parties to address real concerns rather than simply adopt positions.

## 2.3 Making industrial action a matter of last resort

### Proposal 10 Action to be as a last resort

*In considering what level of harm should warrant the intervention of the Fair Work Commission, the Productivity Commission should recommend that the rules ensure protected action is only available as a reasonable last resort and the Fair Work Commission should be given greater discretion to protect the public interest.*

### Proposal 11 Avoid all or nothing:

*In the interests of balance and harm minimisation, the Productivity Commission will consider whether employer industrial action other than “all or nothing” lock outs should be identified and protected.*

There are a range of situations in which protected industrial action is unlikely to play any constructive role in resolving the issues between the parties and, by contrast, pose a significant risk to the underlying relationship. These include:

- Permitting protected action even when reasonable bargaining opportunities have not been exhausted (or even commenced).
- Protected action in support of illegitimate claims.
- Not giving the Fair Work Commission a broader discretion to prevent harm from industrial action.

The Fair Work Commission should be able to step in when it forms the view that the harm caused by the industrial action outweighs any legitimate purpose of the action. This would involve giving the Fair Work Commission a broad discretion when weighing up the benefits and detriments of any particular instance of industrial action. This is a role the Fair Work Commission is uniquely well-qualified to undertake given the experience and expertise of the members who would be exercising this discretion.

## 3 Protection overreach

### 3.1 Better facilitation of new operations and business change

#### Proposal 12 Reduce transmission opportunities

*The Productivity Commission should recommend either a return to more limited transfer of business arrangements OR If existing transfer rules are to remain, the opt out arrangements should be relaxed.*

This is a particular problem when an enterprise (or any of its functions) is moving from the public sector to the private sector which may make it difficult to obtain the full benefits of privatisation and outsourcing.

The Productivity Commission proposes that these rules should not apply to voluntary transfers. In addition, these rules should not apply to transfers within corporate groups which occur with the consent of transferring employees, since the effect of these rules is to greatly increase the administrative burden for employers whose corporate structure involves multiple entities with separate enterprise agreements applying in each entity.

As the Australian economy has become increasingly global, it is appropriate to consider how to recalibrate these arrangements to promote business change, rather than frustrate it. This could be achieved by requiring the Fair Work Commission to grant opt out arrangements unless it is necessary to prevent manifest unfairness.

### 3.2 Prevent unfair dismissal protections from hindering performance

#### Proposal 13 Make lodgment fees effective

*In considering the design of a two-tier lodgment fee, the Productivity Commission should consider experience in other jurisdictions to ensure a proper balance of fairness is struck.*

Despite submissions to increase lodgment fees to prevent unmeritorious or vexatious claims, the Productivity Commission did not recommend this. This is despite such arrangements being prevalent in other jurisdictions to discourage unmeritorious claims being made. However, it did suggest a two-tier arrangement with higher fees for matters that go to arbitration.

This approach is a pragmatic compromise. In one sense, it will not discourage unmeritorious claims being made; conciliation will remain a forum for such claims. To mitigate this, “on the papers” reviews will need to be effective. On the other hand, if properly designed, the second tier fee may discourage vexatious claims from advancing to that point. Fees should be lower for short hearings, and higher for longer hearings, to encourage efficient conduct of proceedings by applicants.

### 3.3 General protections should not impede performance management

#### Proposal 14 Clarify adverse actions

*The Productivity Commission should recommend introducing the dominant purpose test and removing the reverse onus of proof.*

Despite proposed changes, the general protections rules continue to have a very broad scope, causing significant uncertainty for employers. This is a concern given that the Productivity Commission acknowledges these provisions can, and in some instances may have "... prevented an employer's legitimate prerogative to manage their business to maximize productivity and minimize costs"<sup>2</sup>

Further refinements to clarify when the provisions apply may be warranted. This may involve reinstating the dominant reason test and abolishing the reverse onus of proof. The Productivity Commission's unwillingness to reconsider the operation of the reverse onus of proof is disappointing. Restricting discovery in these matters may reduce the cost of running them, but will not address the difficulty and unfairness of employers having to prove their innocence. This creates a disincentive to rigorous performance management.

Further consideration of lodgement fees as a means of discouraging vexatious claims should be considered.

### 3.4 Prevent right of entry abuses

#### Proposal 15 Clarify entry locations:

*The Productivity Commission should recommend that unions do not have a right to nominate a particular location (typically, the lunchroom) for employee meetings.*

A key complaint from many employers is the disruption of workplaces arising from unions being entitled to conduct meetings and discussions in meal rooms and exposing non-members to unwarranted attention. While not persuaded to make recommendations on this, the Productivity Commission did say if employers can put forth tangible evidence of the use of break rooms leading to operational difficulties the Commission would be interested in examining this evidence following the draft report.

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<sup>2</sup> Draft Report p 29