Australian Hotels Association (AHA)

Response to Draft Report

Workplace Relations Inquiry
Productivity Commission

Workplace.relations@pc.gov.au

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Contact:
Stephen Ferguson
AHA National CEO
PO Box 4286 MANUKA ACT 2603
(02) 6273 4007
ceo@aha.org.au

1 Introduction

This submission is in responses to the draft report by the Productivity Commission Review of the Workplace Relations Framework. In general, the AHA is supportive of the recommendations made by the Productivity Commission.

2 Response to draft report

OVERALL DRAFT REPORT FINDING

Despite sometimes significant problems and an assortment of peculiarities, Australia's workplace relations system is not systemically dysfunctional. It needs repair not replacement.

AHA agrees with the overall draft report finding

DRAFT RECOMMENDATION 3.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.

AHA supports the draft recommendation 3.1

DRAFT RECOMMENDATION 3.2

The Australian Government should amend s. 629 of the *Fair Work Act 2009* (Cth) to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President.

Current non-judicial Members should also be subject to a performance review based on the duration of their current appointment. Existing Members with five or more years of service would be subject to review within three years from the commencement of these appointment processes with reviews to be staggered to reduce disruption. Non-judicial Members with fewer than five years of service would be reviewed at between three to five years, depending on the date of their appointment.

AHA supports the draft recommendation 3.2

DRAFT RECOMMENDATION 3.3

The Australian Government should amend the *Fair Work Act 2009* (Cth) to change the appointment processes for Members of the Fair Work Commission. The amendments would stipulate that:

- an independent expert appointment panel should be established by the Australian Government and state and territory governments
- members of the appointment panel should not have had previous direct roles in industrial representation or advocacy
- the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4
- the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.

AHA supports this draft recommendation 3.3

DRAFT RECOMMENDATION 3.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1.

Members of the Minimum Standards Division should have well-developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines.

Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions.

A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.

AHA supports this draft recommendation 3.4, except in relation to the inclusion of members from the Ombudsman's offices, commercial dispute resolution, and the law. In relation to the Ombudsman's offices, these members should not be included as the Fair Work Ombudsman has an enforcement and education role which should be separate from the creation of minimum standards. In relation to commercial dispute resolution, there is little if any value with such members who do not have relevant legal, economic and/or industrial relations experience. In relation to the law, members should have relevant industrial law or industrial relations experience. Members of the tribunal division should not be limited to lawyers.

DRAFT RECOMMENDATION 3.5

The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.

AHA supports this draft recommendation 3.5

DRAFT RECOMMENDATION 4.1

The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the *Fair Work Act 2009* (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards.

AHA supports this draft recommendation 4.1

DRAFT RECOMMENDATION 4.2

The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.

At a minimum, AHA agrees with draft recommendation 4.2. However, the draft recommendation does not capture the issues that:

- there are currently different numbers of public holidays between the states and territories
- The non-NES public holidays have generally far less national (or state/territory) significance compared to the National public holidays and consequently should attract a lesser penalty rate of pay

Therefore, AHA suggests that the draft recommendation be as follows:

> *For the purpose of defining the days on which public holiday penalty rates should be paid as prescribed in modern awards, the Australian Government should amend the National Employment Standards as set out in the Fair Work Act 2009 by deleting S115(1)(b).*

DRAFT RECOMMENDATION 4.3

Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with a cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated tradeoff between wage increases and extra paid leave.

In the event that agreement was negotiated to extend annual leave, then any trade off should not include any leave loading for those additional days.

INFORMATION REQUEST

The Productivity Commission seeks information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carer's leave) if they so wish, and whether such a mechanism would be worthwhile.

AHA would prefer to see more employees graduate from casual employment to part time employment where such additional entitlements exist. However, the current part time structure is extremely inflexible on employers with consequently very few employees employed part time. AHA has been pursuing a more flexible part time arrangement with United Voice as part of the four year modern award review, but the parties are not yet in agreement. Further, AHA would not support such a variation given what it perceives to be low demand from employees and also the costs of administration by business.

INFORMATION REQUEST

The Productivity Commission seeks further views on possible changes to lodgement fees for unfair dismissal claims.

There should be greater FWC filtering of claims when received and the rejection of claims that are frivolous. The continuing emphasis on "go away monies" needs to be further addressed as it is an expectation of a conciliation conference in most cases.

DRAFT RECOMMENDATION 5.1

The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

AHA supports this draft recommendation 5.1

DRAFT RECOMMENDATION 5.2

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct
- procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.

AHA supports this draft recommendation 5.2

DRAFT RECOMMENDATION 5.3

The Australian Government should remove the emphasis on reinstatement as the *primary* goal of the unfair dismissal provisions in the *Fair Work Act 2009* (Cth).

AHA supports this draft recommendation 5.3

DRAFT RECOMMENDATION 5.4

Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the *Fair Work Act 2009* (Cth).

AHA supports this draft recommendation 5.4

DRAFT RECOMMENDATION 6.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to formally align the discovery processes used in general protection cases with those provided in the Federal Court's Rules and Practice Note 5 CM5.

AHA supports this draft recommendation 6.1

DRAFT RECOMMENDATION 6.2

The Australian Government should modify s. 341 of the *Fair Work Act 2009* (Cth), which deals with the meaning and application of a workplace right.

- Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.
- The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.

AHA supports this draft recommendation 6.2

DRAFT RECOMMENDATION 6.3

The Australian Government should amend Part 3-1 of the *Fair Work Act 2009* (Cth) to introduce exclusions for complaints that are frivolous and vexatious.

AHA supports this draft recommendation 6.3

DRAFT RECOMMENDATION 6.4

The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the *Fair Work Act 2009* (Cth).

AHA supports this draft recommendation 6.4

DRAFT RECOMMENDATION 6.5

The Australian Government should amend Schedule 5.2 of the *Fair Work Regulations 2009* (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and reporting processes in this area.

AHA supports this draft recommendation 6.5

DRAFT RECOMMENDATION 8.1

In making its annual national wage decision, the Fair Work Commission should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid.

AHA supports this draft recommendation 8.1

DRAFT RECOMMENDATION 9.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Fair Work Commission is empowered to make temporary variations in awards in exceptional circumstances after an annual wage review has been completed.

AHA supports this draft recommendation 9.1

INFORMATION REQUEST

The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria.

The AHA does not support a structure of junior pay based on a model other than age.

DRAFT RECOMMENDATION 9.2

The Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:

- the role of the current system within the broader set of arrangements for skill formation
- the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression
- the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.

AHA supports this draft recommendation 9.2

DRAFT RECOMMENDATION 12.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to:

- remove the requirement for the Fair Work Commission to conduct four yearly reviews of modern awards
- add the requirement that the Minimum Standards Division of the Fair Work Commission review and vary awards as necessary to meet the Modern Awards Objective.

To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:

- use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains
- obtain public guidance on reform options.

AHA supports this draft recommendation 12.1

DRAFT RECOMMENDATION 12.2

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Minimum Standards Division of the Fair Work Commission has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews.

AHA Supports this draft recommendation 12.2

DRAFT RECOMMENDATION 14.1

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.

AHA agrees that penalty rates have a legitimate role in compensating employees for working long hours or at unsociable times. However, in regard to the Sunday and Public Holiday rates, there is clear evidence that hospitality businesses are closed or offering restricted offerings due to the high cost of penalty rates on those days. Therefore, AHA agrees with draft recommendation 14.1

DRAFT RECOMMENDATION 14.2

The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.

AHA agrees with draft recommendation 14.2

INFORMATION REQUEST

The Productivity Commission seeks views on whether there is scope to include preferred hours clauses in awards beyond the current narrow arrangements, including the scope for an arrangement where an employer would be obliged to pay penalty rates when it requested an employee to work at an employee's non-preferred time in the employment contract. What would the risks of any such 'penalty rate' agreements be and how could these be mitigated?

AHA supports the capacity for employees to nominate (with the consent of the employer) their preferred hours of work because they suit the employees circumstances. Employees would be paid penalty rates if they work outside their preferred hours. This enables employees to choose their
own "unsociable hours". Preferred hours recognises that times deemed unsociable by one person or group of persons, may be quite social for other persons or groups of persons.

DRAFT RECOMMENDATION 15.1

The Australian Government should amend Division 4 of Part 2-4 of the *Fair Work Act 2009* (Cth) to:

- allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement.
- extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights.

AHA agrees with draft recommendation 15.1

DRAFT RECOMMENDATION 15.2

The Australian Government should amend s. 203 of the *Fair Work Act 2009* (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.

AHA agrees with draft recommendation 15.2

DRAFT RECOMMENDATION 15.3

The Australian Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- can be up to five years after the day on which the Fair Work Commission approves the agreement, or
- matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

AHA agrees with draft recommendation 15.3

DRAFT RECOMMENDATION 15.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.

AHA agrees with draft recommendation 15.2

DRAFT RECOMMENDATION 15.5

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that:

- a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted
- a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative.

AHA agrees with draft recommendation 15.5

DRAFT RECOMMENDATION 15.6

The Australian Government should amend the rules around greenfields agreements in the *Fair Work Act 2009* (Cth) so that bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements.

AHA agrees with draft recommendation 15.6

DRAFT RECOMMENDATION 15.7

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may (as illustrated in figure 15.5):

- continue negotiating with the union
- request that the Fair Work Commission undertake 'last offer' arbitration of an outcome by choosing between the last offers made by the employer and the union
- submit the employer's proposed greenfields arrangement for approval with a 12 month nominal expiry date.

Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test.

AHA agrees with draft recommendation 15.7

DRAFT RECOMMENDATION 16.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.

AHA agrees with draft recommendation 16.1

DRAFT RECOMMENDATION 16.2

The Australian Government should amend the *Fair Work Act 2009* (Cth) to introduce a new 'no-disadvantage test' (NDT) to replace the better off overall test for assessment of individual flexibility arrangements. The guidance in implementing the new NDT should also extend to collective agreements (as recommended in draft recommendation 15.4).

To encourage compliance the Fair Work Ombudsman should:

- provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new NDT, including template arrangements
- examine the feasibility, benefits and costs of upgrading its website to provide a platform to assist employers and employees to assess whether the terms proposed in an individual flexibility arrangement satisfy a NDT.

AHA agrees with draft recommendation 16.2

INFORMATION REQUEST

What should be the basis for the revised form of the no-disadvantage test, including whether, and to what extent past forms of the no-disadvantage test provide a suitable model and would be workable within the current legislative framework?

A No Disadvantage test should be simple and able to be understood. This test should compare the proposed agreement to the underpinning and relevant modern award that covers the employee with the No Disadvantage Test measuring the benefits of the applicable modern award against the proposed agreement to ensure that, overall, the employee is not worse off. The No Disadvantage Test should also enable consideration for non-monetary employee benefits to be taken into account.

DRAFT RECOMMENDATION 16.3

The Fair Work Ombudsman should develop an information package on individual flexibility arrangements and distribute it to employers, particularly small businesses, with the objective of increasing employer and employee awareness of individual flexibility arrangements. It should also distribute the package to the proposed Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives.

AHA agrees with draft recommendation 16.3

DRAFT RECOMMENDATION 20.1

Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the *Fair Work Act 2009* (Cth).

AHA agrees with draft recommendation 20.1

DRAFT RECOMMENDATION 22.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.

AHA agrees with draft recommendation 22.1