



Business SA Submission
Workplace Relations Framework
September 2015

Executive Summary

- Business SA welcomes a number of the Productivity Commission's Draft recommendations; however, more substantial reform is needed to ensure Australia has a productive and flexible workplace relations system (The system).
- Business SA supports reforms to penalty rates, Individual Flexibility Agreements, unfair dismissal laws and the proposed Enterprise Contracts.
- However, there remain areas of the workplace relations system that need fundamental reform. The complexity and restrictions in the system are a major barrier to business and in particular small business.
- Business SA has conducted a survey of our membership in regard to the recommendations arising from the Productivity Commission Draft Report (The Report).
- The results of our survey highlight the key concerns of our members, in particular small businesses. We have used this feedback from our member businesses to inform our response to The Report.

Why this matter is important to South Australian businesses

As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State. Our members are affected by this matter in the following ways:

- *South Australia currently has the highest unemployment in the nation (7.9%). The underlying trend for unemployment increasing to 8.1%. We must have a system that is flexible and can drive productivity to enable businesses to thrive and grow to create the much needed jobs for South Australians.*
- *South Australia is the quintessential small business state with 97 per cent of businesses classified as small business with less than 20 employees.*
- *The current system is fundamentally flawed in that its main focus is collective enterprise agreements however the vast majority of small business do not need or want collective agreements. Rather small business requires the ability to have individual workplace agreements with an appropriate safety net for example the "not disadvantage test" contain in the Workplace Relations Act 1996.*
- *South Australia is competing in a global marketplace and so it must have a system that drives economic growth and enables job creation.*

Further information: Tyson Gherghetta, Business SA,

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Major Policy Points

Individual Agreement

Individual agreements should be a fundamental component of The System.

Business SA is supportive of the recommendations regarding IFAs in the Draft Report; however, this will not fully address the need for individual agreement making options. The option of individual agreements must be one of the fundamental reforms.

It must be remembered individual agreements were part of The System from 1996 – 2006 without angst and provided a great deal of flexibility to employers and employees.

Notwithstanding the requirement for individual agreements, Business SA supports the Draft Recommendation to extend the maximum term of an Individual Flexibility Agreement (IFA.) and in a No Disadvantage Test replacing the Better off Overall Test when assessing IFAs.

Business SA's survey of our members confirms the Productivity Commission's finding that the take up of IFAs is low. Sixty eight per cent of members who responded would at least consider using IFA's if the notice period for termination was extended to at least 12 months.

Enterprise Contracts

Business SA strongly advocates a system that enables employer to bargain at an individual level. The required system is one that is adaptable at an enterprise level with appropriate safety nets. There are numerous examples of inflexibilities in the modern awards system and this is hampering growth and productivity, particularly in small businesses, where collective bargaining not used as it is neither practical nor beneficial.

In early 2015 Business SA reached a landmark collective agreement with the Shop, Distributive & Allied Employees' Association (SDA) where a template collective agreement was drafted and agreed upon. The agreement enables South Australian retailer employers to seek agreement with their employees to reduce penalty rates on public holidays and weekends.

Given that when compared to the Modern General Retail Industry Award employees must be better off overall, the template agreement could only allow the total wage costs to be spread more evenly across the week rather than enable a real reduction in weekend and penalty rates. As a result, no retail employers have used the agreement.

Business SA supports the PC's proposed Enterprise Contract as it appears to provide greater flexibility whilst maintaining a safeguard for employees.

The proposed Enterprise Contract appears to be an option that allows employer, in particular small employers, to overcome the complexities of the Award system and enable them to have legally enforceable individual arrangements with employees.

In Business SA survey of members 83% indicated they would consider utilising the option of enterprise contracts.

Penalty Rates

Business SA supports the Productivity Commission's Draft Recommendation that Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for hospitality, entertainment, restaurants and cafe industries. Our support is informed by our survey of members

which found that 95 per cent of those surveyed supported a reduction in Sunday penalty rates to be in line with Saturday penalty rates.

This change would be a step in the right direction which acknowledges that many business now operate in 24/7 environment in order to remain viable and competitive. In most states shop trading hours have also been deregulated, this is another acknowledgement that Saturday and Sunday are no longer viewed as special days, the workplace relations system needs to keep pace with these developments so that businesses have the ability to meet consumer demands.

89 per cent of businesses surveyed (who currently do not roster staff on public holidays) answered that they would consider rostering staff on these days if penalty rates were reduced.

Example from Business SA Survey:

“Our business operates in a beachside tourist precinct that has 75 per cent of our trade on weekends, public holidays and whenever the weather is on our side! We have to pay staff Monday to Friday all year and then when we do get a chance to trade on a sunny weekend we have to cop exorbitant penalty rates. It’s killing us!”

Minimum Wage

Business SA agrees with the Draft Report’s recommendation 8.1 that the Fair Work Commission should broaden its analytical framework when considering the impact of the Minimum Wage and the potential effects on the broader economy.

At the present time the Fair Work Commission’s Minimum Wage Panel makes decisions largely based on a macro-economic assessment of the economy. Business SA agrees that the framework for making a decision should be broadened. This broadening of the framework should include a more consultative process, similar to that conducted Australian Fair Pay Commission (AFPC), when it had the statutory authority to review the national minimum wage.

Juniors, Apprentices and Trainees

Business SA supports the draft recommendation for a comprehensive review of Australia’s apprenticeships and traineeship arrangements.

Employer incentives are a very important aspect of the apprenticeship and trainees system as they help to make sure that the industries that need skilled workers are able to provide training and employment opportunities.

In South Australia trainee and apprentice commencement rates dropped from 25,600 in 2012 to 12,500 in 2014. This significant decrease supports the need for a comprehensive review to ensure traineeships and apprentices remain attractive to employers.

Business SA opposes any suggestion of increasing wage rates for apprentices and trainees and it would be counterproductive to their employment opportunities. South Australia currently has the highest unemployment rate in the nation and a youth unemployment rate of 15.2 per cent, which is significantly higher than the National average.

Anti Bullying

The Productivity Commission has identified that a post-implementation review of the anti-bullying provisions is scheduled providing an opportunity to assess the operation of the jurisdiction.

The Productivity Commission has noted the fact that the expected barrage of claims has not materialised, that the provision is resource intensive for the FWC and it also notes the submissions questioning the need for this function to be incorporated in the Fair Work Act given other avenues for addressing the issue.

Whilst Business SA is encouraged that the Productivity Commission has recognised these matters and will be making submissions to the inquiry, we are disappointed that a recommendation was not made to ensure the post implementation review paid particular attention to these findings and the submissions made by the parties. In particular the impact such provisions would have on small business and the fact that workplace bullying is more appropriately addressed as a work health and safety issue within the work health and safety regime.

Anecdotal evidence from Business SA members show employers are still facing bullying claims across multiple jurisdictions for example Fair Work, Workers Compensations and Work Safety jurisdictions.

Unfair Dismissal Laws

To help inform our response to the Draft Report Business SA conducted a survey of our members and we included questions on unfair dismissal laws.

Our survey found that of the businesses that had been through an unfair dismissal process in the last 6 years 75 per cent believed that the unfair dismissal process and outcome were not fair. The survey also indicated that businesses *evidence of increase in the resolution being purely as a result of the payment of “go away” money rather than a fair and practical resolution of the problems* this is another sign that the system needs reform.

One business commented that *“In 30 years plus of business we have never dismissed anyone. Probably should have but not game to do so in case of action.”* This comment highlights businesses that have not had interaction with the system are concerned the system is weighted toward employees.

Business SA is supportive of the recommendations made by the Productivity Commission in the Draft Report with regards to unfair dismissal laws. The recommendation to give the Fair Work Commission greater discretion to consider unfair dismissal cases ‘on the papers’ is very welcome, along with the removal of the emphasis on reinstatement as the ‘primary goal’ of the unfair dismissal provisions.

Business SA still strongly advocates that the Fair Work Act 2009 should be amended to provide an exemption for businesses from the unfair dismissal laws if they have less than 20 employees.

Fair Work Ombudsman

In evaluating the Fair Work Ombudsman (FWO), the conclusion of the Productivity Commission in the Draft Report is that ‘there is no evident need for changes’.

Business SA is of the view that the FWO role as educator and interpreter has caused confusion for employers. Interpretation by the staff of FWO, where some matters are subject to hearings or cases within the Fair Work Commission, has led to confusion for our members in a number of areas. This includes areas such as leave loading paid on termination, coverage of awards and pay-related issues. This confusion has resulted in employers being wary of the FWO.

In addition, Business SA is concerned about the role of the FWO in providing services traditionally of private sector organisations.

Fair Work Commission

Business SA supports the establishment of the Minimum Standards Division as part of the Fair Work Commission, to undertake the annual wage review and make award determinations, as proposed in Draft Recommendation 3.1. Business SA supports a division of the Commission which would consult directly with people affected by minimum wage decisions including the unemployed and low paid workers and employers of lower paid workers. It is this broad based approach to consulting that Business SA believes should form a part of the minimum wage determinations.

With regard to the modernisation of awards - while the process of award modernisation undertaken to date has been significant for its consolidation of awards, there is still room for further rationalisation and simplification of the content of the 122 Modern Awards.

Business SA notes there is capacity for this to occur naturally given that:

- the Act currently allows for the appointment of Expert Panel members to carry out the annual wage review;
- qualifications which Expert Panel Members must currently hold (knowledge of, or experience in economics, social policy, business, industry or commerce, finance, investment management or superannuation) accord with the qualifications the Productivity Commission has suggested that members of the Minimum Standards Division should hold (economics, social science and commerce); and
- a specialist body has previously been charged with the responsibility for adjusting the minimum wage and award rates of pay.²⁷

Draft recommendation 3.2 suggested the Australian Government should amend s. 629 of the Fair Work Act 2009 (Cth) stipulate 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. In addition current non-judicial Members should also be subject to a performance review based on the duration of their current appointment.

Assuming that Draft Recommendation 3.1 is adopted, Business SA supports the Australian Chamber's position in that it is prepared to endorse the possibility of fixed terms for members of the proposed Minimum Standards Division. Currently Expert Panel Members contributing to annual wage reviews hold office for a period not exceeding 5 years and the Australian Fair Pay Commission existed, its Chair held office for a period not exceeding 5 years, while its Commissioners held office for periods not exceeding 4 years.

However the Business SA does not agree with the imposition of 5 year terms for other members of the FWC or performance reviews that could result in the termination of a FWC member. The Australian Chamber of Commerce and Industry has comprehensively responded to this recommendation and Business SA emphatically supports this response.

Business SA does not support Draft Recommendation 3.3 that the Australian Government should amend the Fair Work Act 2009 (Cth) to change the appointment processes for Members of the Fair Work Commission. Business SA again relies on the comprehensive submissions made by ACCI which "rejects the proposition that having had roles in industrial representation or advocacy or possessing knowledge about the workplace relations framework and the jurisdiction of FWC members

should render an individual unsuitable to suggest candidates for appointment. To the contrary, Business SA regards such qualifications as valuable and essential.

Business SA, as mentioned above, conditionally supports the establishment of a Minimum Standards Division and notes that the proposed competencies of members are compatible with those Expert Panel Members must currently hold (knowledge of, or experience in economics, social policy, business, industry or commerce, finance, investment management or superannuation). In each case, the eligibility criteria seem appropriate.

However as to the eligibility criteria for Tribunal Division members, Business SA does not understand why the Productivity Commission has excluded practitioners who have worked within the jurisdiction and/or who come from a practical hands on role in industry. According to draft recommendation 3.4, practitioners who have had roles in industrial representation or advocacy and possessing knowledge about the workplace relations framework and the jurisdiction of the FWC are excluded regardless of the value of their experience and knowledge.

Possessing relevant experience and knowledge is a core requirement for dispute resolution experts. Being a subject matter expert brings credibility and helps command respect where contentious matters are in issue. These qualities have proven decisive time and time again when the FWC has been called upon to settle disputes. It is an inescapable feature of the Fair Work jurisdiction that the overwhelming majority of practitioners worked predominantly, to the point of exclusively, for either the unions or the employers. Excluding this group altogether would rob the FWC of those competent and experienced operators.

In any event, where s. 627 of the Act is already broad enough to cover the skill sets promoted by the Productivity Commission, the Australian Chamber is not convinced Draft Recommendation 3.4 is necessary.

Further Business SA is concerned with the move toward legally qualified and 'judicial' appointments (regardless of process). Sections 577 and 578 of the Fair Work Act 2009 requires the FWC to promote cooperative and productive workplace relations and prevent disputes in a manner that is: fair and just; quick informal; avoids unnecessary technicalities; is open and transparent; and promotes harmonious and cooperative workplace relations. We would argue that the Fair Work Commission would not be in a position to meet the requirements of the Act without Commissioners who have with a union, employer or government background in business and employment. In particular the ability to resolve disputes without almost immediate referral to arbitration would be significantly reduced without commissioners who have these backgrounds.

National Employment Standards

Public Holidays

Business SA is in favour of enabling parties to reach agreement to substitute a public holiday to another day where this is mutually agreed.

Business SA's view is that nationally consistent standards are best contained in legislated standards with the awards addressing only industry specific content; therefore a simple amendment to the NES is required to achieve substitution in a nationally consistent fashion.

Business SA supports the draft recommendation that 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 designed state and territory public holidays.

It is Business SA's position that there should be a move toward a nationally consistent maximum number of public holidays. Business SA also supports the Australian Chamber's recommendation that penalty rates in awards for working public holidays in industries that customarily trade on public holidays be reformed.

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.

Business SA considers that such an approach may raise practical difficulties. Casual employment enables employees to work and be engaged on an as needs basis suiting both the employee and the business. Casual employee's wages include a loading to compensate for a range of entitlements including leave. Forgoing part of this loading for additional entitlements would raise some practical issues around how leave is accrued and when it would be taken in the absence of fixed working patterns.

Conclusion

Business SA has focused our comments on the Draft Recommendations and requests for information made by the Productivity Commission in the Draft Report. We support many of the Draft Recommendations made, however, we believe that if Australia is to have a workplace relations system that suits the needs of the modern economy more reform needs to be undertaken.

We are pleased that the Productivity Commission has made sensible and practical recommendations around such issues as penalty rates, unfair dismissal laws and the potential introduction of an Enterprise Contract. In South Australia 97 per cent of businesses are small businesses and these recommendations could assist small business to be competitive and effectively manage their workplace.

Business SA remains concerned that many issues with the workplace relations system in Australia have not been adequately dealt with in the Draft Report. The operation of Modern Awards, the regulation of workplace bullying and a greater suite of agreement making options are still areas that need more investigation and reform.