

COMMUNITY AND PUBLIC SECTOR UNION (CPSU) SPSF GROUP

Submission DR270 - Community and Public Sector Union (CPSU) SPSF Group - Workplace Relations Framework - Public inquiry

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Chapter 1 - Introduction

CPSU (SPSF) general response to the draft report

1. This submission is largely responsive to the August 2015 *Productivity Commission Draft Report on the Workplace Relations Framework* (“August Draft”) and should be read together with our primary submissions sent to the Commission on 22 March 2015
2. We agree with the “Overall draft report finding” that “despite sometimes significant problems, and an assortment of peculiarities, Australian’s workplace relations system is not systemically dysfunctional”. It needs repair not replacement.
3. The Fair Work Act and the institutional framework it establishes, does generally represent a stable and fair system of workplace relations. The system does not require radical amendment.

A note on the format of this document

4. The CPSU (SPSF) does not wish to respond to each and every draft recommendation made by the Productivity Commission (from hereon “PC”) in its August Draft.
5. This document is divided into chapters which refer to specific chapters in the August Draft. Where we wish to comment on a draft recommendation the draft recommendation is set out, followed by a commentary on those particular draft recommendations.

Chapter 2 : Reply to Chapter 3, Institutions

Proposal to establish a Minimum Standards Division of the Fair Work Commission; **Draft recommendation 3.1**

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.

6. The PC should not make recommendation 3.1
7. The PC is concerned that history and precedent play too great a part in award making and issues of wage determination. At page 11 of the overview it is stated:

“The implication is that the FWC should develop clearer analytical frameworks and proactively undertake its own data collection and systematic high-quality empirical research as the key basis for its award decisions and wage adjustments. The FWC should not just impartially hear evidence from parties, but also engage with parties that do not usually make submissions, such as those representing consumers and the jobless.”
8. The CPSU (SPSF) is not averse to the Fair Work Commission being specifically empowered to conduct its own research to inform itself in award decisions and wage adjustments. It is not necessary to create a new and separate Division for in house research to occur.
9. Under its current powers the “*FWC may, except as provided by this Act inform itself in relation to any matter before it in such a manner as it considers appropriate*” [s590 (1)]. One of the methods the Commission may inform itself is “*by undertaking or commissioning research*” [590(2) (g)].
10. The quasi judicial manner in which award and minimum wage proceedings are conducted has stood the test of time and has generally provided fair outcomes.
11. If the PC recommendation is accepted, and a minimum standards division is created, there are issues of transparency and natural justice. A problem is created if the Minimum Standards Division reaches conclusions on internal research without a full and transparent mechanism for those decisions, or the data on which they are based, to be tested.

The failed life of the AFPC

12. An example of the problems that would arise from the creation of a minimum standards division is provided by the Australian Fair Pay Commission (“AFPC”).
13. The AFPC was a legislative body created in 2006 under the Howard Government's "WorkChoices" industrial relations law to set the minimum rate of pay for workers. Established to replace the wage setting functions of the Australian Industrial Relations Commission, the AFPC set and adjusted a single adult minimum wage, non-adult minimum wages (such as training wage), minimum wages for award classification levels and casual loadings.
14. The AFPC, throughout its life, was plagued with problems related to transparency in its decision making. It had the power to make judgments with no community oversight or consultation. After some complaints regarding the transparency of its decision making it decided, rather than conducting formal hearings, the APFC would have “community consultations” which were in the style of informal meetings with some or all members of the AFPC.
15. The AFPC funded substantial research on the economic effects of raising the minimum wage, and placed more of an emphasis on determining whether the economic evidence suggested that raising the minimum wage made the poor better off. Affected parties had no formal mechanism to refute either: the internal research or, the matters put by other persons who consulted with the AFPC.
16. The practical example of the AFPC, the “black box” decision making it engaged in, and the inability of affected parties to refute matters put to it, provides a live illustration why this recommendation should not be made.
17. A better methodology is to retain the Tribunal process in place. Any material produced by the Commission on the basis of its own research can be inserted into award or minimum wage proceedings so that affected parties can comment, criticise or critique it by evidence or in oral or written submissions.
18. A “black box” process whereby research is performed and conclusions reached administratively may deny any affected stake holders a capacity to test the conclusions reached.

No to Fixed Term appointments – draft recommendation 3.2

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.

19. The PC should not make recommendation 3.2.
20. The CPSU (SPSF) vehemently opposes the adoption of fixed term appointments to the FWC for a number of reasons.
21. Given the partisan nature of workplace relations debates, and its see-sawing legislative history, it is not appropriate that Presidential and other members of the Commission do not have tenure. They must be secure to make decisions without fear or favour.
22. The rationale for tenure is to insulate the office holder from external pressures. We fear that, should fixed terms be adopted, there is no guarantee that the reappointment process will not be politicised. This may cause an escalation in partisan appointments which the PC is attempting to avoid.
23. Further, the quality of candidate will decline with the removal of tenure. There is an attractive status associated with tenured positions which is not shared by fixed term appointments. It follows a move to fixed term appointment may mean a decline in the quality of applicants.
24. The CPSU (SPSF) is agnostic on the issue of performance reviews for non-judicial members of the Commission, although we understand that such processes are common in other administrative tribunals and in some lower Courts in Australia.

Mode of appointment to the FWC – draft recommendation 3.3 and 3.4

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.

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.

25. The PC should not make this recommendation.
26. The current method of judicial appointment where the views of stake holders are sought informally (including the views of State workplace relations Ministers) is preferable
27. These recommendations rest on a false assumption: that a working life with a contestant in workplace relations, either for a union or an employer body, should act as a disqualification by reason of "bias". The facts rebel against this conclusion.

Chapter 3 : Reply to Chapter 5, Unfair Dismissal

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.

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.

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).

No change to unfair dismissal regime remedies

28. The PC should not make draft recommendations 5.1, 5.2 or 5.3.
29. The proposed removal of reinstatement as a remedy, and the down grading of procedural fairness as the basis of reinstatement, would lead to manifest injustice to persons whose dismissals lack significant procedural fairness.
30. Under the current unfair dismissal procedure in Part 3 Division 3 the FWC has ample discretion to take into account the relative significance of a procedural defect against the level of underperformance or serious misconduct. The decisions have shown a capacity of tribunal members to balance the procedural unfairness in this way.
31. Furthermore, the raw figures on the number of reinstatements that arise from unfair dismissal proceedings show that it is not often awarded. The statistics on the current “Results and Outcomes” page of the Fair Work Commission has the following table (see below). This table gives evidence that of the 192 applications granted between 1

July 2013 and 30 June 2014 only 34 of the 192 ended in reinstatement¹ this is around 17% of the applications that proceeded to a final outcome.

Table 3: Arbitrated proceedings final results for 1 July 2013 to 30 June 2014		
Arbitrated proceedings final results	No. of final outcomes	% of final outcomes
Total applications dismissed	1008	84
Objection upheld—application dismissed	374	31
Application dismissed—dismissal was fair	175	15
Application dismissed—s.399(A) and s.587	459	38
Total applications granted	192	16
Application granted—compensation	150	13
Application granted—reinstatement	9	1
Application granted—reinstatement and lost remuneration	25	2
Application granted—no remedy granted	8	1
Total final results Australia-wide	1200	100

32. There are also sound policy reasons to keep the current regime in place.
33. The threat of a remedy for unfair dismissal for procedural errors has an important deterrent effect. It encourages employers to take steps to warn employees and to adopt fair processes for the discipline and termination of staff.

No change to reinstatement as the primary remedy

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).

34. The PC should not make draft recommendation 5.3
35. We refer the Commission to the submissions and table in paragraph 31 above. Although the Act prioritises reinstatement as a remedy, it is not often ordered by the FWC. In those circumstances the changes recommended here are not necessary.

¹ <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

Chapter 4 : Reply to Chapter 6, General Protections

No change to discovery process for general protections

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.

36. The PC should not make recommendation 6.1.
37. Despite the reverse onus, the proof in general protections matters is usually contained in documents within the custody, ownership and control of the employer. In many circumstances the plaintiff worker may never have seen these documents or know of their existence. The plaintiff worker is dependent on the discovery process to have access to documents to make out their case.
38. If discovery is dependent on an order from the Court that is another application a plaintiff worker must pay for in circumstances where their capacity to fund yet another procedural application will, in most cases, be very limited.
39. The particular “document poor” circumstances of worker plaintiffs in general protections matters are different from the situation of litigants in commercial disputes. In commercial cases the plaintiff (or defendant) would generally possess documents on which to make out his or her case. It follows the logic of the case management rules in the Federal Court should not apply to general protections matters.

No modification to meaning of workplace right in s341

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.

40. The PC should not make the recommendation in the first dot point of draft recommendation 6.2: to modify the provisions in relation to a workplace right where the complaint or inquiry is indirectly related to a persons employment.
41. The general protections designed to protect entitlements to a workplace laws have a strong deterrent effect against non-compliance with agreement, award or similar obligations. The immediacy of the remedies under Part 3-1 are unlike any others in Federal labour law. An amendment of the kind proposed would counter this positive effect.
42. The CPSU (SPSF) has grave reservations about the filtering of complaints by the FWC on the basis of a preliminary interview or, on the basis of an assessment of good faith.
43. We do not consider such a process could sit comfortably with a right to natural justice should the reasons for an adverse determination by the FWC on "good faith" or following the suggested "preliminary interview" be less than fully transparent and not subject to review.

Exclusion of frivolous and vexatious applications under Part 3-1

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.

44. The CPSU (SPSF) does not oppose this draft recommendation

No cap on compensation for Part 3-1 claims

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).

45. The PC should not make draft recommendation 6.4.
46. Some of the discrimination which is the subject of general protections proceedings may have serious financial consequences for the plaintiff worker. In those circumstances it is not appropriate for a cap to be placed on compensation.
47. Further, the sort of discrimination which the general protections are designed to prevent should not be tolerated. There is therefore a sound policy argument for the deterrent effect of uncapped compensation for their breach.

Provision of information on general protection matters

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.

48. This recommendation should be made by the PC for the reasons set out in Chapter 6 of its report.

Chapter 5 : Reply to Chapter 8 and 9, Minimum Wages and their variation

Ample capacity to deal with a broader analytical framework for NWC decisions within the current legislative framework

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.

49. The analytical framework provided by the minimum wage objective in s284 already provides a capacity to take into account “the relative living standards and needs of the low paid” in s284(1)(c). It follows no such “broadening” is necessary. The present Act has ample capacity to take into account all of these matters.

No amendment to Act to make temporary variations to awards in an Annual Wage Review

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.

50. The PC should not make draft recommendation 9.1.
51. Such a legislative capacity will lead to “itchy trigger finger” applications by employer organisations for reductions in the minimum wage every time there is economic instability.
52. The instability and lack of certainty for the economy, and recipients of the minimum wage, would outweigh any advantage that the existence of the capacity to vary in “exceptional circumstances” might bring.

Chapter 6 : Reply to Chapter 12, Repairing Awards

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.

53. The PC should recommend the abolition of the four yearly reviews. The demands of these reviews are too resource intensive for registered organisations already pushed for resources.
54. The CPSU (SPSF) opposes the other recommendations made in Draft Recommendation 12.1 if the “robust analysis” (mentioned in the second dot point of paragraph 2) is not subject to the rigour and openness of the current tribunal and hearing process for making Modern Awards.

Chapter 7 : Reply to Chapter14, Weekend penalty rates

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.

55. The PC should not make draft recommendation 14.1.
56. It is not equitable, or justified, for different penalty rates to exist for different categories of workers deriving from their Modern Award entitlement.
57. If employers wish to vary the Modern Award penalty rates in the selected industries they can do so using the enterprise bargaining tools in the current Act provided they comply with the BOOT test.

Chapter 8 - Reply to Chapter 15, Enterprise Bargaining

No Broader discretion with respect to representational rights notice

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.

58. We will address the proposed replacement of the BOOT test with a no disadvantage test later in this submission (see paragraph 66 and following).
59. The PC should not make the recommendation in the second dot point of draft recommendation 15.1.
60. The prescriptions for notice of employee representational rights should not be loosened. We understand the unfortunate cases where relatively insignificant defects in the text or service of the notice have been fatal to agreements; however, the alternative is worse.
61. If employers have discretion in relation to the text of the notice, or the manner of its service, it is likely to lead to abuse in un-unionised areas where the employer may obscure or misrepresent the capacity of a union to act as a bargaining representative.

No additional statutory compulsion for the terms of a flexibility term

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.

62. The PC should not make draft recommendation 15.2.
63. The philosophy of enterprise bargains should be that parties are free to negotiate any term above the safety net with minimal restrictions. This proposal would prescribe the

form of enterprise flexibility terms reducing the freedom of the parties to bargain over their form.

Five year terms for EBAs

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.

64. The CPSU (SPSF) does not oppose the legislation being amended to include a capacity for five year agreements.

No statutory requirements for productivity improvements in EBAs

DRAFT FINDING 15.1

The case for imposing statutory requirements for employers and employees to discuss productivity improvements as part of the bargaining process, or for the mandatory inclusion of productivity clauses in agreements, is not strong. Voluntary agreements that promote productivity are highly desirable, but such agreements, and the gains they deliver, should arise from better management, not from a regulated requirement, which is likely to have perverse effects.

65. For reasons explained in Chapter 4 of our primary submission (pp 18 to 23) we support this finding because:

- 65.1. There is no agreed measure for productivity in the public sector and therefore, no “one size fits all” amendments should be made to either State or Federal workplace relations statutes that focus on “productivity bargaining” or making “increases in productivity” as a condition precedent to the making of collective instruments as awards or agreements.

The BOOT should remain

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.

66. The PC should not make draft recommendation 15.4.
67. The practical difference between the application of a BOOT test and a No Disadvantage Test is marginal.
68. The FWC does not apply the BOOT on a line by line basis.
69. It is a **global** test, involving consideration of whether entitlements under an agreement will, on balance, result in a reduction in overall terms and conditions of employment. Where there are specific reductions in terms and conditions, the question is whether these are remedied, in an overall sense, by other more beneficial provisions in the agreement. [See for example, *ALDI Foods Pty Ltd re ALDI Minchinbury Agreement 2012*, *ALDI Stapleton Agreement 2012* and *ALDI Derrimut Agreement 2012*; [2013] FWC 3495 (ALDI No 2).
70. In determining whether an enterprise agreement passes the BOOT, the FWC will:
 - consider terms that are more beneficial (or advantageous)
 - consider terms that are less beneficial (or disadvantageous), and
 - make an overall assessment, whether the employee is better off under the agreement.
71. The difference between testing whether the employee is better off all around and testing whether or not the employee suffers a disadvantage is semantic and too marginal to warrant change.

Threshold for employee representations rights

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.

72. The CPSU (SPSF) fully supports the second dot point in this recommendation and urges the PC to formally make it.
73. CPSU's experience with bargaining in the Victorian public service during 2011-12 highlights the problem with bargaining representatives who represent small numbers of employees.
74. The current Act establishes a regime where a union has the same bargaining status as individual employees, although it is the default representative for all its members.
75. There is a requirement for an employer who agrees to bargain to issue a "Notice of Representational Rights". This provides the mechanism for individual bargaining representatives to participate in negotiations (s178).
76. In the case of the VPS, ultimately some 20 bargaining representatives were appointed. Only two sought to represent more than one individual. The others represented themselves. Mostly the bargaining representatives were interested in single issues or limited matters. None provided a comprehensive claim or draft agreement for negotiation.
77. VPS bargaining proceeded for many months by direct negotiations with the employer, and ultimately to conciliation proceedings before FWC.
78. The individual bargaining representatives were informed of all proceedings. No individual representative attended any conciliation proceedings. Bargaining was terminated in December 2011². The Act then provides for a 21 day period, known as the ***post industrial action negotiating period*** (s266 (3)), to try and resolve outstanding issues. None of the VPS individual bargaining representatives attended these proceedings despite being informed of them.

² PR518480

79. When agreement could not be reached the matter proceeded to the making of an ***industrial action related workplace determination*** (s266). S267 sets out the terms of a workplace determination; in particular the determination can only comprise:
- agreed terms (s267(2))
 - matters at issue (i.e. issues outstanding after the 21 day post-industrial action negotiating period (s267(3)))
 - core terms (s272)
 - mandatory terms (273)
80. Victoria's submissions on these matters took the position that there were no 'agreed terms' within the meaning of the Act (see s274) as not all the bargaining representatives had agreed to the terms agreed between the principle negotiating parties i.e. CPSU and State of Victoria. This is despite the fact that these bargaining representatives had taken no role in the negotiation process or Tribunal proceedings.
81. The current Act sets up a scenario whereby an individual employee can nominate themselves as a representative; participate or not in negotiations; and even have their single issue resolved, but still retain a bargaining representative status many months later when a matter proceeds to formal hearing. For these reasons and for the orderly and efficient process of bargaining (particularly in workplaces with hundreds or thousands of employees) it is sensible to put a threshold for representational rights to be conferred. Five percent of the employees strikes the appropriate balance.

Chapter 9 : Reply to Chapter 16, individual arrangements

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.

82. The PC should not make Draft recommendations 16.1 or 16.2.

83. The current statutory regime for flexibility terms and individual flexibility arrangements reach an appropriate balance between the collective instruments and the need for flexibility within them.

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.

84. The PC should recommend the FWO develop an information package on individual flexibility arrangements as suggested in Draft Recommendation 16.3.

Chapter 10 : Reply to Chapter 17, the Enterprise Contract

85. The PC should not recommend legislative change to facilitate the making of enterprise contracts of the kind elaborated in pp. 615 to 627.

86. The PC states at p. 37 of its “Overview” Chapter:

In principle, businesses could still achieve flexible arrangements across their operations by negotiating enterprise agreements but, as discussed later, such agreement making is still rare amongst small and medium-sized

businesses. This is because the procedural aspects of such bargaining can be daunting (though the perceptions are probably worse than the reality).

To meet the needs of such businesses, the Productivity Commission is floating the option of a new type of statutory arrangement — the enterprise contract (figure 9).

It would effectively amount to a collective individual flexibility arrangement, but with some further flexibility. Employers could offer it to all prospective employees as a condition of employment (resembling enterprise agreements, where new employees are covered by an existing agreement when they are hired). No employee ballot would be required for the adoption of an enterprise contract, nor would any employee group be involved in its preparation and agreement unless the employer wished this to be the case. As in enterprise agreements, employers and individual employees could still negotiate individual flexibility arrangements as carve outs from the enterprise contract if they mutually agreed.

87. An individual statutory contract of this kind would be imposed on individual workers rather than negotiated, and the proposed safeguards required of the FWO to “support, educate, to ensure compliance and enforcement”, are not realistic safeguards given the risks to employees in the enterprises of the kind where enterprise bargaining has no traction.
88. The PC concedes that small and medium business employers could achieve the flexibility required by negotiating enterprise agreements but do not because “the procedural aspects of such bargaining can be daunting (though the perceptions are probably worse than reality)”.
89. The remedy to the lack of penetration of enterprise bargaining into small and medium businesses is one of education rather than the sort of drastic statutory change the PC is here recommending.
90. A preferable remedy to the problem could be: the development of specifically targeted guides to enterprise bargaining and; the development of industry templates that can be tailored and adopted by small businesses after they are made by employees in the manner prescribed in the current Act.

Chapter 11 , Reply to Chapter 18, Public Sector Bargaining

91. It is noteworthy PC has made no recommendations with respect to public sector bargaining. We simply urge the PC to reconsider the CPSU (SPSF) primary submission and the proposed recommendations within that primary submission.
92. We reiterate the recommendations made in our primary submission that would effect public sector bargaining:

More predictable jurisdictional footprint for the Federal system

- 92.1. The jurisdictional footprint of the federal system should be more limited for States that have not referred their public sector workforce.

- 92.2. The FWA should include a definition of “trading or financial corporation” to exclude State government entities that have not been formed for the purposes of trade or finance. These entities tend to be bound by government policies and should be regulated by the State systems in which most public sector workers are regulated.

The Victorian referral

- 92.3. The Victorian Government should modernise the Victorian referral consistent with the UFU appeal decision; and enact legislation so that those parts of the NES which the Federal parliament cannot legislate by reason of the *Melbourne Corporation* principle are available to State employees who are employed by a national system employer (e.g. basic redundancy entitlements).

Greater powers for arbitration in a bargaining impasse for public sector workers

- 92.4. The Federal Government should amend the FWA to enable the tribunal to arbitrate a bargaining dispute where employees of the Crown in right of the States, its corporations or agencies reach an impasse in bargaining with their employer. The existence of such a power encourages parties to bargain rather than losing control of the outcome into the hands of the arbitrator. The current Act reduces the Commission to a passive actor in the face of a bargaining impasse.

Statutory limits on the bargaining capacity of public sector workers should be removed

- 92.5. No public sector workers in Australia should be the subject of targeted legislation which specifically restricts the capacity of public sector workers to bargain, prohibits the making of awards with certain terms and conditions, or prohibits them from seeking pay rises above a prescribed percentage through agreement or award making processes.

Chapter 12 , Reply to Chapter 19, Industrial Disputes and Right of Entry

Termination on the basis of significant harm to employees or employer

DRAFT RECOMMENDATION 19.2

The Australian Government should amend s. 423(2) of the *Fair Work Act 2009* (Cth) such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer *or* the employees who will be covered by the agreement, rather than both parties (as is currently the case).

93. The PC should not make this recommendation.
94. Under the current law the power of public sector employers to suspend or terminate industrial action is such as to deny public sector worker a right strike in some areas.
95. We refer the PC to our primary submissions at p. 7 paragraphs 43 to 47.
- 95.1. The capacity of public sector workers to compel concessions through protected industrial action inevitably gives rise to claims for suspension and termination of the industrial action either because it “causes or threatens significant economic harm” under s423 or “threatens or endangers the life, personal safety or welfare of the population or part of it” under s424 of the Act.
- 95.2. Child protection workers or prison officers quickly fall foul of the “threats to the welfare of the population or part of it” which essentially denudes them of a right to strike which the Act is designed to confer.

No removal of strategic advantage in the withdrawal of industrial action notice

DRAFT RECOMMENDATION 19.3

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer’s contingency response.

DRAFT RECOMMENDATION 19.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic.

96. The PC should not make draft recommendations 19.3 or 19.4.
97. The system of protected industrial action within the Fair Work Act was designed to empower employees and their representatives with a capacity to take industrial action as a “lever” to compel employers to agree to their claims for an enterprise agreement. These recommendations would limit the already limited suite of strategic tools open to employees and union to compel agreement by the employer.

Change in the capacity of employer to pay strike pay

DRAFT RECOMMENDATION 19.5

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that where employees engage in brief work stoppages that last less than the shortest time increment used by their employer for payroll purposes, the employer should be permitted to choose to either:

- deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, or
- pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay.

98. The PC should make this recommendation. The current provisions are too inflexible and lead to indirect penalties to employees and costs to the employers.

No increase in statutory penalties for unlawful industrial action

DRAFT RECOMMENDATION 19.6

The Australian Government should increase the maximum ceiling of penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community.

99. The PC should not make recommendation 19.6.
100. Australia has ratified the ILO *Freedom of Association and the Protection of the Right to Organise Convention* (87). The right to strike is an intrinsic corollary of the right to organise protected by Convention 87. This draft recommendation would push Australian domestic law further away from compliance with this convention.

101. Further, increased penalties for unlawful industrial action are not necessary. Any unlawful industrial action invariably founds liability in damages for one or more of the common law remedies which are collectively called the industrial torts.

Right of entry changes to s505A

DRAFT RECOMMENDATION 19.7

The Australian Government should amend s. 505A of the *Fair Work Act 2009* (Cth) for determining when the Fair Work Commission may make an order to deal with a dispute about frequency of entry by an employee representative to:

- repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier's critical resources
- require the Fair Work Commission to take into account:
 - the combined impact on an employer's operations of entries onto the premises
 - the likely benefit to employees of further entries onto the premises
 - the employee representative's reason(s) for the frequency of entries.

102. The PC should make this recommendation 19.7.

103. The current Act lacks the balance of employer and employee rights compared to this proposal.

Chapter 13 , Reply to Chapter 20, alternative forms of employment

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).

104. The PC should not make draft recommendation 20.1.
105. Agreed limitations on the recourse of employers to independent contractors and non-permanent employment in the workplace have been part of the workplace relations landscape in Australia for decades.
106. In the enterprise bargaining era this has continued. Employers who do not wish to be bound by such a term are not compelled to agree. A restriction of the kind suggested by this recommendation unreasonably restricts the rights of employees and their representatives to free collective bargaining over a matter which may affect their job security.

Chapter 14 , Reply to Chapter 21, Migrant Workers

DRAFT RECOMMENDATION 21.1

The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the *Migration Act 1958* (Cth)).

The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.

107. The treatment of migrant workers in Australia, including workers here under 457 visas, is a scandal that requires a strong administrative and legislative response. We wholeheartedly agree that this recommendation should be made by the PC.
108. The systematic underpayment of vulnerable 7/11 workers on visas is a clear indication that the current schema of legislative and administrative remedies is not adequate.

Chapter 15 , Reply to Chapter 22, transfer of business

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.

109. The PC should not make this draft recommendation 22.1.
110. The terms of this recommendation underplays the degree of compulsion faced by employees in circumstances where a transfer of business occurs.
111. Employees employed by the transferee are often presented with a contract of employment with the new employer on a “take it or leave it” basis. Where the alternative is often unemployment the signing of the employment contract, although valid as a matter of law, cannot, as a matter of practicality be said to be at the employees “instigation”.
112. The current transfer of business provisions are inadequate already without an amendment of the kind suggested by this recommendation making them worse.
113. The PC should instead make the following recommendations:
 - 113.1. All prevailing terms and conditions of employment should be captured by the transfer of business provisions. In the public sector context this means that in addition to the transfer of copied state awards, all terms and conditions of employment that are the subject of the National Employment Standards should be transferable.
 - 113.2. The scope of the transfer of business provisions should be broadened so that they apply to the situation of labour hire in the State sector context. The provisions should enable consolidation orders to apply to all employees that undertake work transferred from State sector employment including labour hire employees undertaking work previously performed by State sector workers.

Chapter 16 , Conclusion

114. The PC is correct that, in the broad, the workplace relations system is not systemically dysfunctional.
115. The interaction of the State and Federal system, and the application of the Federal workplace relations law to large public sector employers, does require specific attention in the manner we have outlined in our primary submission and in this reply.