



Government of Western Australia

Productivity Commission Inquiry into the Workplace Relations Framework

SUBMISSION BY THE WESTERN AUSTRALIAN GOVERNMENT

September 2015

INTRODUCTION

The Western Australian Government (WA Government) welcomes the opportunity to provide comments on the Productivity Commission's draft report for its Inquiry into the workplace relations framework.

This submission provides supplementary comments on the following issues:

- The long service leave National Employment Standard (NES) in the *Fair Work Act 2009*;
- The public holidays NES;
- Weekend penalty rates.

LONG SERVICE LEAVE

The WA Government notes the Productivity Commission's hesitation in proposing a uniform national long service leave standard and acknowledges the complicated issues associated with achieving a nationally uniform standard.

The WA Government supports the Productivity Commission's acknowledgement of the complexity of the current transitional long service leave standard in the NES and would reiterate the concerns raised in the initial WA Government submission to the Inquiry.

The WA Government strongly supports the Productivity Commission's comments that it "*sees a case for ensuring all employees derive their LSL entitlements from state and territory based legislation only.*"¹ Not only would this achieve the objective identified by the Commission of stripping away a layer of complexity for business, it would also make it simpler for employees to ascertain their entitlements and make compliance and enforcement simpler and more efficacious.

There is no recommendation consistent with these comments in the draft report. The WA Government strongly supports the Productivity Commission making a formal recommendation in its final report that long service leave entitlements derive from State and Territory long service leave legislation.

¹ Draft Report at p.181.

PUBLIC HOLIDAYS

The significant issue in the context of the public holidays NES in Western Australia is the impact of the NES definition of public holidays for Western Australian employers in the national industrial relations system. This arises because the Western Australian *Public and Bank Holidays Act 1972* provides for **additional** public holidays where certain public holidays fall on a weekend. The interaction with the NES means that **both** the primary public holiday and the additional public holiday fall within the meaning of “public holiday” for the purposes of the NES and by extension for the purposes of modern awards (including for penalty rates clauses unless they provide otherwise).

This is a different issue to the one identified by the Productivity Commission of newly declared holidays. There have not been any newly declared holidays in Western Australia since the commencement of the NES. Indeed, the objective and outcome of the *Public and Bank Holidays Act 1972* is a **consistent** number of weekday public holidays each year.

The issue in Western Australia arising from the NES definition of “public holiday” relates not only to payment for working on public holidays but also the NES entitlement to be absent on a public holiday.

The initial submission by the WA Government indicated the WA Government’s support for amendment of the NES to address the entitlement to be absent for the primary public holiday and the additional public holiday where both days would ordinarily be working days.

In relation to payment for work on public holidays, the Productivity Commission’s draft report does not make any recommendations that will address the issue of employers being required to pay penalty rates for work on both the primary and additional public holiday because the NES defines both as the “public holiday” and penalty rates in modern awards will apply to both days, unless the modern award expressly provides otherwise.

The draft report in Chapter 14.9 (Holiday pay) states that “*Current penalty rate arrangements for public holidays do not need to change, except where they relate to the additional days of leave that State and Territory Governments may announce in the future*”. The WA Government would submit that the draft report overlooks the issue of existing additional (as distinct from substitute) public holidays.

Draft Recommendation 4.1 suggesting the Fair Work Commission should allow in modern awards for substituting a public holiday for an alternative day does not address the situation in Western Australia (and other State and Territory legislation which provide for additional public holidays rather than substitute days) as both the

primary and additional day would still both be public holidays by virtue of the NES definition of public holidays.

Similarly, Draft Recommendation 4.2 does not address the issue in Western Australia as there have not been newly designated public holidays - indeed Western Australia has significant stability, consistency and predictability of public holidays.

This is an issue that can and, in the view of the WA Government, should be dealt with in modern awards and enterprise agreements.

The Productivity Commission draft report recommends in Draft Recommendation 14.2 that the Fair Work Commission should address the issue of penalty rates for Sunday work as part of the current award review process. The issue with respect to penalty rates for working public holidays where both the primary and additional day fall within the NES definition of “public holiday” could similarly be dealt with by the Fair Work Commission varying awards as part of the current award review process.

The WA Government supports the Productivity Commission making a recommendation that the Fair Work Commission address the issue of payment of penalty rates for public holidays where an original and additional public holiday fall within the NES definition of “public holiday” by varying modern awards as part of the current award review process.

It is also worth noting the Productivity Commission’s comment on page 189 of the draft report that *“once the date is arbitrary, it is unclear why the dates should not be the same across jurisdictions”* in the context of the Queen’s Birthday public holiday. The WA Government would note that there is a reason why Western Australia does not celebrate the Queen’s Birthday in June as other States do. The first Monday in June is already a longstanding public holiday in Western Australia, which has been a public holiday since 1832, commemorating the founding of the Swan River Colony. Instead of public holidays on consecutive Mondays in June, Western Australia celebrates the Queen’s Birthday on a proclaimed date (usually the last Monday in September or the first Monday in October) coinciding with the Perth Royal Show and school holidays. While the date for the Queen’s Birthday may be “arbitrary” it disperses public holidays throughout the year and provides an opportunity for attendance at the Royal Show. Clearly, regional considerations are relevant and often determinative of the timing of public holidays. However, it is the industrial consequences that arise directly from the provisions of the *Fair Work Act 2009* that are the primary concern of the WA Government.

The fundamental issue for employers in Western Australia is not how many public holidays there are, or when they are relative to other States and Territories, rather it is how the NES and modern awards have impacted employees’ entitlement to be

absent and their entitlement to payment for working on public holidays. This is the issue the WA Government seeks the Productivity Commission to address in its final report.

WEEKEND PENALTY RATES

The WA Government welcomes the Productivity Commission's recommendations relating to weekend penalty rates in particular segments of the services sector, namely, cafes, hospitality, entertainment, restaurant and retail industries. The WA Government supports penalty rates being updated and reformed to improve productivity and increase employment opportunities.

The WA Government agrees that the quantum of Sunday penalty rates is out of step with community expectations that these services be available on Sundays. The proposal that Sunday rates be consistent with Saturday rates is, in the WA Government's view, a balanced approach that retains some compensation for employees working weekends but that will also allow businesses to provide more employment opportunities.

The WA Government supports these findings and recommendations by the Productivity Commission.