

**Community and Public Sector Union**

Nadine Flood – National Secretary

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Workplace Relations Framework  
Productivity Commission  
GPO Box 1428  
Canberra City ACT 2601

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Dear Sir/Madam

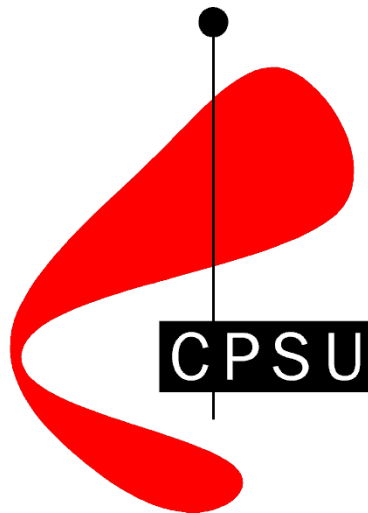
**Workplace Relations Framework Draft Report**

Please find attached the submission from the Community and Public Sector Union (PSU Group) to the Productivity Commission's Workplace Relations Framework Draft Report.

For further information please contact Melissa Donnelly, Deputy Secretary

Yours sincerely

Nadine Flood  
**National Secretary**



# **CPSU (PSU Group) Submission**

## **Response to Workplace Relations Framework Draft Report**

September 2015

## Introduction

The PSU Group of the Community and Public Sector Union (**CPSU**) actively represents approximately 55,000 members who are predominantly employed by the Commonwealth Government, ACT and NT Public service, CSIRO, telecommunications sector, call centres, employment services and in broadcasting.

This submission is made in response to the Draft Report into the Workplace Relations Framework (**Draft Report**),<sup>1</sup> issued by the Productivity Commission on 4 August 2015 and should be read in conjunction with the *CPSU (PSU Group) Submission to the Productivity Commission's Inquiry into the Workplace Relations Framework* made in March 2015.

The CPSU also supports and endorses the ACTU submissions to the Draft Report.

The Fair Work Act (**FW Act**) aims to strike an appropriate balance between the needs of employers and the rights of workers.<sup>2</sup> Notwithstanding the careful nature of this balance, the Draft Report makes a number of recommendations which effectively water down current obligations on employers, and impose new restrictions on the conduct of employees and unions. In our view the Draft Report also fails to deal with a number of inadequacies in the FW Act, particularly in the area of enterprise bargaining.

The CPSU submission will focus on the following areas which are of particular concern to CPSU members:

- enterprise bargaining;
- industrial action;
- performance management; and
- enterprise contracts.

## Enterprise bargaining

The Draft Report makes a number of recommendations regarding the enterprise bargaining provisions of the FW Act. These recommendations generally seek to weaken obligations on employers and restrict the rights of employees and unions.

The Draft Report recommends removing the ability for parties to negotiate with respect to job security and the use of contractors. Such a modification would constitute an arbitrary limit on the ability for employers, employees and unions to bargain freely.

Matters of employment security are a legitimate concern of employees, and employees and unions should not be prevented by law from seeking to reach agreement on those matters with employers. The current legislative limits are already excessive in this regard.

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<sup>1</sup> Productivity Commission, *Workplace Relations Framework, Draft Report*, 2015 ("Draft Report")

<sup>2</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth.) outline, 9, 130, 177, 297, 342

The Draft Report suggests replacing the “Better of Overall Test” (**BOOT**) - which has formed a cornerstone of the Fair Work enterprise bargaining regime - with a “No Disadvantage test”. The BOOT is an important part of a framework which seeks to ensure that minimum employment conditions are not eroded. Therefore the CPSU opposes this change as it would reduce the current protections afforded to employees.

### Good Faith Bargaining

The Draft Report observes that: ‘The good faith bargaining requirements appear to be working relatively well’<sup>3</sup>. The CPSU cannot endorse this assessment which, in our view, fails to contemplate the real issues which beset bargaining.

The practical reality of enterprise bargaining, particularly in the public service context, is that lengthy and protracted negotiations occur and that there is little formal redress (in terms of Fair Work Commission (**FWC**) processes) for workers and their unions when employers appear to comply with good faith bargaining (**GFB**) requirements but do not in fact substantively participate in bargaining in a meaningful way.

The GFB requirements are largely procedural. Notwithstanding that the GFB requirements have been construed as requiring an intention to conclude an agreement.<sup>4</sup> In practice this can be difficult to ascertain. In particular, it is premature to conclude as the Draft Report does, that ‘the case law does seem to have successfully distinguished between hard and surface bargaining’.<sup>5</sup>

In the current round of APS enterprise bargaining, attempts to genuinely bargain and reach fair and reasonable settlements are not helped by shortcomings in the current Act. In the APS a rigid centrally controlled Government bargaining policy has meant no genuine negotiations have occurred between parties on a range of claims. The primary decision-makers mandating what agencies may offer are central policy agencies and the Minister’s office, whereas negotiations take place at an individual agency level. This means employees and unions are effectively barred from genuinely negotiating with the parties responsible for determining the employer’s position.

The FWC has previously held that consultation requires “...providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision maker”.<sup>6</sup> The CPSU is of the view that this consideration should also apply in the bargaining context.

In respect of the public sector specifically, the Draft Report highlights the balances between the need for government to control spending, and the greater efficiency of allowing agencies

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<sup>3</sup> Draft Report, 533

<sup>4</sup> *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764; see also *Collective Bargaining in the Public Service: A Way Forward*, International Labour Conference 2<sup>nd</sup> Session, 2013, 281 [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_205518.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205518.pdf)

<sup>5</sup> Draft Report, 558

<sup>6</sup> *CPSU v Vodafone* PR91157 2001, 25

and workplaces to bargain with minimal restraint.<sup>7</sup> The CPSU supports an effective bargaining system for the APS which would involve a degree of centralisation; however, for enterprise bargaining to be both genuine and efficient it is important that the parties can deal directly with the relevant decision maker.

As a matter of policy, the industrial relations framework should support genuine negotiations in bargaining. In our view, it is appropriate that amendments to the GFB regime are made to support genuine bargaining, which means involving actual decision-makers.

#### Role of the Fair Work Commission in bargaining disputes

Problems around the genuineness of bargaining processes are compounded by the fact that the FWC has no, or limited, scope to intervene in bargaining disputes and ensure resolution. The current setting, which provides only conciliation of bargaining disputes in most situations, does not encourage parties to reach agreement in the way that the availability of arbitration would. By limiting the role of the FWC, the FW Act provides no sensible way to resolve intractable bargaining disputes.

The Productivity Commission in the Draft Report states "...[it] does not accept that greater access to arbitration will lead to improved behaviour across the bargaining landscape".<sup>8</sup>

The CPSU takes a contrary position. Bargaining conduct would improve if the FWC has a stronger role in the bargaining process. In our experience, the introduction of GFB saw a marked change in the bargaining conduct of major employers without recourse to FWC. That is, major parties understood the provisions and amended their conduct to ensure they met those standards. There is every reason to suppose that introducing a stronger role for the FWC in resolving intractable bargaining disputes would have a similar effect and encourage bargaining parties to resolve bargaining disputes.

For these reasons, the CPSU is of the view that the FWC has a stronger role to play in resolving intractable bargaining disputes. A stronger role for the FWC would be an important way to avoid costly and drawn out bargaining disputes.

#### Conduct of Government as an employer in bargaining

Of concern to the CPSU is the suggestion in the Draft Report that it may be appropriate for Government to choose to draw out negotiations with its own employees for its own gain.

The Draft Report states:

Protracted negotiations are not a problem *per se*...there may be instances where 'holding out' or refusing to make concessions may be a viable negotiating tactic, particularly where one side has a significant amount of market power. In the public sector, this may enable a government in pursuit of its preferred fiscal outcome to

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<sup>7</sup> Draft Report, 640

<sup>8</sup> Draft Report, 559

apply pressure on employees by drawing out the bargaining process, **rather than finding agreement through genuine back and forth negotiating.**<sup>9</sup>

The Government should be a model employer. As such, the Government's aim in enterprise bargaining should be to adhere to established principles, exercise genuine good faith, and reach a reasonable outcome. To the extent that budgetary or fiscal goals are pursued, this should not be done rigidly or in such a way that ignores that fact that public servants are workers who have lives, families and budgets of their own.

### Productivity in the public sector

The Draft Report makes a number of comments regarding productivity in the public sector. The CPSU's view is that productivity in the public sector is difficult to quantify.

In industrial relations the concept of productivity is commonly misinterpreted and misapplied.

In the current round of APS bargaining, the Government has defined productivity as largely constituting employee-related cashable savings, such as reducing employment conditions and increasing working hours in the public sector. This approach fundamentally misunderstands, and therefore will consequently fail to deliver, genuine productivity improvements. Even if successful such cuts to employment conditions would not mean that Government agencies or the employees within them are more productive.

The Draft Report compares wages and wage growth between the public and private sectors.<sup>10</sup> Such a comparison is not straight-forward as there are a range of factors that impact on wage outcomes, such as the skill level of the workforce and rates of enterprise agreement coverage. More fundamentally, however, the Draft Report presupposes that wages are the major indicator of bargaining outcomes, when this is not the case. In actual fact, in the current round of bargaining it is issues of rights and conditions that are of most concern to APS employees.

## **Performance management**

In a section dedicated to performance management issues in the public sector, the Draft Report makes reference to "anecdotal evidence" which suggests that employees in the public service are "more difficult to terminate" than their private sector counterparts.<sup>11</sup> Such evidence is more prejudicial than probative and is not a well chosen starting point in terms of framing debate in this area.

Employees in the public sector are very committed to providing the best possible public services to the Australian community. The CPSU does not accept that there is an inherent

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<sup>9</sup> Draft Report, 641 emphasis added

<sup>10</sup> See Draft Report, Figures 18.1-18.5, pp634-635

<sup>11</sup> Draft Report, Section 18.5, p644

problem with performance management in the public sector as compared to the private sector.

APS agencies have clear legislative powers to deal with performance issues and enterprise agreements set out clear procedures. CPSU strongly disagrees with the proposition that agreed performance management procedures stand in the way of better performance outcomes. It is our experience that clearly setting out expectations and procedures in enterprise agreements greatly assists in the proper handling of these issues, as it creates clear, known, enforceable standards for both employees and managers.

The proper focus of any performance management process should be on allowing employees the opportunity to improve their performance to an acceptable level.<sup>12</sup> Overall, performance management should be administered fairly, and with a focus on a “fair go all ‘round” – irrespective of whether the setting is the public or private sector.

## **Industrial action**

The Draft Report makes a range of recommendations regarding the industrial action provisions of the FW Act.<sup>13</sup>

Employees have a right to take industrial action.<sup>14</sup> Recognition of this right forms part of Australia’s obligations under international law.<sup>15</sup> The exercise of this right is already subject to onerous requirements, and unions must go through a range of steps to ensure that industrial action is “protected”.

The range of procedural steps required for protected industrial action compounds the limitations placed on CPSU members exercising their right to take industrial action. Industrial action taken in the public sector is far more likely to give rise to considerations of public welfare, and damage to the Australian economy, and be terminated accordingly.<sup>16</sup> For this reason, public sector employees in areas such as DHS and the DIBP have given a range of undertakings and exclusions with respect to which groups of employees take which

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<sup>12</sup> *Johnston v Woodpile Investments T/A Hog’s Breath Café - Mindarie* [2012] FWA 2 (unreported, Williams C, 6 January 2012), 58.

<sup>13</sup> These include: Limiting the right to strike as a response to an employer’s refusal to bargain (Recommendation 19.1) providing for the termination of industrial action on the basis of significant economic harm to only 1 party (Recommendation 19.2); Creating the ability for employers to stand workers down without pay, where notice of industrial action is withdrawn (Recommendation 19.3); and, imposing greater penalties for industrial action (Recommendation 19.6)

<sup>14</sup> *CFMEU v Woodside Burrup Pty Ltd* [2010] FWA 6021, para 37

<sup>15</sup> *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), opened for signature on 17 June 1948, 86 UNTS 17 (entered into force 4 July 1950); *Right to Organise and Collective Bargaining Convention 1949* (No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) (“Convention 98”); *CFMEU v Woodside Burrup Pty Ltd* [2010] FWA 6021, para 37

<sup>16</sup> see ss the Act 423, 424

types of industrial action. Additionally, public sector employees are the only workforce whose employer can take away the right to take industrial action by way of a mere declaration.<sup>17</sup>

The Draft Report recommendations would impose further limitations on the right to take industrial action. In particular, the proposals to restrict when protected industrial action can be taken<sup>18</sup> and lower the requirements for when protected industrial action can be terminated<sup>19</sup>.

The CPSU does not support any further diminution of the right to take industrial action.

The Draft Report also invites feedback with respect to greater employer options for industrial action, and the imposition of a minimum deduction of 25% of wages where employees partake in partial work bans.

The CPSU does not support the imposition of standard percentage based minimum deduction (whether of 25 *per cent* or any other percentage) available to employers where employees engage in partial work bans. On a practical level, such a power could see employers obtaining a greater than 75 *per cent* share of work at only three-quarters of the ordinary cost. Additionally, minimum deduction of the type contemplated might incentivise employees to engage in greater partial work bans than they otherwise would have, rather than be disproportionately penalised.

## Enterprise contracts

The Draft Report identifies scope for, and seeks feedback with respect to: “a new form of agreement — the ‘enterprise contract’ — to fill the gap between enterprise agreements and individual arrangements”.<sup>20</sup> The CPSU does not share the view that such a gap requires filling and points to a key object of the FW Act, as being:

ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind **given that such agreements can never be part of a fair workplace relations system.**<sup>21</sup>

Whilst this suggestion is couched in terms of benefits for small business, the Draft Report does not suggest the contracts would only be available for use in that sector.

The proposed “Enterprise Contract” shares the following hallmarks with Australian Workplace Agreements: they could be formed without employee involvement; they would be

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<sup>17</sup> the Act s 431

<sup>18</sup> Draft Report, Recommendations 19.1 and 19.4

<sup>19</sup> Draft Report, Recommendation 19.2

<sup>20</sup> Draft Report, 57

<sup>21</sup> *Fair Work Act* para 3(c), emphasis added



statutory in force; they could be offered on a “take-it-or-leave-it” basis;<sup>22</sup> they would reduce incentives for employers to collectively bargain; and, they would not require approval;

The CPSU has substantial experience dealing with AWAs under the predecessor legislation to the Fair Work Act.

AWAs were extensively used in the Commonwealth Government and by other major employers with CPSU membership. Notwithstanding justifications in terms of mutual choice and flexibility, thousands of identically templated AWAs were rolled out as unilaterally dictated employment arrangements. The practical experience for the overwhelming majority of CPSU members on AWAs was that there was no capacity for individual negotiations and employment and promotion opportunities were conditional on accepting a pro-forma AWA.

Any moves to undercut collective bargaining through individual contracts are a significant threat to employees’ rights and would undercut the benefits of collective bargaining for employees, employers and the economy.

For these reasons, the CPSU is strongly opposed to the return of individualised statutory contracts in any form.

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<sup>22</sup> Draft Report, 39