PRODUCTIVITY COMMISSION INQUIRY INTO WORKPLACE RELATIONS

RESPONSE TO DRAFT REPORT

SUBMISSION OF PROFESSIONALS AUSTRALIA

Introduction

On 19 December 2014, the Australian Government released terms of reference for an inquiry into Australia's workplace relations framework to be conducted by the Productivity Commission.

Through the terms of reference the Productivity Commission was tasked to assess the impact of the workplace relations framework on matters including:

- unemployment, underemployment and job creation;
- fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net;
- small businesses;
- productivity, competitiveness and business investment;
- the ability of business and the labour market to respond appropriately to changing economic conditions;
- patterns of engagement in the labour market;
- the ability for employers to flexibly manage and engage with their employees;
- barriers to bargaining;
- red tape and the compliance burden for employers;
- industrial conflict and days lost due to industrial action; and
- appropriate scope for independent contracting.

On 22 January 2015, the Productivity Commission released five Issues Papers for comment.

On 13 March 2015, Professionals Australia provided a submission *"Ensuring a balanced workplace relations framework for Australia"* to the Productivity Commission which focussed on matters in the Issues Papers which affect managerial and professional employees in the workplace.

On 4 August 2015, the Productivity Commission released a Draft Report containing a number of draft findings and information requests. Professionals Australia welcomes the opportunity to provide feedback on the draft findings and where possible, provide responses to the information requests.

Professionals Australia supports the submission which has been made by the Australian Council of Trade Unions (ACTU) on behalf of the union movement. Many of the issues canvassed in the ACTU submission also affect Professionals Australia members. For instance approximately 50% of Professionals Australia's membership are covered by enterprise agreements and accordingly are affected by the proposed recommendations.

Professionals Australia's submission will focus on select draft recommendations and information requests which affect managerial and professional employees in the workplace.

Overall Draft Report Finding

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

Professionals Australia agrees with the overall draft report finding if not with many of the proposed recommendations.

In its initial submission made to the Productivity Commission, Professionals Australia advocated for a balanced workplace relations framework which enhances the full participation of managerial and professional employees. Professionals Australia submitted that the framework should consist of the following safeguards:

- A strong legislative framework which promotes good faith collective bargaining with access to "last resort" or "first contract" arbitration of the content of enterprise agreements;
- A strong and viable safety net consisting of modern awards which cover all employees and an expanded National Employment Standards (NES);
- Access to the Fair Work Commission for all employees engaged on common law contracts of employment for a dispute resolution process which is timely, efficient, and cost free;
- A right for all employees to seek a remedy if they believe that they have been unfairly dismissed;
- A strong and independent workplace relations tribunal, currently the Fair Work Commission; and

- A strong and well-resourced statutory office that ensures compliance with Australian workplace law, currently the Fair Work Ombudsman.

In line with the Productivity Commission's overall finding, Professionals Australia considers that if "repair" to the current workplace relations system has regard to the safeguards outlined above then this would contribute to a workplace relations system that operates effectively.

However, the "repair" of the workplace relations system as outlined by the Productivity Commission if implemented will unfortunately further weaken the rights of managerial and professional employees and exacerbate the unequal bargaining relationship which already exists.

Chapter 3 - Institutions

Professionals Australia does not support the draft recommendations made by the Productivity Commission in relation to the Fair Work Commission ("FWC").

Professionals Australia believes that it is essential for the FWC to consist of members who have advanced industrial experience and considers that the current composition of the FWC comprising persons from a diverse range of industrial backgrounds results in a practical and informed approach to decision making. It is difficult to envisage how the quality of this decision making will be improved by the splitting of the Fair work Commission into basically two sections whereby those responsible for setting minimum wages are separated from those involved in dispute resolution.

Chapter 4 - National Employment Standards

As outlined in our initial submission whilst many professional and some managerial employees have coverage under modern awards and enterprise agreements there are those, particularly in the private sector, who are "award free".

This group of employees usually have their salaries and conditions of employment regulated by some form of common law contract. These contracts are underpinned by the National Employment Standards (NES) and in this regard, Professionals Australia believes that it is essential that the NES is maintained as a strong and viable safety net and where necessary extended as proposed in its original submission.

Professionals Australia is highly critical of any changes to the NES that result in the minimum conditions that are offered by the NES being weakened by their operation being able to be negotiated individually between the employer and employee. For instance the proposal in respect of payment for newly gazetted public holidays is a case in point. Another matter of concern is the conflating of annual leave and public holidays and the potential for the trade-off of salary increases.

The NES has existed in order to provide a baseline of protection thereby providing those employees who have no award protection with non-negotiable minimum standards.

In this regard the notion that there is equality in the bargaining relationship between an employer and individual employee is rejected as lacking in any sound evidence. In its original submission Professionals Australia made reference to a survey of its members which found that almost 82% of respondents felt that there was either no or little negotiation regarding the terms of their contract of employment. This finding reflects the lived experience of Professionals Australia's members.

In respect of specific recommendations Professionals Australia responds as follows:

Draft Recommendation 4.1

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

It is considered that this recommendation is unnecessary as most modern awards already contain provisions which allow for the substitution of public holidays.

Draft Recommendation 4.2

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

Professionals Australia does not support this recommendation which establishes two categories of public holidays. At the very least a public holiday should be paid and if worked the appropriate penalty or some other form of equivalent compensation should apply. If employees are required to negotiate with their employer as to whether they will be paid for an absence on the newly designated public holiday then it is highly likely some employers would simply choose not to negotiate in order to avoid having to pay leave or additional penalty rates.

Draft Recommendation 4.3

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

Again Professionals Australia considers that it important for the NES to provide minimum standards that are relevant and that these should not be undermined due to the unequal bargaining relationship which exists in the workplace whereby employees may feel obliged to agree to a cashing – out option.

In addition the Association believes that there should be a significant degree of caution regarding the ability to cash out annual leave entitlements as it may defeat the purpose of annual leave that is, to provide employees with a break from the workplace and weaken the obligation on employers to plan sufficiently to provide for staff absences.

Chapter 5 – Unfair Dismissal

Professionals Australia is strongly opposed to the draft recommendations made by the Productivity Commission to the extent that they seek to limit the rights of individuals seeking recourse for unfair dismissal.

There appears to be an overarching notion that many unfair dismissal claims are made vexatiously and maliciously, creating a need to be able to filter out such claims from taking up time and resources. This is not the experience of Professionals Australia who represent members who have experienced unjust treatment and on occasions an abuse of process.

Professionals Australia suggests that if the draft recommendations in relation to the unfair dismissal penalty regime were to be adopted then the right to seek relief in respect of unfair termination would be seriously weakened.

Information Request

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

Professionals Australia notes that feedback is requested on the following two-tier approach to fees:

- increasing by a modest amount the fees for application, and tying the fee to income levels at the time of dismissal, such that higher income earners pay to lodge application; and/or
- introducing an additional fee for cases proceeding to arbitration to partly recover the substantial costs involved with conducting proceedings in the FWC.

Professionals Australia submits that the unfair dismissal process is an essential part of the Australian workplace relations framework as it provides recourse for employees who have been unfairly dismissed. As such Professionals Australia does not consider that a user pays system is appropriate for unfair dismissal claims. The Association supports the proposition that all employees should be able to access an unfair dismissal remedy free of charge.

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.

Professionals Australia notes that this recommendation is aimed at reducing the practice of so called 'go away' money.[1] This assumes that 'go away' money is paid by employers to avoid having to defend an unfair dismissal claim, even if the claim is without merit. As stated in its initial submission Professionals Australia submitted that the unfair dismissal compensation cap provides an element of certainty to both employers and employees regarding the maximum amount that an employee can gain from pursing unfair dismissal. In this regard, the reference to 'go away' money trivialises what is in actual fact a realistic judgement call whereby both parties assess their likely prospects of success.

If an employee was to reject a reasonable settlement offer and the Fair Work Commission awarded less compensation than was offered at settlement, the employer could seek a cost order against the employee. In this regard, the risk of a costs order being made is often a reason why an employee will accept an offer of compensation instead of pursuing their matter to arbitration where they may end up worse off.

Professionals Australia does not support the recommendation that the Fair Work Commission should be able to consider an unfair dismissal application 'on the papers' prior to conciliation for the following reasons:

- it would deny the Applicant their "day in court" to express their concerns about the way in which their employment was terminated.
- the merits of a case cannot be simply determined on what is stated in an application form as it may not accurately reflect the Applicant's view particularly in cases where the Applicant is self-represented and may not have a clear understanding about what makes their dismissal harsh, unjust or unreasonable.

Professionals Australia notes that the role of conciliation in an unfair dismissal claim is 'an informal method of resolving an unfair dismissal application by helping the parties to reach a settlement. An independent conciliator can help the parties explore options for resolution without the need for a conference or hearing before a member.'[2] Whilst the Applicant and Respondent may query the merits of each other's case at conciliation, the conciliator is not in a position to determine merit.

Professionals Australia is sceptical of criticism of the unfair dismissal system whereby employers are concerned of the financial implications of defending a claim including the payment of so called 'go away money'. Professionals Australia considers that it is important to recognise that defending an unfair dismissal claim does not in all circumstances require the employer to engage a paid agent or a lawyer. The FWC operates in such a manner so

[1] PC Draft report pg 229
[2] Unfair Dismissal Benchbook

as to encourage self-representation in order that an employer does not have to incur unnecessary costs.

Further, as noted by the Productivity Commission the FW Act in of itself enables the Fair Work Commission to prevent claims without merit including:

- having the power to dismiss applications (s 399A);
- making an order for costs against a party (s 400A);
- imposing a cost order against a lawyer or paid agent where a speculative claim is encouraged (s 401A(1A))[3]

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.

Professionals Australia opposes this draft recommendation on the basis that is completely defeats the purpose of unfair dismissal claims being available to challenge dismissals that are harsh, unjust or unreasonable.

Professionals Australia notes that s 392 FW Act provides criteria what must be considered when the FWC awards compensation which includes:

> (a) the effect of the order on the viability of the employer's enterprise; and
>
> (b) the length of the person's service with the employer; and
>
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
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> (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
>
> (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
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> (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
>
> (g) any other matter that the FWC considers relevant.

[3] PC Draft Report pg 230

Further, if FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order by an appropriate amount on account of the misconduct. This is explicit recognition by legislation that employees will not necessarily receive compensation if their misconduct was a contributing factor to termination.

Professionals Australia recognises and appreciates that the FW Act needs to provide employers with the capacity to take appropriate management action and decisions. Further, employers need to be able to make decisions in order to respond to poor performance, or if necessary take disciplinary action and direct and control the way work is carried out. However, management action must be carried out in a reasonable manner. As such, employers are already in a position where they are able to terminate employment due to consistent underperformance. However, in order for the termination not to be considered harsh, unjust or unreasonable, the employer is currently required to demonstrate that they afforded the employee with an opportunity to improve performance. The FWC expects that reasonable performance management is undertaken which requires that the employee has a clear understanding of what they are required to achieve over a specified period of time and the employer assisting the employee to improve performance through providing training and development.

Having regard to the requirements of reasonable performance management, the proposed draft recommendation suggests that if an employer terminated an employee for underperformance without following reasonable performance management process, then their failure to follow procedure would be cured to the extent that they would not be liable to compensate the terminated employee. Professionals Australia suggests that legislation should promote best practice in employee relations rather than providing an employer with an opportunity to avoid any sort of penalty for not offering a terminated employee procedural fairness.

In addition Professionals Australia considers that it often the manner in which employees are terminated that does not follow proper procedure or practice that causes employees the most distress and grief. Noting that compensation for unfair dismissal is not provided for shock or distress, it is highly necessary for employers to be held accountable for any procedural errors. Fair Work Commission ordered compensation to an employee who has been found to be unfairly dismissed due to an employer failing to follow proper procedure is recognition that the individual employee was not treated fairly.

If counselling or education of an employer was the only penalty that an employer would be subjected to procedural errors during termination of an employee, an employer would not be necessarily be inclined to act with regard to procedural fairness as any sanction for their failure to do so would be weakened and in many respects meaningless.

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).

Professionals Australia submits that reinstatement of the employee to their former position should be retained as the primary goal of the unfair dismissal jurisdiction.

Section 390 of the FW Act requires that the FWC must determine if reinstatement is appropriate before considering any other remedy. If the FWC is satisfied that reinstatement is not an appropriate remedy, then compensation can be considered.

As stated in our initial submission, generally speaking an employer will not reinstate a dismissed employer unless ordered to so by the FWC. As such, employers have used payment under the compensation cap as a way to avoid unfair dismissal matters proceeding to arbitration where there is a possibility that if the dismissal is found to be unfair that the dismissed employee may seek reinstatement.

Professionals Australia suggests that due regard needs to be given to what an order for reinstatement means. It requires that the employer must:

- reappoint the person to the position in which they were employed immediately before the dismissal; or
- appoint the person to another position with terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

It is clear that reinstatement requires restoration of the terminated employee to the position they would have otherwise been in if they had not been terminated. Compensation does not provide this restoration.

Professionals Australia does acknowledge that the restorative remedy of reinstatement is not always a feasible option and the FW Act provides guidance on when reinstatement would not be appropriate, which includes:

- a loss of trust and confidence between employer and terminated employee;
- no position being available for the terminated employee; and where
- the terminated employee is sick or injured which renders them unable to perform the inherent requirements of the role.

Nevertheless it is important that if reinstatement is a viable option that the Fair Work Commission has the power to so order and restore the employee to their former position.

Chapter 6 – The General Protections

Professionals Australia is strongly opposed to the draft recommendations made by the Productivity Commission to the extent that they heavily seek to limit the rights of individuals seeking recourse for adverse action.

Similar to the position in respect of Unfair Dismissals there appears to be a presumption that many adverse action claims are made vexatiously and maliciously, thereby creating a need to be able to filter out such claims from taking up time and resources

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.

Professionals Australia notes the concerns raised in the draft report which suggests that the definition of "workplace right" for the purposes of determining whether adverse action has occurred is quite broad. However, Professionals Australia does not support any recommendation which would prevent adverse action claims that arose of matters indirectly related to employment. Professionals Australia considers that this recommendation if legislated, would heavily impact the protections provided for trade union activity.

Further and more generally as the General Protections jurisdiction is in its relative infancy Professionals Australia that it is premature for any changes at this stage.

The proposal that Complaints should be required to be made in "good faith" presumes that there are a large number of adverse action claims being made in "bad faith". The experience of Professionals Australia is that managers and professionals carefully consider whether they wish to proceed down this path and only take this step following the most serious consideration.

Introducing a requirement that a complaint is made in "good faith" imposes a jurisdictional hurdle on the employee to establish "good faith" prior to being capable of making a general protections application. If an employee is able to ascertain that they made a complaint in good faith, the onus of proof reverts to the employer to establish that the adverse action was not taken for a proscribed reason. Such a recommendation would add a layer of complication which is not required. The current conciliation process is very useful in "testing" adverse action claims and is usually carried out expeditiously. Accordingly Professionals Australia considers that this is all that is required.

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.

The FW Act already in of itself enables the Fair Work Commission to prevent claims without merit including:

- having the power to dismiss applications (s 399A);
- making an order for costs against a party (s 400A);
- imposing a cost order against a lawyer or paid agent where a speculative claim is encouraged (s 401A(1A))[4]

In this regard, it does not appear to be necessary to explicitly amend Part 3-1 of the FW Act to introduce exclusions for complaints that are frivolous and vexatious.

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).

Professionals Australia does not support an introduction of cap on compensation for claims lodged under Part 3-1 of the FW Act.

The protections provided by Part 3-1 cover:

- workplace rights;
- engaging in industrial activities;
- discrimination; and
- sham arrangements.

It is not appropriate to cap compensation due to the breadth of protections provided by the general protections jurisdiction. It is not possible to conjure up a monetary figure which can be said to adequate compensate an employee for being subject to adverse action as each case should be determined in its facts.

Professionals Australia notes that the remedies for adverse action can be quite broad and compensation may not even eventuate. For example if an adverse action claim is resolved by consent arbitration of the FWC then at the conclusion of the arbitration process the FWC may make one or more of the following orders:

- an order for reinstatement of the person
- an order for the payment of compensation to the person
- an order for payment of an amount to the person for remuneration lost

[4] PC Draft Report pg 230

- an order to maintain the continuity of the person's employment, or
- an order to maintain the period of the person's continuous service with the employer.

As mentioned above Professionals Australia believes that it is important to note once again that the General Protections jurisdiction is currently evolving and therefore attempts to cap the compensation available under this jurisdiction are at this stage premature and in fact may have the effect of limiting the protection provided by the jurisdiction.

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

Professionals Australia supports the ACTU's views on this issue.

Professionals Australia would be in favour of some sort of statutory review process being retained for the reason outlined above, but does recognise that the current review of modern awards is very resource intensive for both employer and employee organisations. Professionals Australia suggests that this could be alleviated with the ability to vary or make a modern award outside the designated statutory review process. This would highly likely result in interested parties making only those applications to vary awards which were considered to be a high priority.

Chapter 14 -Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurants and cafe industries

As outlined in our initial submission, Professionals Australia is totally opposed to proposed reductions to penalty rates.

Of all Professionals Australia members, Pharmacists employed under the Pharmacy Industry Award 2010 are one of the groups which would be directly impacted if the proposed

reduction as part of the 4 year review of modern awards was to be successful. Professionals Australia notes the comments by the Federal Government that the issue of penalty rates is a matter to be determined by the Fair Work Commission. In this regard the upholding of penalty rates paid to Pharmacists required to work unsociable hours is a high priority for Professionals Australia. In this regard the Association opposes outright the recommendations proposed in this section of the draft report.

Chapter 15 - Enterprise Bargaining

Approximately 50% of the members of Professionals Australia are covered to one extent or another by enterprise agreements.

Professionals Australia is concerned regarding the recommendations which have been proposed by the Productivity Commission and strongly supports the submissions of the ACTU in this regard.

Chapter 18 - The Enterprise Contract

Information Request

The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:

- additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements
- the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised
- clauses that could be included in the template arrangement
- possible periods of operation and termination
- the advantages and disadvantages of the proposed opt in and opt out arrangements.
- In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies.

As stated in the request for information the Productivity Commission *"seeks information on the costs (including benefits of an enterprise contract to employers, employees and to regulatory agencies."*

From the perspective of Professionals Australia there are 2 main areas of concern which relate to "process" and "content".

Firstly, the capacity to vary a Modern Award by the imposition of the proposed enterprise contracts on a *"class, or a particular group of employees"* is a matter of serious concern.

Such a proposal abandons any notion that employees will have a right to negotiate regarding their salaries and conditions of employment notwithstanding how limited that right is in practise. In addition such instruments could be imposed without negotiation as a condition of employment.

Issues relating to the unequal bargaining relationship which exists between employers and employees were canvassed in some detail in the Association's initial submission.

For instance, and as mentioned earlier in this submission, a survey of Professionals Australia's members found that nearly 82% of respondents reported that that they had little or no say in the negotiation of their contracts of employment. The recommendation that enterprise contracts may be imposed implies that the lack of a right for employees to negotiate is a virtue and is something to be welcomed.

Professionals Australia submits that removing the already limited rights that individual employees have to negotiate would be a serious retrograde step.

Secondly, the content of enterprise contracts as outlined would be to allow the employer at their sole discretion to negate the operation of the modern award safety net. In this regard the view that an enterprise contract would remove any ambiguity in the interaction between a common law contract and a modern award for example is probably correct. Currently a common law contract cannot be in conflict with a modern award or enterprise agreement. Under an enterprise contract it would be possible to have a "Set Off" provision which in exchange for the payment of a monetary amount the entire modern award could be negated.

As outlined in Professionals Australia initial submission (p.25-35) the Association has had experiences with common law contracts which already contain "Set Off" provisions which seek to override modern award provisions. However, these common law contracts need to comply with the various industrial instruments which enshrine rights. Professionals Australia totally rejects the proposition that these underpinning rights could be unilaterally removed.

Finally, this submission was prepared by National Industrial Officer/Lawyer Janet Tan and Michael Butler, Director Industrial Relations.

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