Australian Higher Education Industrial Association

**PRODUCTIVITY COMMISSION**

**WORKPLACE RELATIONS FRAMEWORK REVIEW**

# POST-DRAFT SUBMISSION BY

# AUSTRALIAN HIGHER EDUCATION INDUSTRIAL ASSOCIATION

**18 September 2015**

AHEIA takes this opportunity to provide a submission in addition to the one provided on 17 March 2015.

This submission focuses on key issues arising from the Productivity Commission's Draft Report released on 4 August 2015, as is in two parts.

The first part of this submission (below) refers to key items that AHEIA will seek to address in person at the Productivity Commission's public hearing in Melbourne on 23 September 2015. The second part of this submission is an attached table summarising the AHEIA position with respect to each one of the draft recommendations and related matters specifically outlined in the Draft Report. The colour scheme in the table headings highlights Green for support, Beige for neutrality, and Red for non-support.

## Key Items

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."*

The Draft Report (at p.229) notes that further consideration is warranted in regard to reforms to the current unfair dismissal provisions that would better identify cases without genuine merit. The Draft Report further accepts that the issue of ''go-away money'', identified as a problem in the 2012 review of the Fair Work Act ("the FW Act"), remains a concern.

AHEIA is of the view that the issue of unmeritorious claims would be best addressed by adoption of an "up front filter" that would enable such claims to be dismissed "on the papers" in appropriate circumstances, without the need for a conciliation conference. This could be done in two ways. Firstly, as proposed by the Catholic Commission for Employment Relations ("CCER"), the conciliator or Fair Work Commission ("FWC") member could conduct an initial assessment and summarily dismiss the application if they consider it fails to disclose a prima facie case. The access to justice concerns identified by CCER could be largely overcome if, rather than writing to the parties to advise that the matter would be dismissed, the conciliator or FWC member contacted the applicant and either conducted a preliminary interview with them or asked for further information in writing. Secondly, a number of claims lack merit because, for jurisdictional reasons, they do not constitute a dismissal. Prior to the introduction of the FW Act, certain jurisdictional objections were able to be dealt with on the papers. Respondents who raised a jurisdictional objection were also given the option of proceeding straight to a jurisdictional hearing, which, if successful, would mean the matter would be dismissed and there would be no requirement for a conciliation conference. We suggest that the re-introduction of these measures should also be considered by the Productivity Commission.

AHEIA certainly supports the concept of more robust and merit-based conciliation of unfair dismissal claims. However, based on our experience, we are of the view that more merit-based conciliation alone will not of itself result in a dramatic reduction in claims that lack merit. In this respect, we see no reason why the two proposals at draft recommendation 5.1 should be considered as being mutually exclusive, and suggest that they should both be adopted.

Chapter 5 Information Request

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

AHEIA repeats its submission of 17 March 2015 that filing fees should be increased to act as a form of deterrent to claims that have no reasonable prospect of success, and that this should be the case for unfair and unlawful dismissal applications, general protections applications and anti-bullying applications.

The AHEIA submission of 17 March 2015 referred to the fact that the United Kingdom has introduced reasonably significant unfair dismissal filing fees (£250 and a further £950 if the matter proceeds to a hearing), with orders for reimbursement by the employer able to be made if the claim is successful. The Report of the UK Ministry of Justice on Tribunal Statistics for the quarter ending June 2014 (at page 8) refers to a 70% reduction in Employment Tribunal claims from the corresponding quarter in 2013, and relates this to the fee regime introduced on 29 July 2013 alongside wider reform of procedural rules.

The introduction of a similar regime in Australia would deter frivolous or vexatious claims and/or claims from employees hoping to get a "commercial" settlement from their employer. The quantum of the increased fees need not, however, be as high as in the United Kingdom, or be so high as to be prohibitive to low-paid employees.

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."*

AHEIA agrees that it is crucial that s.341 of the FW Act be modified so as to curb the excessive breadth of claims that may be brought under the heading of a "complaint or inquiry" in relation to a person's employment (s.341(1)(c)(ii)). Greater clarity in relation to the definition of "in relation to employment", as proposed by Draft Recommendation 6.2, would go some way to alleviating this problem. We would propose that the FW Act be modified so as to make it clear that in order to constitute a workplace right, the complaint or inquiry must be "directly" related to the person's employment.

This modification alone, however, would not address the greater issue, which is the uncertainty in relation to the first limb of the section – that is, the breadth of the "complaint or inquiry" itself. A number of parties, including AHEIA, made submissions in regard to this issue. We acknowledge that, as set out at p 251 of the Draft Report, the Australian Government intended that the general protections were intended to rationalise, but not diminish, existing provisions, and that it was intended that there be some expansion in the scope of the protections that had existed prior to the introduction of the FW Act. Nevertheless, the inconsistency in various court judgments in interpreting the scope of the section (see p 39-40 of the CCER submission) has led to uncertainty, and, arguably, to decisions that go beyond what might have been envisaged by the Parliament. We are of the strong view that the FW Act should be modified so as to make it clear that the "complaint or inquiry" (irrespective of to whom it is made) needs to be confined to subject matter that is capable of adjudication by a court or tribunal. For example, this would include a complaint regarding underpayment of wages, or a failure by the employer to abide by a contractual obligation, but would not include a complaint about the employer's approach to decision making (see *Harrison v In Control Pty Ltd* [2013] FMCA 149).

AHEIA notes that the second part of Draft Recommendation 6.2 appears to deal with the issue of "genuine belief" raised by CCER at p 40-41 of its submission. We agree with the CCER that this is a problematic area, and the proposal suggested by the Commission would seem to us to be a sound, efficient and cost-effective method of addressing it.

Chapter 19 Information Request

*"The Productivity Commission seeks further input from inquiry participants on whether s.424 of the Fair Work Act 2009 (Cth) should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low."*

AHEIA opposes any changes to s.424 that would permit industrial action to proceed on the basis that the risk of harm is low. The issue is not the degree of risk. The issue is the nature of the damage that may be caused if the industrial action takes place.

The evidence given by Monash University's Director of Mental Health and Safer Community Programs, Ms Sally Trembath, in the 2013 case involving bans on the transmission of student examination results at that university – see *NTEU v Monash University* [2013] FWCFB 5982 at [35] – regarding the psychological impact of the industrial action in question on innocent third parties, is very illustrative of the severe consequences that certain types of industrial action can have on individuals not involved in the bargaining process.

It is particularly important that industrial action should not be permitted if it involves a threat to life or to the personal health or safety of human beings. If the focus is placed on the issue of the likelihood of the damage occurring, and a finding of low likelihood is made and subsequently proven wrong, terrible consequences may result that profoundly affect individuals. A considered assessment of the likelihood of such consequences is also always going to be problematic given the short space of time that will be available to the FWC to make such an assessment.

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**PRODUCTIVITY COMMISSION WORKPLACE RELATIONS FRAMEWORK REVIEW**

# AHEIA POSITION SUMMARY

**Chapter 3 Institutions**

| **DRAFT RECOMMENDATION 3.1** | **AHEIA position** |
|---|---|
| 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. | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 3.2** | **AHEIA position** |
| 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.<br>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.<br>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. | No position is being put regarding this draft recommendation. |
| **DRAFT RECOMMENDATION 3.3** | **AHEIA position** |
| 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:<br>• an independent expert appointment panel should be established by the Australian Government and state and territory governments | No position is being put regarding this draft recommendation. |

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| • members of the appointment panel should not have had previous direct roles in industrial representation or advocacy<br>• the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4<br>• 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** | **AHEIA position** |
| 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.<br>Members of the Minimum Standards Division should have well-developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines.<br>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.<br>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. | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 3.5** | **AHEIA position** |
| The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes. | AHEIA supports this draft recommendation. |

**Chapter 4 National Employment Standards**

| **DRAFT RECOMMENDATION 4.1** | **AHEIA position** |
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| 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. | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 4.2** | **AHEIA position** |
| 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. | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 4.3** | **AHEIA position** |
| 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. | AHEIA does not support an increase to the NES annual leave entitlement. Any increases to annual leave entitlements, coupled with trade-offs, should be the subject of enterprise bargaining rather than legislative intervention. |
| **INFORMATION REQUEST** | **AHEIA position** |
| The Productivity Commission seeks information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carer's leave) if they so wish, and whether such a mechanism would be worthwhile. | AHEIA does not see this as a practical option for universities. It is, however, something that is presently able to be bargained, and no legislative intervention is necessary. |

**Chapter 5 Unfair dismissal**

| INFORMATION REQUEST | AHEIA position |
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| The Productivity Commission seeks further views on possible changes to lodgement fees for unfair dismissal claims. | AHEIA's submission of 17 March 2015 called for an increase in lodgement fees. AHEIA is of the view that the fees should be of sufficient magnitude to act as a deterrent to claims that have no reasonable prospect of success. |
| **DRAFT RECOMMENDATION 5.1** | **AHEIA position** |
| 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. | AHEIA supports changes to the conciliation process that seek to ensure that there is a more robust discussion of the merits of the application, consistent with the submission of CCER. AHEIA also supports the introduction of an "up-front filter process" enabling claims with no prospect of success (eg because of jurisdictional issues) to be dismissed on the papers. |
| **DRAFT RECOMMENDATION 5.2** | **AHEIA position** |
| The Australian Government should change the penalty regime for unfair dismissal cases so that:<br>• an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct<br>• 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. | AHEIA supports this draft recommendation, except that the reference to **"serious misconduct"** needs to be replaced with a reference to "misconduct". Financial penalties should only apply, however, where the procedural error is deliberate or reckless. |
| **DRAFT RECOMMENDATION 5.3** | **AHEIA position** |
| 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). | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 5.4** | **AHEIA position** |
| Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the Fair Work Act 2009 (Cth). | No position is being put regarding this draft recommendation. |

**Chapter 6 The General Protections**

| DRAFT RECOMMENDATION 6.1 | AHEIA position |
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| 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. | AHEIA supports this draft recommendation.<br><br>A number of employer submissions had argued for reform to the reverse onus of proof in general protections cases. While the Productivity Commission has rejected this, it has acknowledged that submissions have indicated that the discovery process is being used as a tool by which an applicant can seek to search for the employer's ''intent'' by requiring potentially hundreds of thousands of documents to be produced, and the draft recommendation would have the effect of removing this practice. |
| **DRAFT RECOMMENDATION 6.2** | **AHEIA position** |
| 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.<br>• 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.<br>• 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. | AHEIA supports this draft recommendation.<br><br>AHEIA is also strongly of the view that it be made clear that "complaint or inquiry" should be confined to subject matter that is capable of adjudication by a court or tribunal. For example, this would include a complaint regarding underpayment of wages, but would not include a complaint about the employer's approach to decision making. This is consistent with the decision in *Harrison v In* Control [2013] FMCA 149. |
| **DRAFT RECOMMENDATION 6.3** | **AHEIA position** |
| 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. | AHEIA supports this draft recommendation, and supports the proposition that it is legitimate for an employer to take adverse action against an employee who makes frivolous or vexatious complaints. |

| DRAFT RECOMMENDATION 6.4 | AHEIA position |
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| The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the Fair Work Act 2009 (Cth). | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 6.5** | **AHEIA position** |
| 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. | AHEIA supports this draft recommendation. |

**Chapter 8 Minimum wages**

| DRAFT RECOMMENDATION 8.1 | AHEIA position |
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| 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. | AHEIA supports this draft recommendation. |

**Chapter 9 Variations in uniform minimum wages**

| DRAFT RECOMMENDATION 9.1 | AHEIA position |
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| 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. | AHEIA supports this draft recommendation. |
| **INFORMATION REQUEST** | **AHEIA position** |
| The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria. | No position is being put regarding this request. |
| **DRAFT RECOMMENDATION 9.2** | **AHEIA position** |
| The Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:<br>• the role of the current system within the broader set of arrangements for skill formation<br>• the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression<br>• the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives. | AHEIA supports this draft recommendation. |

**Chapter 10 Measures to complement minimum wages**

| INFORMATION REQUEST | AHEIA position |
|---|---|
| The Productivity Commission invites participants' further input on the feasibility, merits and optimum design on an earned income tax credit in Australia, what its introduction might mean for future minimum wage determinations and employment outcomes, and in what conditions it would be appropriate to implement such a scheme. | No position is being put regarding this request. |

**Chapter 12 Repairing awards**

| DRAFT RECOMMENDATION 12.1 | AHEIA position |
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| The Australian Government should amend the Fair Work Act 2009 (Cth) to:<br>• remove the requirement for the Fair Work Commission to conduct four yearly reviews of modern awards<br>• 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.<br>To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:<br>• use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains<br>• obtain public guidance on reform options. | AHEIA opposes the removal of 4 yearly review regime, and is concerned that its removal may lead to a greater number of ad hoc union applications to vary modern awards. |
| **DRAFT RECOMMENDATION 12.2** | **AHEIA position** |
| The Australian Government should amend the Fair Work Act 2009 (Cth) so that the Minimum Standards Division of the Fair Work Commission has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews. | Whilst AHEIA agrees that incidental or mechanical variations, such as consolidating ad hoc allowances into minimum wage rates should be permitted, AHEIA strongly opposes allowing minimum wage rates within awards to be varied other than on work value grounds. Particular difficulties would arise from adjusting award rates with regard to market forces, as markets obviously move up and down over time. Consideration of market forces should be confined to enterprise bargaining. |

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

| DRAFT RECOMMENDATION 14.1 | AHEIA position |
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| 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.<br>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.<br>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. | No position is being put regarding this draft recommendation. |
| **DRAFT RECOMMENDATION 14.2** | **AHEIA position** |
| The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice. | No position is being put regarding this draft recommendation. |
| **INFORMATION REQUEST** | **AHEIA position** |
| The Productivity Commission seeks views on whether there is scope to include preferred hours clauses in awards beyond the current narrow arrangements, including the scope for an arrangement where an employer would be obliged to pay penalty rates when it requested an employee to work at an employee's non-preferred time in the employment contract.<br>What would the risks of any such 'penalty rate' agreements be and how could these be mitigated? | No position is being put regarding this request. |

**Chapter 15 Enterprise bargaining**

| DRAFT RECOMMENDATION 15.1 | AHEIA position |
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| The Australian Government should amend Division 4 of Part 2-4 of the Fair Work Act 2009 (Cth) to:<br>• 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.<br>• 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. | AHEIA supports this draft recommendation.<br>In the last round of agreement approvals, several of our member universities were disadvantaged by the current inflexibilities in the Fair Work Act 2009 in relation to both these issues, and in some cases incurred the cost of legal advice to address and/or resolve them. |
| **INFORMATION REQUEST** | **AHEIA position** |
| The Productivity Commission seeks feedback on whether there is a mechanism that would only restrain pattern bargaining:<br>• where it is imposed through excessive leverage or is likely to be anticompetitive<br>• while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to | No position is being put regarding this request. |
| **DRAFT RECOMMENDATION 15.2** | **AHEIA position** |
| 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. | AHEIA supports this draft recommendation.<br><br>The current situation, where the collective can effectively eliminate the flexibility options of the individual, is inconsistent with the aims of the Fair Work Act. |
| **DRAFT RECOMMENDATION 15.3** | **AHEIA position** |
| 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:<br>• can be up to five years after the day on which the Fair Work Commission approves the agreement, or<br>• 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. | AHEIA supports this draft recommendation. |

| ***DRAFT FINDING 15.1*** | **AHEIA position** |
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| *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.* | AHEIA agrees with this draft finding. |
| **DRAFT RECOMMENDATION 15.4** | **AHEIA position** |
| 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. | AHEIA supports this draft recommendation. |
| **INFORMATION REQUEST** | |
| What should be the basis for the revised form of the no-disadvantage test, including whether, and to what extent past forms of the no-disadvantage test provide a suitable model and would be workable within the current legislative framework? | AHEIA considers that the no-disadvantage test should be the same as applied under the Workplace Relations Act 1996 (Cth) prior to the introduction of the WorkChoices amendments.<br><br>Unless outweighed by public interest considerations that should lead to the agreement otherwise being approved by the Fair Work Commission, approval should not occur unless "…on balance, there is no reduction in the overall terms and conditions of employment" of the classes of employees covered by the agreement, when contrasted to the NES and the relevant modern award.<br><br>It is essential that the agreement be assessed on an overall basis, as opposed to a "line by line basis". Approval should also not be denied simply because an individual employee may be able to point to how the agreement might disadvantage that person because of their unique personal circumstances. |

| DRAFT RECOMMENDATION 15.5 | AHEIA position |
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| The Australian Government should amend the Fair Work Act 2009 (Cth) so that:<br>• a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted<br>• 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. | AHEIA opposes the draft recommendation that a "5% cohort" threshold should apply for representation, as we are concerned to ensure that individual staff who are not union members are permitted an opportunity to be represented in bargaining.<br><br>Any notice period prescription for nominating a bargaining representative would also need to cater for employees who commence employment after bargaining has commenced. |
| **DRAFT RECOMMENDATION 15.6** | **AHEIA position** |
| The Australian Government should amend the rules around greenfields agreements in the Fair Work Act 2009 (Cth) so that bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 15.7** | **AHEIA position** |
| The Australian Government should amend the Fair Work Act 2009 (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may (as illustrated in figure 15.5):<br>• continue negotiating with the union<br>• request that the Fair Work Commission undertake 'last offer' arbitration of an outcome by choosing between the last offers made by the employer and the union<br>• submit the employer's proposed greenfields arrangement for approval with a 12 month nominal expiry date.<br>Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test. | AHEIA supports this draft recommendation. |

**Chapter 16 Individual arrangements**

| DRAFT RECOMMENDATION 16.1 | AHEIA position |
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| The Australian Government should amend the Fair Work Act 2009 (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum. | AHEIA supports this draft recommendation. |

| DRAFT RECOMMENDATION 16.2 | AHEIA position |
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| 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).<br>To encourage compliance the Fair Work Ombudsman should:<br>• provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new NDT, including template arrangements<br>• 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. | AHEIA supports this draft recommendation. |

| DRAFT RECOMMENDATION 16.3 | AHEIA position |
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| 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. | AHEIA supports this draft recommendation. |

**Chapter 17 The enterprise contract**

| INFORMATION REQUEST | AHEIA position |
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| 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:<br>• additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements<br>• 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<br>• clauses that could be included in the template arrangement<br>• possible periods of operation and termination<br>• the advantages and disadvantages of the proposed opt in and opt out arrangements.<br>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 | AHEIA supports the proposal for the availability of 'enterprise contracts' for classes of employees, as an alternative to enterprise agreements, and for the contract to operate for a specified period of time with employees being able to opt out on the giving of 12 months' notice.<br><br>AHEIA also supports the proposition that employees be permitted to opt to be covered by enterprise contract irrespective of whether they are currently covered by a modern award or by an enterprise agreement.<br><br>Whilst there may be some administrative costs involved in putting an enterprise contract in place, this will be a consideration for the employer to take account of when deciding whether or not to offer an enterprise contract to a class of employees. |

**Chapter 19 Industrial disputes and right of entry**

| DRAFT RECOMMENDATION 19.1 | AHEIA position |
|---|---|
| The Australian Government should amend s. 443 of the Fair Work Act 2009 (Cth), clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination. | AHEIA supports this draft recommendation (which adopts the AHEIA submission of 17 March 2015).<br><br>This will not prevent the commencement of bargaining, and the consequential right to seek a protected action ballot order, where the employer and/or the majority of employees genuinely wish to bargain for a new agreement. |
| **INFORMATION REQUEST** | **AHEIA position** |
| The Productivity Commission seeks further input from stakeholders on how protected action ballot procedures may be simplified to reduce compliance costs, while retaining the benefits of secret ballots. Potential simplifications include:<br>• removing the requirement that a protected action ballot specify the types of actions to be voted on by employees, and instead simply requiring a vote in favour of any forms of protected industrial action<br>• amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared<br>• granting the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot. | AHEIA opposes any lessening of the current requirements for the taking of protected industrial action. |
| **INFORMATION REQUEST** | **AHEIA position** |
| The Productivity Commission seeks further input from stakeholders on how 'significant harm' should be defined when the Fair Work Commission is deciding whether to exercise its powers under s. 423 and s. 426 of the Fair Work Act 2009 (Cth). | AHEIA is of the view that 'significant economic harm' under s.423 and s.426 (and 'significant damage' under s.424 (1)(d)) should be defined to make it clear that the harm need not be 'exceptional' to be regarded as 'significant'. |
| **DRAFT RECOMMENDATION 19.2** | **AHEIA position** |
| 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). | AHEIA supports this draft recommendation. |

| INFORMATION REQUEST | AHEIA position |
|---|---|
| The Productivity Commission seeks further input from inquiry participants on whether s. 424 of the Fair Work Act 2009 (Cth) should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low. | AHEIA opposes any changes to s.424 that would permit industrial action to proceed on the basis that the risk of harm is low. |
| **DRAFT RECOMMENDATION 19.3** | **AHEIA position** |
| 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. | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 19.4** | **AHEIA position** |
| 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. | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 19.5** | **AHEIA position** |
| 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:<br>• deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, or<br>• 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. | AHEIA does not believe that the draft recommendation will involve any meaningful improvement for dealing with brief work stoppages (or partial work bans).<br><br>AHEIA understands the reservations of the Productivity Commission that a minimum 4 hour pay deduction (as proposed by AHEIA in it's submission of 17 March 2015 or a 25% pay deduction as proposed by the Qantas Group) might provide an incentive for longer work stoppages. Alternatively, therefore, employers should be given the discretion to determine the amount of the pay deduction up to a permitted maximum (which AHEIA considers should be 4 hours). This discretion will necessarily involve the repeal of s.472 of the Fair Work Act 2009. |

| INFORMATION REQUEST | AHEIA position |
|---|---|
| While the Productivity Commission sees a prima facie case for allowing employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban that impacts on the performance of normal duties, the Commission requests feedback from stakeholders about the risks that such a change may entail. | AHEIA repeats its comments above in relation to brief work stoppages, which are equally applicable to partial work bans. |
| **INFORMATION REQUEST** | **AHEIA position** |
| The Productivity Commission seeks further feedback from inquiry participants on what forms of more graduated employer industrial action should be permitted, and how these should be defined in statute. | AHEIA supports amendment of the Fair Work Act 2009 to make it clear that employer industrial action can include:<br>(i) a direction to employees to only perform a particular subset of their normal work functions; or<br>(ii) imposing a form of 'partial lockout' by reducing the working hours of employees<br>and adjusting their wages accordingly. |
| **DRAFT RECOMMENDATION 19.6** | **AHEIA position** |
| 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. | AHEIA supports this draft recommendation. |
| **DRAFT RECOMMENDATION 19.7** | **AHEIA position** |
| 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:<br>• repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier's critical resources<br>• require the Fair Work Commission to take into account:<br>- the combined impact on an employer's operations of entries onto the premises<br>- the likely benefit to employees of further entries onto the premises<br>- the employee representative's reason(s) for the frequency of entries. | AHEIA supports this draft recommendation. |

| DRAFT RECOMMENDATION 19.8 | AHEIA position |
|---|---|
| The Australian Government should amend the Fair Work Act 2009 (Cth) so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days. | AHEIA supports this draft recommendation. |

**Chapter 20 Alternative forms of employment**

| DRAFT RECOMMENDATION 20.1 | AHEIA position |
|---|---|
| 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). | AHEIA supports this recommendation (which takes account of the AHEIA submission of 17 March 2015). With respect to casual employees, with whom an employment relationship obviously exists, an agreement should not be able to impose restrictions on their engagement, but should be able to regulate their terms of employment. |
| **INFORMATION REQUEST** | **AHEIA position** |
| The Productivity Commission seeks feedback on the extent to which unpaid internships have become more commonplace across the economy, whether any growth in such arrangements has led to problems rather than opportunities, as well as the potential remedies to any specific issues. | AHEIA recognises that university students are often engaged in unpaid internships as part of their course of study. This is regarded as an entirely legitimate arrangement that assists the acquisition of knowledge, and is recognised as such by s.15 of the Fair Work Act 2009 in excluding these internships from the concept of employment. |

**Chapter 21 Migrant workers**

| DRAFT RECOMMENDATION 21.1 | AHEIA position |
|---|---|
| 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)).<br><br>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. | AHEIA supports this draft recommendation. |

**Chapter 22 Transfer of business**

| DRAFT RECOMMENDATION 22.1 | AHEIA position |
|---|---|
| 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. | AHEIA supports this draft recommendation. |

**Chapter 24 Competition policy**

| INFORMATION REQUEST | AHEIA position |
|---|---|
| The Productivity Commission seeks further input from inquiry participants on whether the secondary boycott prohibitions in the Competition and Consumer Act 2010 (Cth) should be amended to:<br>• amend or remove s. 45DD(1) and s. 45DD(2)<br>• grant Fair Work Building and Construction a shared jurisdiction to investigate and enforce the secondary boycott prohibitions in the building and construction industry | AHEIA supports amendment of s. 45DD(1) and s. 45DD(2) to outlaw secondary boycotts that are put in place to pursue bargaining claims. |

**Chapter 25 Compliance costs**

| INFORMATION REQUEST | AHEIA position |
|---|---|
| The Productivity Commission seeks data or other information on the extent to which the workplace relations system imposes unnecessary ongoing costs on unions, and how these costs are likely to be affected by draft recommendations proposed in this inquiry. | No position is being put regarding this request. |