2ND Submission to the Productivity Commission- Workplace Relations Framework Inquiry

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1. Introduction

Job Watch Inc (**JobWatch**) is pleased to contribute to the Productivity Commission's Workplace Relations Framework Inquiry.

In this, its second submission to the Productivity Commission[1], JobWatch will reply to the recommendations put forward by the Productivity Commission in its Workplace Relations Framework Draft Report[2] (**the Report**) and refers to and repeats its first submission.

JobWatch recommends that:

1. **The current workplace relations system, including the unfair dismissal and general protections provisions of the *Fair Work Act 2009* (Cth) (FW Act) remain largely unchanged as it strikes an appropriate balance between the interests of employers and employees.**

2. **Filing Fees for Unfair Dismissal applications remain unchanged.**

3. **Procedural Fairness continue to play its role in the award of compensation for successful Unfair Dismissal claims.**

4. **A 'Front End Filter' not be implemented in Unfair Dismissal cases.**

5. **Reinstatement remain the primary goal of Unfair Dismissal legislation.**

6. **The Small Business Code be removed.**

7. **Discovery processes under the FW Act not be aligned with those under the *Federal Court Rules 2011*.**

8. **Definitional issues regarding "workplace rights" under s341 of the FW Act be left to the judiciary to decide.**

9. **A Good Faith Test for General Protections claims not be implemented.**

10. **Compensation for successful General Protections claimants remain uncapped.**

11. **No Enterprise Contracts.**

[1] See first submission: JobWatch Inc. 2015, Submission to the Productivity Commission- Workplace Relations Framework Inquiry, Melbourne
[2] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra

2. Unfair Dismissal

JobWatch is pleased that the Productivity Commission agrees that "Unfair Dismissal laws provide important and needed protections for employees."[3] Such laws prevent or mitigate employers from acting capriciously or unfairly towards their employees and legislation with this effect can be found in many OECD jurisdictions.[4] As stated in our first submission,[5] from the perspective of public policy if an employer wants to unfairly dismiss an employee it should be the employer that compensates the employee for being out for work, not the public purse.

The stated objectives of Unfair Dismissal laws, as articulated in the FW Act, are to balance the needs of business and the needs of employees, and to establish procedures that are quick, flexible and informal. Despite this inherent concern for balance, the Productivity Commission has suggested a number of unwelcome reforms that in effect tip the balance too far in favour of the employer. We consider these proposals now.

2.1 Filing Fees

The Report[6] suggests that:

> *"There may be merit in considering a revised, two-tier approach to lodgment fees by:*
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> - *increasing by a modest amount the fees for application lodgment, and tying the fee to income levels at the time of dismissal, such that higher income earners pay more to lodge applications; and/or*
> - *introducing an additional fee for cases proceeding to arbitration to partly recover the substantial costs involved with conducting proceedings in the FWC."*

The incidence of businesses choosing to pay 'go away' money to settle potentially vexatious claims is cited as one reason for the proposed increase. There are two points worth considering here. The first is if a matter proceeds to the Fair Work Commission (**FWC**), the FWC already has the power to find that the claim was made vexatiously, without reasonable cause, or with no

[3] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg. 199
[4] JobWatch Inc. 2015, Submission to the Productivity Commission- Workplace Relations Framework Inquiry, Melbourne, Pg. 6
[5] JobWatch Inc. 2015, Submission to the Productivity Commission- Workplace Relations Framework Inquiry, Melbourne, Pg 6
[6] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg.231

reasonable prospect of success, and may consequently award costs in the employer's favour.[7] Secondly, although payment of 'go away money' allows matters to settle quickly and quietly, employers are under no obligation to offer 'go away money' and have discretion to offer any amount of money they feel is appropriate or make no offer of settlement at all. If some employers choose to pay 'go away money' because that is the commercial, if not economically rational thing to do, then that should not concern the Productivity Commission and may in fact be evidence that the Unfair Dismissal system is working effectively and efficiently, taking into account the savings made by the FWC and Centrelink (i.e. the tax payer).

In advancing the appropriateness of the proposed increases, the Productivity Commission compares current Australian filing fees with those in overseas jurisdictions (e.g. the United Kingdom where fees are equivalent to $480 per Unfair Dismissal application and a further $1800 for cases going to arbitration). As a matter of public policy though, Unfair Dismissal laws exist to redress an economic bargaining power imbalance between employers and employees. The relative economic position of weakness that the employee occupies demands that Unfair Dismissal laws be simple and easy to access.

While filing fees may help deter vexatious claims, they are a blunt instrument that may equally deter meritorious claims. It did not take long for a search of the JobWatch database to yield an example of an individual who decided not to proceed with their application for a claim of Unfair Dismissal due to the associated costs.[8] We are confident that there are many similar cases on record. Of course, some safeguards do already exist against the inequities of filing fees. For example, if a matter settles at conciliation, or at least two days prior to hearing, the filing fee will be refunded. A fee waiver also exists in cases of financial hardship. While these are important and necessary provisions, a disincentive still exists for applicants who do not meet the requirements for a fee waiver and who wish to exercise their right to proceed beyond conciliation.

Recommendation: Filing Fees for Unfair Dismissal applications remain unchanged.

Finally, as Unfair Dismissal applicants are invariably *former* employees who are no longer in receipt of a wage, the proposal to fix fees to income levels at the time of dismissal cannot be viewed as either equitable or logical because, simply, there is no longer any income with which to fix such fees. On the basis of this reason and those mentioned above, JobWatch objects to any changes to fees relating to the lodgment of Unfair Dismissal claims.

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[7] *Fair Work Act 2009* (Cth) s587
[8] Female Caller (No Name), 6/7/99

2.2 Procedural Fairness

The Report recommends a reworking of the FW Act in order to reduce the weighting given to procedural fairness in the awarding of compensation. "The most problematic aspect of the current legislation," the Report says, "is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer."[9] The Report therefore makes the recommendation that the FW Act be amended so that procedural errors alone can no longer be a sufficient reason to award compensation or restore employment in what would otherwise be regarded as a valid case of dismissal. Conversely though, the Report does allow that such errors, at the discretion of the FWC, lead to either advice to the employer, or where serious or repeated, financial penalties.[10]

JobWatch opposes this recommendation on the basis that the Unfair Dismissal provisions already reflect an appropriate balance between procedural and substantive fairness. In the first instance, the legislation's eligibility requirements allow small employers 12 months, and large employers 6 months, to ascertain the suitability of an employee before the employee is eligible to lodge an Unfair Dismissal claim. During this time a termination by an employer is governed by the common law, meaning that the employer need not have a good reason (or a reason at all) nor adopt a fair procedure when dismissing an employee. Notice of termination or pay in lieu is all that is generally required.

In cases where the employee is eligible to make a claim, s385 of the FW Act requires that in order to be unfair a dismissal must either be harsh, unjust or unreasonable. In determining whether a dismissal is harsh, unjust or unreasonable, s387 requires that the Commission take into account a range of factors as far as they are relevant to the case being heard.[11] Such considerations include those pertaining to the substance of the matter (e.g. whether there was a valid reason for the dismissal related to the applicant's capacity or conduct) and those pertaining to procedure (e.g. whether the applicant had received any warnings about unsatisfactory performance, though in order to ensure fairness to businesses, it also has to consider both the size of the business and its access to HR). The FWC may also give consideration to any other matter it deems relevant.

It is important that procedure is considered when determining the unfairness of a dismissal and ultimately, the award of compensation. According to Stewart[12] "the emphasis on procedural fairness reflects the approach originally developed by the state tribunals in assessing the fairness

[9] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report Overview, Canberra, Pp 27-28
[10] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg. 233
[11] *Pipe Hunter Pty Ltd v Mahony [2013]* FWCFB 4852
[12] Andrew Stewart, Stewart's Guide to Employment Law (5th Ed), (2015) Pg. 350

of dismissals. In particular, it is expected that an employee will not be sacked for poor performance without having had their shortcomings drawn to their attention and being given an opportunity to improve. Nor should an employee be dismissed for misconduct without first having the chance to contest any allegations, and/or provide an explanation for their behaviour." For example, in *Fichera v Thomas Warburton Pty Ltd*,[13] the reasons provided for the dismissal of a manager of an underperforming branch with low sales were held to be valid, but the failure by the employer to warn the manager that his employment was at risk or to give the manager an opportunity to respond rendered the dismissal unfair. This was despite the fact that the manager was dismissed due to his poor performance and inability to provide the necessary leadership for the branch.

Nevertheless, because cases ultimately turn on their facts and no single consideration will be determinative, there already exists a safeguard against an over-reliance on procedure when determining the unfairness of a dismissal. For example in *Byrne v Australian Airlines Ltd*,[14] two airport workers were dismissed for stealing from bags they were handling despite not being given a proper opportunity to present their side of the story. The High Court held that the dismissal could not be regarded as harsh, unjust or unreasonable for that reason alone, without at least considering whether their conduct warranted dismissal. It is therefore necessary to view the circumstances of the case as a whole.

The warnings and procedural fairness that may be required when dismissing an underperforming employee are not onerous and simply accord with notions of natural justice – a founding principle of our legal system. To remove considerations of procedural fairness in determining whether a dismissal is unfair would be to render our definition of unfair dismissal incomplete. By extension, to deny compensation to a person who has not been accorded procedural fairness would be unintelligible. It should also be noted that the FWC has the power to reduce the amount of any order for compensation where there has been a lack of procedural fairness but where the employee caused their dismissal via their conduct.

Recommendation: Procedural Fairness continue to play its role in the award of compensation for successful Unfair Dismissal claims.

[13] *Fichera v Thomas Warburton Pty Ltd [2012]* FWA 4382 (unreported, Gooley C, 24 May 2012)
[14] *Byrne v Australian Airlines Ltd (1995)* 185 CLR 410

2.3 Front End Filter

The Productivity Commission agreed with submissions asserting that there existed an absence of an "effective filter at the front end of the unfair dismissal claims process and, at conciliation, a tendency to steer parties towards financial settlement."[15] Consequently it recommended providing the FWC with "greater direction to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation."[16]

While JobWatch is not in principle opposed to decisions being made 'on the papers' it is essential that all processes of decision-making accord with the requirements of natural justice. The FWC should only hear a matter 'on the papers' if the facts of the matter are not in dispute (e.g. by the applicant's own admission they haven't met the minimum employment period for Unfair Dismissal protection). Where the facts are in dispute, natural justice requires that parties be given an opportunity to contest allegations put against them. In most cases oral submissions are more favourable. Though for cases involving parties who are either illiterate or otherwise uncomfortable with the English language, oral submissions may be essential.

Recommendation: A 'Front End Filter' not be implemented in Unfair Dismissal cases.

Given that the long-stated aim of Unfair Dismissal law is to provide 'a fair go all round,'[17] it is hard to see how an expansion of 'on the papers' decision-making would advance this aim.

2.4 Reinstatement

The Productivity Commission has suggested that the Government should remove the emphasis on reinstatement as the primary goal of Unfair Dismissal provisions in the FW Act.[18] The reinstatement provisions require that, where an order for reinstatement is made, the person either be reappointed to the same position as they occupied immediately prior to the dismissal, or to another position on terms or conditions no less favourable.[19] Where an order for reinstatement is made, the FWC will retain the discretion to order any back pay (i.e. compensation for lost wages). Under the current arrangements the FWC can only award compensation alone (capped at 6 months wages) where it is satisfied that reinstatement is inappropriate. The Productivity Commission notes that despite being the primary goal, reinstatement is rarely ordered. Rather, it

[15] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg. 232
[16] Ibid.
[17] Re Loty (1971) Pg. 99
[18] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg. 235
[19] Andrew Stewart, Stewart's Guide to Employment Law (5th Ed), (2015) Pg. 377

suggests, in practice consideration of the objective is largely a "mere formality and is honoured more in the breach than the observance."[20]

JobWatch acknowledges that reinstatement is rarely ordered in practice. Two fundamental reasons may be advanced as to why this is. The first reason, overlooked by the Report, is that employees have to apply for the remedy and in practice "most successful applicants are ultimately willing to settle for monetary compensation."[21] This fact is neither here nor there when considering the appropriateness of the order's primary remedy status but does go some way in explaining why the remedy is so rarely ordered.

Another reason is the difficulty in re-establishing a broken down relationship. The key issue is not whether reinstatement would be difficult or embarrassing but whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive.[22] In practice, most employers succeed in disputing the viability of reinstatement.[23] Obviously, where proceedings have been brought against an employer it is reasonable to expect that the employment relationship might be pushed to its limits.

Nevertheless a strained relationship will not always amount to 'irretrievably broken.' For instance in *GlaxoSmithKline v Mackin (2010)*[24] Commissioner Bisset of the AIRC concluded that despite GSK's submission that there was an irreconcilable break down of the employment relationship, an order of reinstatement was not inappropriate. Of particular consequence was the fact that that there was no lack of contrition on the part of the applicant. Meanwhile in *Linfox v Stutsel (2012)*[25] Commissioner Roberts of the FWC found that given the applicant had shown no rancour towards Management, the employee/employer relationship could be re-established provided that there is goodwill on both sides. Likewise, in *Virgin Australia v Taleski (2013)*[26] Commissioner Cribb of the FWC found that given that the applicant was a good and diligent employee and that the employer was of a large size, reinstatement was not inappropriate.

As in these cases, where a former employee is keen to get back to work, and where the employment relationship has not been found to be beyond all repair, it is hard to see why reinstatement should not be the primary remedy. Given that Unfair Dismissal laws exist to redress the injustice caused by an employment relationship that has in essence wrongfully come to an

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[20] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg. 235
[21] Andrew Stewart, Stewart's Guide to Employment Law (5th Ed), (2015) Pg. 377
[22] Nguyen v Vietnamese Community in Australia [2014] FWCFB 7198
[23] Andrew Stewart, Stewart's Guide to Employment Law (5th Ed), (2015) Pg. 377
[24] *GlaxoSmithKline Australia Pty Ltd v Mackin (2010)* 197 IR 266
[25] *Linfox v StutselPty Ltd (2012)* 217 IR 52 (upheld in Linfox Australia Pty Ltd v FWC [2013] FCAFC 157
[26] *Virgin Australia International Airlines Pty Ltd v Taleski [2013] FWCFB 4191*

end, reinstatement is the most ideal remedy for rectifying this injustice. For those cases where reinstatement is appropriate, the primary status of the remedy ensures that it is not overlooked.

Recommendation: Reinstatement remain the primary goal of Unfair Dismissal legislation.

The primary status of reinstatement may also have a deterrent effect against employers unfairly dismissing employees whom they simply want to get rid of at any cost. In such cases the deterrent effect of compensation may not be sufficient where an employer has sufficiently deep pockets. For this reason, and those mentioned above, JobWatch believes that the Productivity Commission's recommended change to the primary status of the reinstatement order is unwarranted.

2.5 Small Business Dismissal Code

The Productivity Commission recommends that the Government remove the (partial) reliance on the Small Business Fair Dismissal Code within the FW Act. The Commission shows that the code "does not appear to be a sufficient safeguard for small businesses against a claim of unfair dismissal, nor is the advice provided by the Code clear and concise."[27] JobWatch notes that the impact of the code has been minimal with the best response to an Unfair Dismissal claim for small employers being in the factors that the FWC must take into account in determining whether a dismissal was harsh, unjust and unreasonable under section s387 of the FW Act including the size of the business and its access to legal or HR advice. The 12 month minimum employment period for Unfair Dismissal protection is also very helpful to small business.

Given that one of the practical effects of the code may be that it unreasonably emboldens small business to unfairly dismiss their employees, JobWatch agrees that the removal of the code is a step in the right direction. However, removal of the code should be unconditional and should not, contrary to the Productivity Commissions recommendations, hinge on the implementation of the Reports other recommendations regarding Unfair Dismissal laws.

Recommendation: The Small Business Code be removed.

[27] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg. 239

3. General Protections and Adverse Action

General Protections legislation emerged from various provisions guaranteeing freedom of association. Today, the provisions found in part 3-1 of the FW Act provide for a range of protections against discriminatory or wrongful treatment. Despite welcoming the Productivity Commision's assertion that "general protections.... have a valid role as... discrimination against any party based on factors unrelated to their work performance is both inefficient and contrary to well established social norms," JobWatch's opinion is that many of its subsequently proposed recommendations are unjustified. Given that there is now a growing body of literature and international law arguing for workers' rights to non-discriminatory treatment to be recognised as human rights, the importance of General Protections legislation is not to be understated.[28]

3.1 Sole/ Dominant Reason Test

We agree with the Productivity Commission's finding that...

> "On balance, and given recent case law, the grounds for significant change do not seem persuasive. Recent decisions have clarified substantially that the test to employ is whether a person took adverse action against another person, with a focus on 'substantial or operative' factors influencing the decision, or an 'operative or immediate' reason for acting, as the primary consideration. Given this, the evidence presented thus far to the inquiry does not suggest that a return to a test based on a sole or dominant reason is required."

3.2 Reversal of Onus of Proof/ Discovery Processes

JobWatch also welcomes the Productivity Commission's recommendation to retain the reverse onus of proof – the rationale being that employees cannot be in a position to acquire the information to prove the employer's intent (i.e. the reason for taking adverse action against them).

Of concern to the Productivity Commission however is that this reverse onus can "trigger a discovery process that allows a union or court to sift through potentially hundreds of thousands of documents in search of intent."[29] According to the Productivity Commission this may be costly for the employer and potentially expose many aspects of the business that would be unreasonable to expose to third parties.[30] The Productivity Commission recommends that the Australian

[28] See, eg, Philip Alston (ed), Labour Rights as Human Rights (Oxford University Press, 2005)
[29] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report Overview, Canberra, Pg. 29
[30] Ibid.

Government should amend the FW Act to formally align the discovery processes used in general protections cases with those provided in the *Federal Court's Rules 2011 (FCR)*.

While Part 20 of the *FCR*[31] provides that "a party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible," under the FW Act, there is currently no need for employer to discover anything more than is relevant to the proceeding, decided by a Judge in a directions hearing. Given this, JobWatch feels that the Productivity Commissions recommendation is unnecessary.

Recommendation: Discovery processes under the FW Act not be aligned with those under the *Federal Court Rules 2011.*

3.3 Workplace Rights

The Productivity Commission has suggested that the Government modify s341 of the FW Act in order to clarify the meaning of "workplace right."

The principle protections contained in Part 3-1 are divided into those relating to workplace rights and those relating to industrial activity. A person has a workplace right if he or she:[32]

(a) is entitled to the benefit of, or has a role or responsibility under a workplace law, workplace instrument or order made by an industrial body

(b) is able to initiate or participate in a process or proceedings under a workplace law or instrument

(c) is able to make a complaint or inquiry

  (i) to a person or body with the capacity to seek compliance with that law or workplace instrument or

  (ii) if they are an employee - in relation to their employment.

Certain persons, including employers, employees and industrial associations, are prohibited from taking adverse action against certain other persons because the other person has, or exercises a workplace right, or engages in industrial activity.

The Productivity Commission notes that of particular concern to several stakeholders is that the definition of what constitutes a 'workplace right' is overly vague. They argued that the current definition can be used to prevent employers from undertaking legitimate performance management or restructuring activities for fear of facing an adverse action claim. However, in

[31] *Federal Court's Rules 2011* (Cth) Part 20
[32] *Fair Work Act 2009* (Cth) s 341(1)

order for an employee to successfully make a General Protections claim, they must rely on a protected attribute. Poor performance is not a protected attribute and employers are at liberty to dismiss underperforming employees provided proper process is followed.

The Productivity Commission also believes that the 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. While the wording of s341(1)(c) may have initially left much to be desired the case law has now developed to a level where the scope of the provision can be ascertained with some clarity. In the case of *Shea v TRUenergy Services Pty Ltd (No 6)*,[33] Streeton-Dodds J, examined the creation of the provision, its apparent legislative purpose and also the case law relating to the extent of its operation. In summary, it was found that a complaint that an employee is able to make in relation to his or her employment is not at large, but must be founded on a source of entitlement, whether instrumental or otherwise. On appeal[34] the Full Court warned against implying into s341 that a complaint be "genuine" as it would encourage disputes about the bona fides of a complaint and discourage those with mixed motives from making a complaint. Moreover, whether a complaint is made "in relation to their employment" is context dependent. However the phrase will not extend to tenuous or remote relationships. Rather it "must lie within the bounds of relevance to the statutory purpose."[35]

Recommendation: Definitional issues regarding "workplace rights" under s341 of the FW Act be left to the judiciary to decide.

Given that more case law is likely follow, JobWatch believes it would be more appropriate to allow the courts to progressively clarify such definitional issues without immediately resorting to legislative intervention.

3.4 Good Faith Test

To allay purported concerns about unfounded litigation, the Productivity Commission has made two recommendations. Firstly, it has recommended that the FW Act also be amended to require complaints be made in 'Good Faith'. Such a decision would be made by the FWC via a "preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties. Secondly, the Productivity Commision

[33] Shea v TRUenergy Services Pty Ltd (No 6) (2014) 314 ALR 346
[34] Shea v EnergyAustralia Services Pty Ltd [2014] FCAFC 167
[35] Evans v Trilab Pty Ltd [2014] FCCA 2464 at [34]–[35]

recommends the Australian Government amend Part 3-1 of the FW Act to introduce exclusions for complaints that are frivolous and vexatious.

JobWatch recognises at least 3 possible issues regarding the introduction of a Good Faith Test. Firstly, as the FWC is not a Chapter 3 court, it will not have the jurisdiction to make final determinations about whether or not a General Protections claim is made in Good Faith and to strike out or otherwise prevent a claim from proceeding. If, however, the test is merely yet another step along the way, in addition to mediation/conciliation and with no determinative power, one may wonder what utility it would provide to warrant the extra resources that would have to be expended by the respective employee and the FWC itself.

In any instance a much more useful check against vexatious litigation already exists. Currently if an applicant applies to have a matter heard in the Federal Court or Federal Circuit Court, the respondent may immediately apply for an order that judgment be given against the applicant, i.e. the applicant's claim be struck out, because[36]

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or
(b) the proceeding is frivolous or vexatious; or
(c) no reasonable cause of action is disclosed; or
(d) the proceeding is an abuse of the process of the Court; or
(e) the respondent has no reasonable prospect of successfully defending the proceeding or part of the proceeding.

Such an application will be subject to the rules of Federal Court or Federal Circuit Court and will, unlike the proposed Good Faith Test, be binding. To this extent a separate preliminary test is not necessary.

Recommendation: A Good Faith Test for General Protections claims not be implemented.

As to the proposed introduction of Part 3-1 exclusions for complaints that are frivolous and vexatious, JobWatch believes that the power of the court to strike out such claims is more than satisfactory.

[36] *Federal Court's Rules 2011* (Cth) Rule 26.01

3.5 Compensation

The Productivity Commission has argued for the introduction of a cap on compensation for claims lodged under Part 3-1 of the FW Act. Amounts above the cap would therefore only be available through the courts directly.[37] An absence of compensation caps for matters covered by Part 3-1 of the FW Act, it argues, creates incentives for some parties to: [38]

1. Press speculative claims with little merit,
2. Choose this avenue of action over the standard unfair dismissal provisions.

JobWatch rejects the need for compensation caps under Part 3-1. The General Protections guard against a diverse range of human rights abuses by employers. The consequences of a breach of a General Protection can, as the Productivity Commission admits, have "very adverse impacts on claimants."[39] Uncapped compensation not only ensures that the award of compensation be commensurate with the breach but also provides a strong deterrent effect. Capped compensation amounts could have the undesirable effect of encouraging wholesale breaches by employers who would be able to factor a quantum of loss into a cost benefit analysis.

JobWatch therefore recommends retaining an uncapped compensation arrangement, which is in effect commensurate with damages at common law. The FW Act gives an eligible court the power to make any order it deems appropriate to remedy a General Protections breach. [40] In practice, for example, this means that a person dismissed in breach of the General Protections can claim their actual economic loss which is not capped in the same manner as in Unfair Dismissal (i.e. at 6 months wages) but is in effect capped by the applicant's actual or quantifiable economic loss which may be less than 6 months wages. Therefore, to state that compensation is uncapped in the General Protections is misleading as an eligible court will not order compensation in excess of the actual loss and damages suffered by an Applicant.

Recommendation: Compensation for successful General Protections claimants remain uncapped.

[37] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg. 263
[38] Ibid.
[39] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, Pg. 263
[40] *Fair Work Act 2009* (Cth) s 545(1)

4. Enterprise Contracts

The Productivity Commission has recommended that small businesses be permitted to vary the terms of an award for a class of employees to suit the needs of their business without having to negotiate with each worker individually or at the enterprise level and without the need for an employee ballot.[41] 'Enterprise Contracts' would effectively amount to a collective individual flexibility arrangement, but with some further flexibility. Employers could offer it to all prospective employees as a condition of employment but existing employees would be able to choose whether to sign on or stay with their existing employment contract. Moreover all Enterprise Contracts will be required to be lodged with the FWC but will only be required to pass a 'holistic no disadvantage test' if a complaint has been made by a covered employee.

JobWatch believes that the introduction of the Enterprise Contract model would be detrimental to employee bargaining power. The adoption of such a model would mean that potential future employees who wish to be covered by an award would simply have to walk away from the offer. Given that Individual Flexibility Agreements are currently not allowed to be offered on a take it or leave it basis, the Productivity Commissions recommendation for Enterprise Agreements is a step in the wrong direction.

Moreover the fact that Enterprise Agreements will not be assessed for disadvantage by the FWC until *after* a complaint has been made means that an illegal agreement may persist indefinitely. This possibility is of particular concern where a given class of employees are more likely to be unaware of their employment law rights or are otherwise disempowered from raising a complaint, for instance by virtue of language barriers or for fear of dismissal. Additionally, no mention is made in the Report regarding back pay for employees where an Enterprise Contract is subsequently found not to pass any 'no disadvantage test' by FWC.

JobWatch strongly opposes the concept of Enterprise Contracts as, quite simply, they would be open to abuse by disreputable employers and will lead to further exploitation of already vulnerable and disadvantaged workers.

[41] Productivity Commission 2015, *Workplace Relations Framework*, Draft Report Overview, Canberra Pg. 39

5. Conclusion

The current workplace relations system, including the unfair dismissal and general protections provisions of the FW Act should remain largely unchanged as it strikes an appropriate balance between the interests of employers and employees.

Thank you for considering our submission. JobWatch is confident that the above recommendations will increase the fairness of Australia's workplace relations framework.

We would welcome the opportunity to discuss any aspect of this submission further. Please contact Ian Scott on (03) 8643 1118 if you have any queries.

6. References

Cases

1. *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410
2. *Evans v Trilab Pty Ltd* [2014] FCCA 2464
3. *Fichera v Thomas Warburton Pty Ltd* [2012] FWA 4382 (unreported, Gooley C, 24 May 2012)
4. *GlaxoSmithKline Australia Pty Ltd v Mackin* (2010) 197 IR 266
5. *Linfox v StutselPty Ltd* (2012) 217 IR 52 (upheld in Linfox Australia Pty Ltd v FWC [2013] FCAFC 157
6. *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198
7. *Pipe Hunter Pty Ltd v Mahony* [2013] FWCFB 4852
8. *Shea v EnergyAustralia Services Pty Ltd* [2014] FCAFC 167
9. *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 314 ALR 346
10. *Virgin Australia International Airlines Pty Ltd v Taleski* [2013] *FWCFB 4191*

Legislation

1. *Fair Work Act 2009* (Cth)
2. *Federal Court's Rules 2011* (Cth)

Texts

1. Alston, Philip, (ed), Labour Rights as Human Rights (Oxford University Press, 2005)

2. JobWatch Inc. 2015, *Submission to the Productivity Commission- Workplace Relations Framework Inquiry*, Melbourne
3. Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra
4. Productivity Commission 2015, *Workplace Relations Framework*, Draft Report Overview, Canberra
5. Stewart, Andrew, *Stewart's Guide to Employment Law (5th Ed)*, (Sydney, The Federation Press, 2015)

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