

*Productivity
Commission Report
into Workplace
Relations – has it
gone far enough?*

9 September 2015



1 Introduction

Nothing provokes more debate than the state of workplace relations in Australia. The workplace system touches almost every aspect of life in some way.

When announced, it was anticipated that that the Productivity Commission's wide ranging enquiry into the operation of the workplace relations system could significantly influence the way Australian business manages its people.

In August 2015, the PC released its draft report, following more than 250 submissions from a wide range of stakeholders.

The PC report is likely to trigger a substantial debate in the coming months. It will shape the thinking of leaders – business, trade unions and political parties – as that debate unfolds. It will foreshadow reform that Australian business will have to plan for.

Most importantly, the draft report provides a real opportunity for business leaders to contribute to and influence this debate by making further submissions, prior to the release of the Productivity Commission's final report in November, 2015.

Given our unique insights into the operation of Australian industry, PwC takes pleasure in providing to its clients its analysis of this draft report and is ready to assist industry understand key issues in this debate and how to position itself for anticipated reform.

If you or your organisation would like to know more about how PwC can assist you deal with this or any other workplace relations matter, please feel free to contact Tim Frost on 02 8266 4609.



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2 Context: Reforming the labour market involves dealing with our past and future at the same time

Our past is catching up with us.....

Over the past 30 years Australia's workplace system has been in transition. This shift has not been smooth and is not complete.

In reality *"the system is neither a conciliation and arbitration system or a collective bargaining system but is a form of hybrid that seeks to straddle both systems"*.

While this approach has brought acknowledged improvements in recent history, there are serious doubts about whether this hybrid of old and new promotes necessary workplace productivity, workforce participation and business sustainability; particularly in light of significant and anticipated demographic changes of the Australian workforce

... and our future is just around the corner

The combination of disruptive emergent technology (including Artificial Intelligence and robotics) and a massive expansion of a very mobile global

labour market represent a near future perfect storm. According to the Centre for Economic Development Australia (CEDA) this will have a profound impact on the Australian workforce. CEDA predicts:

- almost 5 million Australian jobs being replaced by computers in the next decade or two.
- new relationships between businesses and employees with an increasing number of internationally mobile workers and more workers seeking self employment; many of them older and more professionally focused than previously so.
- new relationships between employees and their own careers as work becomes more specialised.
- Increased needs to develop innovation (rather than be an early adopter of innovation) to underpin the nation's prosperity will shift the demand for skills towards creative thinking and will also require new attitudes to the workforce.

"Without a boost in productivity growth, Australians face a future of stagnant and possibly declining living standards – a bequest to our children and grand children which no other generation of Australians have left"

John Fraser, Secretary to the Department of Treasury, 12 July 2015 – AFR, p 7

*"Australia is on the cusp of a new but very different industrial revolution".
"The extension of computerization into almost every aspect of human activity threatens to radically reshape the workforce of tomorrow.
However, in the more globalised economy, it remains to be seen whether it will generate a net increase in employment and wealth within Australia or if the labour market benefits will be dispersed."*

The Committee for Economic Development Australia (July 2015)

3 Context: Addressing these problems is like eating an elephant – one bite at a time

Identifying what is achievable – practical but yet aspirational goals

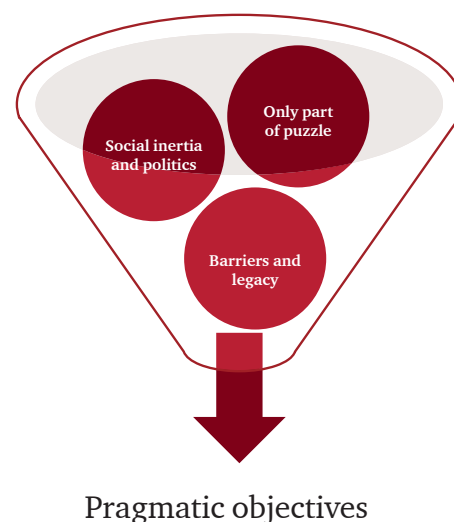
To address these challenges Australia must maximise the value of its workforce. Our health, education, population and workplace relations systems all need to be calibrated to meet this objective.

This won't happen overnight. The workplace system serves multiple objectives; focus will be hard. Further, it requires a balance between encouraging action and mandating compliance. Also, working towards this outcome will confront and challenge many political and social beliefs; the resistance to change is significant.

To put Australia's workplace relations system on a credible reform path, a pragmatic and staggered approach is required. Any changes need to meet three practical, though aspirational goals; namely:

- Promoting the pursuit of productivity, flexibility and innovation necessary to meet our changing needs.
- Shaping harmonious workplace arrangements to meet the needs of individual employers and employees.
- Removing the ability to abuse protections that negatively and inappropriately impact on productive performance.

With these goals in mind we have identified credible opportunities for reform, recommendations from the PC that address these area and further matters that require greater focus. This analysis is on the basis of our deep understanding of Australian Industry and specific research about concerns with the operation of the existing system.



4 What does the Draft Report say (and not say)?

In the remainder of this report, we analyse the Productivity Commission's report.

Firstly, we have identified 3 focusses of the thinking and recommendations set out in the Draft Report. These focusses are:

1. achieving higher levels of productivity, flexibility and innovation
2. increasing the focus on the needs of the enterprise and people
3. focussing protective regimes to minimise impacts on productivity

In each of these areas, we identify themes amongst the recommendations, and examine the recommendations the Productivity Commission has made, and set out some other measures we think are worthy of consideration.

In this way, we pull together by reference to the guiding principles of the Productivity Commission in this process both an outline of the recommendations that have been made, and some thoughts on where else reform effort could be focussed.

5 Productivity, flexibility and innovation

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| Opportunity | Assist business to achieve productivity through bargaining. |
| Productivity Commission recommendations | <ul style="list-style-type: none"> • Changing how the Fair Work Commission operates • Simplifying minimum standards and bargaining rules and changing penalty rate standards. |
| Other options | <ul style="list-style-type: none"> • Focus the Fair Work Commission on achieving productivity • Prohibit types of enterprise agreement clauses that limit productivity • Allow expired enterprise agreements to be terminated if they undermine productivity. |

What do employers say

Many employers and employees report little value in bargaining except certainty during the life of agreements.

Common concerns are that productivity has to be bought, and enterprise agreements may lock in undesirable work practices.

The bargaining system should promote innovative arrangements and help achieve enhanced productivity.

The PC recommendations

The PC says that enhanced productivity “... should arise from better management, not from a regulated environment.” This suggests the Productivity Commission does not see a role for changed rules in this area.

However, the PC recommendation of a change of focus and greater analytical capability within the Fair Work Commission may lead it to take a more proactive view on promoting greater workplace productivity and flexibility.

A less onerous “no disadvantage test” and limits on bargains regulating contractor use is likely to improve the quality of future enterprise agreements.

Other things that can be done ...

The “light touch” regulatory approach is correct, but there is an opportunity to do more.

- **The role of the Fair Work Commission:** Better resourcing of the Fair Work Commission, and establishment of a third division charged with the development of best practice approaches and industry education could help it and the Fair Work Ombudsman guide parties to achieving more productive approaches.
- The Productivity Commission should identify common enterprise agreement clauses that restrict productivity improvements (in addition to a prohibitions of the use of contractors and labour hire arrangements), and recommend that they not be permitted.
- **Termination of Enterprise Agreements:** The grounds on which an expired enterprise agreement (or part of an agreement) can be terminated should be widened to facilitate termination of arrangements that impede or restrict the productivity of the business.



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| Opportunity | Removing unnecessary regulation and red tape. |
| Productivity Commission recommendations | <ul style="list-style-type: none"> • Make it easy to correct process errors in bargaining applications rather than start again • Enterprise contracts to operate from lodgement without vetting by FWC/FWO • Proactive and targeted award repair replacing 4 yearly reviews • Increased skills and accountability of Commission members • Increased transparency of FWC conciliation processes • Minor amendments to the administration of holiday administration. |
| Other options | <ul style="list-style-type: none"> • A range of specific regulatory proposals not pursued (eg self regulation of agreement approval, streamlining redundancies, simpler transfer of business rules) • Streamlined award and enforcement arrangements to minimise the compliance burden and cost on small and medium sized business. |

What do employers say

The workplace system is extremely elaborate and legalistic.

Many of the processes of the system impede a direct relationship between employer and employees.

Complexity is increased by numerous agencies that don't fit well together.

The system should be simpler and easier to understand and use.

The PC's recommendations

Enterprise contracts which could operate without vetting are an important improvement. These would allow award provisions to be replaced without application to the Fair Work Commission, and could be the template for all agreements in the future.

“Award repair” has the potential to reduce unnecessary red tape. The proposed changes will require the FWC to take a proactive approach, targeting those areas that will make the biggest impact on employers’ burden and cost. One area of caution is to ensure that this process moves promptly so these benefits can be realized quickly.

Other things that can be done ...

Submissions to the Productivity Commission made many sensible suggestions which should be further considered. These include:

- self-regulation for collective agreement certification, as proposed for enterprise contracts
- streamlining redundancy based dismissals
- simplifying transmission of business arrangements. These warrant further consideration.

There are options to streamline the burden of red tape on this sector. The Small Business Code streamlined unfair dismissal processes for small businesses. This type of approach could be extended beyond unfair dismissals into areas such as general protection arrangements and award entitlement disputes. Specific proposals such as small business schedules to awards, exempting or simplifying entitlements and one stop shops for employment matters (FWC/FWO and Australian Human Rights Commission) should also be considered. Also, the PC might consider scrutinizing the compliance costs for small business further as it proposes to do in relation to costs for unions.

5 Productivity, flexibility and innovation (cont.)

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| Opportunity | Facilitate use of alternative labour sources. |
| Productivity Commission recommendations | <ul style="list-style-type: none"> • Enterprise agreements should not be allowed to restrict the engagement of contractors or the use of labour hire arrangements. |
| Other options | <ul style="list-style-type: none"> • Establish clearer rules to distinguish employees from contractors • Minimizing the consequences of errors in classifying workers as independent contractors • Promoting resources to education and assistance of those seeking to utilise alternative work arrangement. |

What do employers say

Constraints on the use of contractors and labour hire arrangements should be relaxed. There are two main constraints on the use of contractors

1. Enterprise agreements that impose limitations or restrictions
2. Uncertainty about whether a valid contractor relationship will be recognized by the law.

The PC recommendations

The PC recommends that terms in enterprise agreements that restrict the engagement of independent contractors/labour hire workers, etc., or regulate their engagement should be considered unlawful terms (and therefore inoperative). This is an important initiative that will, if implemented, remove one source of inflexibility in this area.

However, tightening of defences around sham contracting will increase the risk to employers of using contractors, especially where the contracting arrangement is with an individual rather than a corporate entity.

Other things that can be done ...

A clear definition of “contractor”:

The PC should work with stakeholders to develop a more straightforward distinction between employees and contractors. For example, if the arrangement involves the use of a corporate entity or ABN and workers compensation or other acceptable injury and illness insurance arrangements are satisfied by the contractor, the default position could be that a legitimate contractor relationship is established.

Dedicating resources to the education and assistance of those seeking to utilise such arrangements may be useful in dealing with uncertainties and the bias towards traditional employment arrangements. The Productivity Commission should consider ways for state and federal corporate business agencies to create certainty by developing user friendly tools and checklists which, once properly utilized, create a rebuttable presumption that contracting arrangements are appropriate.

6 Focus on the enterprise

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| Opportunity | Individual agreements? |
| Productivity Commission recommendations | <ul style="list-style-type: none"> • The development and promotion of revamped Individual Flexibility Agreements • The development of “enterprise contracts”? • A new streamlined “no disadvantage test”. |
| Other options | <ul style="list-style-type: none"> • Option to submit enterprise contract/IFA to FW Ombudsman to test for no disadvantage. |

What do employers say

Businesses and their employees are better able to develop workplace arrangements to meet their particular needs when there are a number of bargaining options available.

However the existing system offers few simple or effective options.

The complexity of existing options stops many businesses from using them.

The PC recommendations

IFAs: The Productivity Commission has described Individual Flexibility Agreements as “a new marque” of statutory individual arrangements” and has proposed a comprehensive package of changes to make them more readily available and more widely used.

- Collective agreements will no longer constrain their scope.
- Unilateral termination can be delayed for up to a year.
- Education and awareness about their use and effectiveness will be developed and deployed by the Workplace Ombudsman.

Enterprise contracts: The PC recognises that the existing high costs and daunting procedures of agreement making means small and medium sized businesses rarely use these arrangements to promote greater flexibility. In response, the Productivity Commission floats the concept of “enterprise contracts”, which would operate without ballot and without prior approval of the FWC.

An enterprise contract could alter award terms, subject to a no disadvantage test and other protections, and could be offered as a condition of employment for new employees (unlike an Individual Flexibility Agreement). Existing employees would have a choice to take up an enterprise contract or stay on existing arrangements.

Other things that can be done

Consideration should be given to providing employers an option to have enterprise contracts/IFA’s vetted by the FWC or FW Ombudsman to provide comfort that the no disadvantage test has been satisfied. This would further encourage take up of these options.

6 Focus on the enterprise (cont.)

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| Opportunity | Focus on enterprise and employer interests. |
| Productivity Commission recommendations | <ul style="list-style-type: none"> • “Award repair” should be undertaken, including a more proactive and targeted approach to award modernisation • A streamlined no disadvantage test. |
| Other options | <ul style="list-style-type: none"> • The opportunity to outlaw EBA terms that go beyond the interests of the enterprise and their employees. |

What do employers say

The existing arrangements permit bargaining in relation to a wide range of matters, but the complexity of the system and a focus on issues that don’t help productivity and efficiency can make this process difficult.

Bargaining is often sidetracked by extraneous matters, not directly relevant to the performance of the business or the employment of its staff.

The PC recommendations

The Fair Work Commission’s proposed **Minimum Standards Division** is slated to take a more proactive approach to award modernization, focusing particularly on those parts of awards that create complexity expense by utilizing better analytical and conceptual frameworks and capability. This is a useful approach, even though it is not clear how long it will take before these arrangements are effective.

Establishing a streamlined **No Disadvantage Test** to replace the Better Off Overall Test will give employers greater confidence that their enterprise

agreement proposals will pass the minimum standards required in the system. The Productivity Commission says it intends a less intrusive and more flexible approach, but wishes to hear the views of interested parties before it finalises the detail of this proposal.

Other things that can be done

There are some areas where a stronger focus on enterprise needs could be achieved:

- Areas already strongly regulated, such as general protections, workplace safety and rights to stand down employees should not also be able to be addressed in enterprise agreements
- Any claim that would undermine a fundamental design feature of the workplace system should be excluded – for example, dispute procedures that automatically mandate the arbitration of disputes should not be permitted.



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| Opportunity | Improving the bargaining process. |
| Productivity Commission recommendations | <ul style="list-style-type: none"> • Clarify when non-union bargaining agents may participate in discussions. |
| Other options | <ul style="list-style-type: none"> • Steps should be taken to encourage more effective bargaining • The role for the FWC and FWO in promoting better bargaining could be enhanced. |

What do employers say

The enterprise bargaining process is a key feature of the workplace relations system.

Many employers question whether the balance between orderly bargaining and industrial action is right.

Are the sanctions so lenient that they fail to deter bad faith bargaining?

The PC's recommendations

The Productivity Commission says that the good faith bargaining rules work well and that the Fair Work Commission already has sufficient powers to step in as a last resort where this is necessary. The PC rejects limits on bargaining that may encourage parties not to bargain among themselves. Their proposal to limit bargaining agents to a union representative or a person engaged to represent at least 5% of the affected workforce is a sensible change.

Other things that can be done

- Alternative bargaining styles can achieve good bargaining outcomes and have a broader public benefit
- The Fair Work Commission and Fair Work Ombudsman can play an enhanced role in promoting better bargaining behavior.

Case Study: Interest based bargaining in the United States

US experience with Interest Based Bargaining (IBB) shows that bargaining style is a key ingredient of an agreement's success.

The IBB approach focuses much more on understanding and building interests rather than asserting positions and seeking compromise. This approach:

- uses problem solving tools to avoid positional conflicts as opposed to creating conflict to win a point; and
- creates a high trust and open exchange rather than low trust/positional relationships).

A key enabler of such an approach is the active facilitation by skilled independent third parties (such as the Fair Work Commission) to teach good bargaining skill, ensure commitment to the process and help parties to address real concerns rather than simply adopt positions.

Cornell University researchers have found that “transformative” labour relations initiatives using IBB are more likely to succeed than other approaches, particularly in the areas of job security, profit-share and gain-share arrangements, team based working, work rule flexibility and increased engagement through work committees and increased worker input. (See Cutcher-Gershenfeld, J and Kochan, T. *Taking Stock; Collective Bargaining at the Turn of the Century* (2004) Vol 58(1) *ILRR* review pXX).

6 Focus on the enterprise (cont.)

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| Opportunity | Making industrial action a matter of last resort. |
| Productivity Commission recommendations | <ul style="list-style-type: none">• Industrial action should not occur until bargaining commences• Stand-downs should be allowed in the face of harmful “tactical” withdrawals of threats where the employer has made reasonable contingency plans• Streamline payroll deductions for industrial action• Increased penalties for unlawful industrial action. |
| Other options | <ul style="list-style-type: none">• The FWC should have enhanced powers to intervene to stop otherwise lawful industrial action when the harm to the business or community warrants• A consideration of other lawful actions employers may take other than lock outs. |

What do employers say

Industrial action is an undesirable but, within limits, is a legitimate part of the workplace system.

There are concerns that existing limits allow industrial action too early in the process, don't make industrial action a matter of last resort and don't allow intervention where necessary.

The PC recommendations

While recognising some shortcomings with the existing “extensive and complex” arrangements, the Productivity Commission says industrial disputes appear not to be a major problem.

It accepts that there is no rationale or community interest for action to commence before bargaining. Its proposals to allow stand-downs where industrial action is threatened and then does not proceed, and to “dock” employee's pay for periods of industrial action are desirable, as they are designed to create consequences for mischievous industrial action. Increased penalties are also an appropriate proposal.

Increased penalties are also an appropriate proposal.

Other things that can be done

The Fair Work Commission should be able to step in when the harm caused by industrial action is too great. The Productivity Commission is opposed to FWC “...effectively acting as a commercial arbiter between two parties” even when claims are excessive or impact negatively on productivity. We would encourage the Productivity Commission to recommend a broadening of the range of factors for the Fair Work Commission to consider in deciding whether to intervene.

Also, the Productivity Commission should identify forms of employer industrial action other than “all or nothing” lock outs. This will involve both:

- Identifying the forms that such action could take (eg refraining from offering any work outside ordinary hours, directing work to be undertaken in a particular way); and
- Ensuring that such action would not create a basis for a general protections or other form of action by employees who are affected by such action.

7 Protection overreach

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| Opportunity | Better facilitate new operations and business change. |
| Productivity Commission recommendations | <ul style="list-style-type: none">• Increasing the bargaining options for greenfield sites• Allowing the duration of greenfield agreements to reflect the life of the project• Extending good faith bargaining obligations to greenfield matters• Clarifying that transmission rules do not apply to voluntary transfers. |
| Other options | <ul style="list-style-type: none">• The PC declined to change automatic transmission rules but said it will consider whether it should be easier to opt out of transmission arrangements. |

What do employers say

Arrangements to protect industry conditions can discourage new business opportunities. New projects require certainty but the Act should not mandate that greenfields agreements must be with a union.

In addition, the Act currently over-protects conditions in a way that makes it more difficult to realise the potential of the new business.

The PC recommendations

The Productivity Commission recommends the union monopoly on greenfield bargaining be broken by offering a range of options – union agreement, last offer arbitration or a 12 month employer-determined approach. All must meet the proposed No Disadvantage Test and must be bargained in good faith.

The duration of these agreements can be set to the end of the project (beyond 5 years with FWC approval) to reduce the risk of industrial action during a project.

Other things that can be done

The Productivity Commission accepts that automatic transfer of employment terms to new employers may discourage beneficial restructuring proposals and diminish efficiency dividends. This is a particular problem when an enterprise is moving from the public sector to the private sector. These rules should be relaxed, especially where the terms that would be offered by the new employer would satisfy a ‘No Disadvantage Test’ approach.

The Productivity Commission proposes that these rules should not apply to voluntary transfers. In addition, these rules should not apply to transfers within corporate groups with the consent of transferring employees.

If these transfer rules are to remain, the opt out arrangements should be relaxed.

7 Protection overreach (cont.)

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| Opportunity | Prevent unfair dismissal protections from hindering performance. |
| Productivity Commission recommendations | <ul style="list-style-type: none"> • Suite of initiatives to shift balance from fair process to fair outcome • Introduce triage of claims and more merit focused conciliation to reduce the number of matters going to full determination. |
| Other options | <ul style="list-style-type: none"> • Streamlining the requirement to demonstrate reasonable redeployment effort in the case of redundancy • Pursuing lodgment fees to commence unfair dismissal action. |

What do employers say

Current unfair dismissal rules often offer a higher degree of protection than is warranted.

There should be less focus on procedure leading to termination.

Also, the Fair Work Commission should adopt more streamlined dispute resolution processes which allow the system to operate more quickly with less cost.

The PC recommendations

Banning reinstatement for pure procedural error and banning compensation where there is evidence of persistent underperformance and misconduct will give managers more comfort when dealing with discipline or performance matters.

Reviewing claims “on the papers” (i.e., on the basis of the documents that are filed, with no hearing) will help to dismiss early the claims that have no prospect of success. A conciliation process that is more focused on the strengths and weaknesses of the claim is important to reduce the tendency to compromise just to finalise the claim.

Other things that can be done

The requirement to explore reasonable opportunities for redeployment before retrenching an employee should be dropped or made less onerous, as it adds much process for very little benefit.

The PC did not recommend increased lodgment fees to prevent unmeritorious or vexatious claims, despite submissions to this effect. Its suggestion of a two-tier arrangement with higher fees for matters that go to arbitration is worth pursuing. This could provide a strong incentive to realistic settlements at conciliation if it was coupled with a conciliation process in which views about the prospects of employee’s claim were more clearly expressed.



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| Opportunity | General protections should not impede performance management. |
| Productivity Commission recommendations | <ul style="list-style-type: none"> A suite of measures to reduce the incentive for making and maintaining unmeritorious claims Some clarification of when general protection actions are triggered Limits on using discovery as a fishing expedition Increased transparency through increased data analysis and reporting. |
| Other options | <ul style="list-style-type: none"> Further refinements are desirable to better define when adverse actions occur. |

What do employers say

Existing arrangements are perceived to be a significant limiting factor on managers properly dealing with poor performance or productivity issues.

In some instances, organisations choose to concede unmeritorious claims rather than risk a claim.

The PC recommendation

The measures to deal with unmeritorious claims are welcome.

Capping the compensation payable will reduce the incentive to make such claims, and will do so in a way that is consistent with unfair dismissal rules.

Requiring the FWC to find that the claim is made in good faith before conciliation may reduce the burden of defending hopeless cases.

FWC should have the power to dismiss vexatious and frivolous claims.

Seeking more clarity around complaints where the behaviour complained of does not relate directly to the claimant’s employment is sensible though the PC does not suggest how that line will be drawn.

Other things that can be done

The scope of these provisions is very broad and the circumstances to which they apply are uncertain. Most decisions impacting on employees now need to be viewed through a general protections lens, causing significant uncertainty for employers.

The PC’s unwillingness to reconsider the operation of the reverse onus of proof is disappointing. Restricting discovery in these matters may reduce the cost of running them, but will not address the difficulty and unfairness of employers having to ‘prove their innocence’. This creates a disincentive to rigorous performance management.

Also, allowing claims to be made on the basis of any form of complaint or inquiry about the claimant’s employment sets the bar too low.

At the very least, consideration could be given to codifying recent High Court decisions to reduce some aspects of the uncertainty of these rules.

7 Protection overreach (cont.)

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| Opportunity | Prevent right of entry abuse. |
| Productivity Commission recommendations | <ul style="list-style-type: none"> • Limit entry for discussion purposes to 2 visits per 90 days unless union has members or is negotiating an agreement • Empower the Fair Work Commission to stop or limit visits when too frequent. |
| Other options | <ul style="list-style-type: none"> • The Productivity Commission will consider further evidence to determine whether discussions in lunchrooms are unduly disruptive • The PC did not make any recommendations about the protection of private information acquired during record inspections and the capacity to extend right of entry through enterprise bargains. |

What do employers say

Right of entry abuses are often used inappropriately to seek to bully an employer into granting the union concessions. Unwelcome site visits can create a hostile and stressful work environment, especially for employees who do not want to get involved.

The PC recommendations

The Productivity Commission proposal to limit entry for the purpose of holding discussions reflects employer concerns that existing arrangements allow unions with little or no connection to the workplace a right of entry which is effectively unlimited. This is a particular issue in areas where union membership is extremely low.

Proposals for increased FWC powers are significant as the existing triggers for intervention are set too high. Under the proposed rules, the Fair Work Commission would be required to consider the impact of entry and reasons for frequent visits generally when deciding whether to limit further visits.

Other things that can be done

The lunchroom issue is important for many employers. This practice is reported to cause disruption in the workplace, and to expose non-union members to unwanted attention and a stressful environment that removes their ability for a break during their work day. The Productivity Commission should examine this again and seek evidence of the operational difficulties caused by it.

The Productivity Commission should also recommend that confidential information about the business and personal information about employees which is obtained through a right of entry process must be kept confidential. Sanctions should apply if this is not done.

Finally, special rules are required to ensure that rights of entry are not abused during enterprise bargaining periods.

8 *Where to from here*

The PC report is likely to trigger a substantial debate in the coming months. It is important that industry understands the shape of this debate and participates where possible. Ultimately it will be for Government to respond to the PC's findings, however it is clear that this report foreshadows reform opportunities that industry will have to plan for in the future.

The PC has said it wants to hear from the community about its draft report before finalizing a final report to Government in November, 2015. The PC is taking written submissions until 18 September, 2015 and proposes public hearings in some capital and regional centres in September 2015.

In this report, PwC has identified areas for further consideration. The PC, has already foreshadowed some of these. Some have not been foreshadowed but nevertheless are important enough to be raised with the PC during this time.

PwC takes pleasure in providing to its clients its analysis of the PC's draft report. It is ready to assist industry understand key issues in this debate and help clients develop submissions they may wish. Beyond this, PwC is ready to assist businesses to ready themselves for potential reform.



9 Overview of recommendations and areas for further thought

Productivity, flexibility and innovation

| Opportunity | Assist business to achieve productivity through bargaining. | Removing unnecessary regulation and red tape. | Facilitate use of alternative labour sources. |
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| Productivity Commission recommendation | <ul style="list-style-type: none"> • Changing how the Fair Work Commission operates • Simplifying minimum standards and bargaining rules. | <ul style="list-style-type: none"> • Make it easy to correct process errors in bargaining applications rather than start again • Enterprise contracts to operate from lodgment without vetting by FWC/FWO • Proactive and targeted award repair replacing 4 yearly reviews • Increased skills and accountability of Commission members • Increased transparency of FWC conciliation processes • Minor amendments to the administration of holiday administration. | <ul style="list-style-type: none"> • Enterprise agreements should not be allowed to restrict the engagement of contractors or the use of labour hire arrangements. |
| Other options | <ul style="list-style-type: none"> • Focus the Fair Work Commission on achieving productivity • Prohibit types of enterprise agreement clauses that limit productivity • Allow expired enterprise agreements to be terminated if they undermine productivity. | <ul style="list-style-type: none"> • A range of specific regulatory proposals not pursued (eg self regulation of agreement approval, streamlining redundancies, simpler transfer of business rules) • Streamlined award and enforcement arrangements to minimise the compliance burden and cost on small and medium sized business. | <ul style="list-style-type: none"> • Establish clearer rules to distinguish employees from contractors • Minimizing the consequences of errors in classifying workers as independent contractors • Promoting resources to education and assistance of those seeking to utilise alternative work arrangement. |



Focus on the enterprise

| Opportunity | Individual agreements? | Focus on enterprise and employer interests. | Improving the bargaining process. | Making industrial action a matter of last resort. |
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| Productivity Commission recommendation | <ul style="list-style-type: none"> • The development and promotion of revamped Individual Flexibility Agreements • The development of “enterprise contracts”? • A new streamlined “no disadvantage test”. | <ul style="list-style-type: none"> • “Award repair” should be undertaken, including a more proactive and targeted approach to award modernisation • A streamlined no disadvantage test. | <ul style="list-style-type: none"> • Clarify when non-union bargaining agents may participate in discussions. | <ul style="list-style-type: none"> • Industrial action should not occur until bargaining commences • Stand-downs should be allowed in the face of harmful “tactical” withdrawals of threats where the employer has made reasonable contingency plans • Streamline payroll deductions for industrial action • Increased penalties for unlawful industrial action. |
| Other options | <ul style="list-style-type: none"> • Option to submit enterprise contract/IFA to FW Ombudsman to test for no disadvantage. | <ul style="list-style-type: none"> • The opportunity to outlaw EBA terms that go beyond the interests of the enterprise and their employees. | <ul style="list-style-type: none"> • Steps should be taken to encourage more effective bargaining • The role for the FWC and FWO in promoting better bargaining could be enhanced. | <ul style="list-style-type: none"> • The FWC should have enhanced powers to intervene to stop otherwise lawful industrial action when the harm to the business or community warrants • A consideration of other lawful actions employers may take other than lock outs. |

9 Overview of recommendations and areas for further thought (cont.)

Protection overreach

| Opportunity | Better facilitate new operations and business change. | Prevent unfair dismissal protections from hindering performance. | General protections should not impede performance management. | Prevent right of entry abuse. |
|--|---|--|--|--|
| Productivity Commission recommendations | <ul style="list-style-type: none"> Increasing the bargaining options for greenfield sites Allowing the duration of greenfield agreements to reflect the life of the project Extending good faith bargaining obligations to greenfield matters Clarifying that transmission rules do not apply to voluntary transfers. | <ul style="list-style-type: none"> Suite of initiatives to shift balance from fair process to fair outcome Introduce triage of claims and more merit focused conciliation to reduce the number of matters going to full determination. | <ul style="list-style-type: none"> A suite of measures to reduce the incentive for making and maintaining unmeritorious claims Some clarification of when general protection actions are triggered Limits on using discovery as a fishing expedition Increased transparency through increased data analysis and reporting. | <ul style="list-style-type: none"> Limit entry for discussion purposes to 2 visits per 90 days unless union has members or is negotiating an agreement Empower the Fair Work Commission to stop or limit visits when too frequent. |
| Other options | <ul style="list-style-type: none"> The PC declined to change automatic transmission rules but said it will consider whether it should be easier to opt out of transmission arrangements. | <ul style="list-style-type: none"> Streamlining the requirement to demonstrate reasonable redeployment effort in the case of redundancy Pursuing lodgment fees to commence unfair dismissal action. | <ul style="list-style-type: none"> Further refinements are desirable to better define when adverse actions occur. | <ul style="list-style-type: none"> The Productivity Commission will consider further evidence to determine whether discussions in lunchrooms are unduly disruptive The PC did not make any recommendations about the protection of private information acquired during record inspections and the capacity to extend right of entry through enterprise bargains. |

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