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Workplace Relations: The Productivity Commission Blueprint for Renovation

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During what has generally been a difficult first term for the Abbott Government, it has largely tried to avoid debates about employment conditions and workplace relations – except when it can focus on misconduct by or within trade unions.

However, now that the Productivity Commission (PC) has released a draft of its long-awaited report on the workplace relations framework, that stance will become progressively harder to maintain.

The commitment to a 'comprehensive and broad' review by the PC was a centrepiece of the Coalition's 2013 election policy. It promised that any changes to come from the inquiry would be taken to the people before being implemented in a second term, although there would be some more immediate adjustments to the *Fair Work Act 2009* (FW Act) in relation to matters such as industrial action, union rights of entry, greenfields agreements and individual flexibility arrangements (IFAs).

Once in office, however, the Coalition has hardly moved with the speed or enthusiasm that many business groups would have liked. Its proposed amendments to the FW Act have been left to languish in the Senate, with the government unwilling even to bring them on for debate. It has also been unable to secure support for a restoration of the Howard Government's regime for the building industry, or tighter controls on registered organisations.

As for the PC inquiry, it took well over a year for this to be instituted. In marked contrast to the priority given to the Heydon Royal Commission into Trade Union Governance and Corruption, it was not until the very end of 2014 that the PC was formally requested to commence work.

Given less than 12 months to complete its mammoth task, the PC has had to move quickly. A series of issues papers were released in January 2015. Now, just eight months later, it has produced a draft report that can be viewed [here](#). A further period of consultation will follow, including public hearings in various cities and regional centres during September, before a final report is delivered to government by the end of November.

The big picture

The draft report, which runs to nearly a thousand pages, speaks of a system that needs 'renovation', but not a 'knockdown and rebuild'.

To the disappointment of those pushing for more radical reforms, the PC is generally positive about the way the current framework seeks to balance the bargaining power of employers and workers, respect community norms about fair treatment and encourage employment.

As it notes in seeking to dispel some of the 'myths' commonly voiced by stakeholders, 'Australia's labour market performance and flexibility is relatively good by global standards, and many of the concerns that pervaded historical

arrangements have now abated' (Overview, p 3).

Employment relations are described as being generally 'harmonious and productive', with any 'toxic' situations often attributable to 'poor relationship management rather than flaws in the WR framework' (pp 3, 5).

At the same time, the draft report identifies certain 'deficiencies' that need to be addressed. To that end, it recommends a number of changes, though much fewer in number than might have been expected. The most significant proposals concern the structure and membership of the Fair Work Commission (FWC), the reduction of Sunday penalty rates in certain industries, and the creation of a new 'enterprise contract' option that would allow businesses to vary award terms for groups of employees.

These and other key recommendations and observations are summarised below, with the caveat that there is still time for the PC to change its mind - and no guarantee that its final recommendations will be taken up by the government, much less implemented.

Institutional reforms

The Fair Work Ombudsman (FWO) is lauded for its 'targeted and innovative approaches to compliance and information provision' and the draft report notes that it is 'highly regarded by many stakeholders' (Overview, p 10). The PC recommends only that it be given additional resources to monitor the treatment of migrant workers, a group identified as facing 'higher risks of exploitation' (p 43).

By contrast, three major changes to the FWC are proposed. One would be to create a separate Minimum Standards Division to deal with minimum wages and modern awards. This would be staffed by members primarily with 'expertise in economics, social science and commerce, not the law' (p 12). A Tribunal Division would deal with other functions, principally those involving dispute resolution. But there would not, as some employer groups have urged, be a separate division or body to deal with appeals.

Secondly, the principle of tenure for FWC members should be abandoned, with new appointees given five year terms and even existing members subjected to regular 'performance reviews'.

Thirdly, to counter persistent claims about 'stacking' and a marginal tendency to bias in decision-making (something identified only in relation to unfair dismissal matters), there would be a new process for selecting members. The government could appoint only from a shortlist developed by an independent panel, which would be specifically charged to identify candidates widely seen as credible and non-partisan in their likely approach to workplace relations matters.

The safety net

The PC recommends retention of the National Employment Standards, which it notes have attracted little controversy. But it does propose that the capacity of State or Territory governments to impose additional public holidays be curtailed. It is also interested to explore the idea of allowing casuals to exchange part of their loading for specified entitlements they would not otherwise get, such as paid personal leave.

As for awards, which have played such a unique (in global terms) and longstanding role in prescribing industry-level standards, these too should be retained. They do not appear to create adverse outcomes and the 'distortions' they create in the labour market can be seen as 'beneficial since they address unequal bargaining power and reduce the transaction costs of forming employment contracts for small business' (Overview, p 21).

At the same time, existing awards are criticised for being inflexible, ambiguous and too often 'historical relics of the relative bargaining strength of past protagonists [rather] than a carefully thought out way of remunerating employees' (ibid).

Both in varying awards and in setting minimum wages, the FWC is encouraged to place less weight on precedent and make more of an effort to 'proactively undertake its own data collection and systematic high-quality empirical research as the key basis for its ... decisions' (p 11).

The PC does note the steps being taken as part of the current four-yearly review to make modern awards simpler and easier to understand. But it recommends that the concept of a regular review of all awards be abandoned, with further assessments to be undertaken only as needed.

On the controversial subject of penalty rates, the PC strongly endorses the need for workers to be compensated for working overtime, at night or on rotating shifts. It also accepts the case for public holiday rates.

But at least in the hospitality, entertainment, retail, restaurant and café industries, Sunday rates should be reduced to the

same as those set for Saturdays, given changing patterns of consumption on weekends and evidence that ‘the overall social costs of daytime work on Sundays are similar to Saturdays, and consistently lower than evening work’ (p 24). This change ‘would desirably occur as part of the current four yearly review’ (p 25), though it would not affect employees in other industries.

The PC has also invited feedback on whether there should be any greater capacity than at present for ‘preferred hours’ clauses, which would permit employees to ‘volunteer’ to work at times of their choosing without penalty rates.

In terms of minimum wages, the PC rejects the view that ‘existing levels are highly prejudicial to employment’ (p 3) and notes that modest increases of the type awarded in recent years can be seen as beneficial in various ways.

At the same time, it advocates the need for the FWC to take a conservative approach at a time when the economy is weak and youth unemployment levels have risen. It also, without making any specific recommendations, expresses interest in the idea of the government using wage subsidies or tax credits as a more targeted way of protecting the low-paid, especially when workers on minimum wages can often be found in higher income households.

For employees under 21, the PC canvasses a switch from setting rates based on age to using competency or years of experience. A systematic review of wages for trainees and apprentices is recommended. Feedback is also sought on any problems associated with the growth and regulation of unpaid internships.

Protections for workers

The PC accepts the need for constraints on the power of employers to dismiss workers, observing that there is little evidence for the proposition that the current unfair dismissal regime impedes hiring. It also notes that ‘there is insufficient data about the extent of go away money, and how it can be distinguished from cases where the employer and the employee agree that the justification for dismissal is not clear cut’ (Overview, p 27).

However, it does recommend that a dismissal found to be unfair purely on procedural grounds should not result in the employee concerned being compensated; at most, the employer should be cautioned or fined. It is also proposed that the formal primacy given to reinstatement as a remedy be removed, and that the Small Business Fair Dismissal Code be scrapped.

In a similar vein, the PC rejects most of the criticisms directed by employer groups at the ‘general protections’ against wrongful or discriminatory treatment. But it does propose that Part 3-1 of the FW Act be amended to clarify the meaning and application of some of its provisions, especially those concerning the ‘right to complain’. There should also be a cap on compensation for breaches of the general protections, though it is unclear from the report whether this would apply to claims taken beyond the FWC to the courts, or what the cap would be.

In relation to the ‘sham contracting’ provisions, employers can currently escape liability for misrepresenting what is in fact an employment arrangement, provided they were not reckless in treating the worker as an independent contractor. The PC proposes (albeit without formally recommending) that this defence only be available where the mistaken belief was reasonable in all the circumstances.

This last suggestion is just one of a number of instances in which the PC’s view mirrors that taken in the 2012 review of the FW Act commissioned by the Gillard Government. A further example is the proposal that the Act’s transfer of business provisions not apply when an employee voluntarily switches to a similar job within the same group of related employers. In other respects, the PC has resisted calls from employer groups to make it easier to outsource work without costly or ‘cumbersome’ terms and conditions being transferred to a new provider, while calling for further evidence and submissions.

Finally under this heading, the PC notes that there has not yet been sufficient time to undertake a proper evaluation of the anti-bullying provisions enacted in 2013, though it accepts that ‘the FWC’s current approach appears to be considered and effective’ (p 30).

Enterprise bargaining

The most significant changes proposed by the PC to the system of making enterprise agreements under Part 2-4 of the FW Act concern greenfields agreements for new enterprises or projects.

Aside from requiring those negotiating such agreements to observe the rules of good faith bargaining, it is envisaged that businesses unable to strike a union deal after three months’ negotiation would be given two options. These are significantly different to those proposed in the Abbott Government’s Fair Work Amendment Bill 2014.

One choice would be to go ahead and register the employer’s own preferred ‘agreement’. But such an agreement could have a nominal duration of no more than a year – leaving the employer vulnerable after that time to a further round of

bargaining and the taking of protected industrial action.

The other option would be for the employer to agree to arbitration by the FWC on a 'last offer' basis, a concept the 2012 review had also proposed. Rather than compromise between the parties, the FWC would have to choose between the employer's proposed agreement and that offered by the relevant union(s).

An agreement made via this last route could have a nominal duration of up to five years, or even longer if the FWC could be persuaded of the need to extend that period (for example, in the case of a large construction project). The same would apply to greenfields agreements negotiated with unions. For all other enterprise agreements, the maximum duration of four years would revert to the five years set under Work Choices.

Another proposed reversion would see the reinstatement of a no-disadvantage test, in place of the better off overall test introduced by the FW Act. The benchmark for assessing the content of an agreement would continue to be the award conditions that would otherwise apply, though the FWC would be encouraged to avoid 'line-by-line' comparisons and to focus on the position of classes of employee, rather than individual workers.

The FWC would be empowered to ignore procedural defects, such as problems with a representation notice, if satisfied that no employees had been adversely affected. To make bargaining more efficient, it is also recommended that non-union delegates could only act as bargaining representatives if acting for at least 5% of the employees to be covered by a proposed agreement.

In relation to content, the PC has supported the Competition Policy Review's call to prevent enterprise agreements from being used to regulate the use of contractors or labour hire. But in other respects it has resisted calls for an expanded list of 'prohibited content' or for greater constraints on 'pattern bargaining'. It also sees little merit in requiring parties to discuss or achieve productivity improvements as a condition for an agreement to be approved.

In terms of the FWC's powers to regulate bargaining, the PC has not been persuaded that these need amendment or augmentation. In particular, it has rejected the need for a new mechanism to deal with 'intractable' disputes.

IFAs and 'enterprise contracts'

The PC considers it 'surprising that employees and employers have not used individual flexibility arrangements more frequently, as they offer considerable flexibility, provide protections for employees, and are not hard to make' (Overview, p 35).

To remedy this, it is proposed that their availability be advertised more widely, and that the FWO provide greater guidance as to their permissible content – as well as conducting random audits to ensure that safeguards against their misuse are not being ignored.

A no-disadvantage test would apply, as for enterprise agreements, and it would be permissible for employees to agree to a non-termination period of up to a year, rather than the 13 weeks that currently apply for IFAs under awards, or 4 weeks for those made under enterprise agreements. Enterprise agreements would also be prohibited from constraining the subject-matter of IFAs, as indeed the Fair Work Amendment Bill 2014 has already proposed.

In terms of creating greater 'flexibility' for businesses, the more interesting proposal – and indeed arguably the most novel element in the entire report – is the creation of a new instrument, to be called an 'enterprise contract'.

This is intended to span the gap between IFAs, which (if genuinely customised to the needs of individuals) may involve high transaction costs, and formal enterprise agreements, the procedural requirements for which tend to deter many small or medium-sized businesses.

The enterprise contract is described as being in effect a 'collective IFA', but with extra flexibility (p 37). It would vary the terms of an award for a class or group of employees within an enterprise, though again subject to a no-disadvantage test. Businesses would be encouraged (though not required) to use template terms pre-approved by the FWC, so as to have confidence that their arrangements were lawful. It could be used even for workers covered by an enterprise agreement.

The contract would need to be lodged with the FWC, but could take effect prior to any checking, and there would be no collective vote of employees to approve it. Existing employees could choose either to accept it or stay on their current terms. New employees, by contrast, could be required to agree to it as a condition of their employment. All employees would have the right to opt out of an enterprise contract after a minimum period (possibly twelve months), or after the contract reached its expiry date.

Contracts found on complaint not to meet the statutory requirements could be varied by the FWO, though it is unclear what (if any) penalty would be imposed on the employer.

The PC's ideas about these new instruments are plainly still tentative: hence the lack of any formal recommendations and the acceptance that 'the desirability, practicalities and detailed design of an enterprise contract needs [sic] to be tested further' (p 39).

Industrial action

The PC accepts that industrial disputation does not appear to be a major problem, and that there is no evidence the FW Act has led to any upsurge in industrial action. It has resisted suggestions that higher paid workers be barred from taking protected action. It has also rejected a key plank of the government's Fair Work Amendment (Bargaining Processes) Bill 2014, that employees be unable to take action in support of claims that are 'excessive' or that would adversely impact on productivity.

At the same time, however, the PC has indicated support for a number of changes to the rules regarding industrial action. These include:

- supporting the government's proposal to reverse the effect of the *JJ Richards* decision, by requiring a union to obtain a majority support declaration before organising protected action against an employer that has refused to bargain
- exploring ways to simplify the system for obtaining a protected action ballot order
- reviewing the circumstances in which protected action can be suspended or terminated by the FWC, including the level of 'harm' that must be identified (something that is arguably too hard to establish in some situations, and too easy in others)
- giving employers more discretion over decisions to deduct wages for brief stoppages or partial work bans
- allowing employers to respond to employee action with something less than a lockout, such as a reduction in working hours (assuming this is not already permissible)
- increasing the maximum penalties for unlawful action, to give courts 'more scope to apply penalties commensurate with the harm associated with such action' (Overview, p 41)
- broadening the scope of the 'secondary boycott' provisions in the *Competition and Consumer Act 2010* and permitting Fair Work Building and Construction to enforce them in the building industry.

There are also a number of proposals directed at the tactic of unions notifying an intention to organise protected action and then calling it off at the last minute. The PC's proposal is that employers be permitted to stand down the employees in question for the duration of any 'reasonable contingency plan' already implemented to deal with the proposed action. The FWC would also be empowered to withhold a ballot order for up to 90 days where satisfied that the employees concerned had previously adopted this tactic.

Union rights of entry

The current provisions in Part 3-4 of the FW Act regarding the right of accredited union officials to enter workplaces are described as 'broadly sound, though at times both sides play games with each other' (Overview, p 42).

But the PC does support the proposal in the Fair Work Amendment Bill 2014 to make it easier for the FWC to deal with disputes about frequency of entry. It also recommends that unions without a member at a workplace and who are not negotiating an enterprise agreement should be allowed to enter for discussion purposes no more than twice in any 90-day period.

Conclusion

The PC's draft report has already attracted vocal criticism from the labour movement for its proposals on penalty rates and enterprise contracts. There is also likely to be suspicion concerning the proposed reversion to a no-disadvantage test, even though the PC's intent seems to be to clarify the operation of this key safeguard, not weaken it. Similarly, while the proposed restructuring of the FWC is plainly meant to improve both the quality and independence of its decision-making, sceptics will worry about the changes being used as a cover to appoint new members who are more palatable to the government and its supporters.

On balance, however, the report is likely to be far more disappointing to those within the Coalition and the business community who have been calling for radical changes to labour regulation. While not wholly endorsing the Fair Work system, the PC is largely supportive of its objectives and is proposing relatively few alterations - and arguably none as far-reaching as those in 1993, 1996, 2005 or 2009. Of course it remains to be seen whether anything changes in that respect between now and the end of November.

As for the Abbott Government, it is still trying to stay as quiet as possible, emphasising that this is a report *to* government, not *by* it. But if only in private, it will already be beginning to weigh up how many of the PC's recommendations to take to

the next election - and whether it is prepared to resist what will be increasingly strident demands from some of its backers to go further.

Even if the Coalition is re-elected, there will be doubts as to whether it has not just the will but the numbers in the Senate to achieve any more than minor changes. All in all, the chances are still strong of the Fair Work system remaining largely intact for the foreseeable future, regardless of who is in office.