

FINAL REPORT INTO AUSTRALIA'S WORKPLACE RELATIONS FRAMEWORK

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Legal Briefings - By **Nicholas Ogilvie** and **Darren Hexter**

The final report into Australia's Workplace Relations Framework has been released by the Australian Government.

Media attention following this week's release of the Productivity Commission's final report on Australia's Workplace Relations Framework has almost entirely focused on the recommendations relating to penalty rates, however there are a number of notable recommendations that have been overlooked.

The Report has been criticised as a 'missed opportunity', however, for employers, the Report makes some beneficial, albeit limited recommendations, in respect of enterprise bargaining and unfair dismissal/general protections claims. If implemented the changes will create a greater discretion for the Fair Work Commission (FWC) to moderate parties' industrial behaviour and manage claims.

The Overall Report Finding was that despite sometimes significant problems and an assortment of peculiarities, Australia's workplace relations system is not systematically dysfunctional, and that it needs repair not replacement.

Employment Minister Michaelia Cash has stated that the Coalition government will give due consideration to the Report and that it is open to introducing any "fair and sensible" changes proposed.

At this stage it is unclear what recommendations will be taken up by the Government and will translate into changes to the *Fair Work Act*, but it is anticipated that together with the findings of the Heydon Royal Commission, these recommendations will form a key plank in the Coalition's election policy for 2016, and a mandate for legislative reform.

KEY RECOMMENDATIONS

1. **Enterprise bargaining** – In seeking to reduce protracted and inefficient bargaining the Productivity Commission (PC) recommends the removal of procedural defects as a bar to approval (a common reason agreements are not approved), and replacing the better off overall test (BOOT) in favour of the ‘no-disadvantage’ test. It also suggests making bargaining less frequent by increasing the nominal expiry date. Notably the PC found that there was not a strong case for imposing statutory requirements on parties to discuss productivity improvements as part of the bargaining process.
2. **Enterprise Contracts** – The introduction of Enterprise Contracts (EC) is recommended as an option for making agreements which would allow all award-based businesses the flexibility to vary an award for a class of employees to suit their business operations. The EC could be offered to any new employees that would not be covered by an existing enterprise agreement.
3. **Industrial disputes** – Significantly for employers, the recommendations include a lowering of the threshold for the FWC to intervene in some disputes, deter the use of aborted strikes and brief stoppages, and provide for more options to respond to stoppages. It is also recommended that the penalties for unlawful industrial action be increased by up to 3 times the current rate.
4. **Fair Work Commission** – The PC has sought to address inconsistencies around decision making in the FWC that arise out of political appointments, by recommending all appointments be selected from a shortlist created by an independent expert appointment panel.
5. **General Protections** – Only relatively minor changes are recommended to the General Protections regime. The PC suggests the complicated structure of General Protections claims could be improved through: clarification of the ‘ambiguous right’ to make a complaint; reducing the time and expense of discovery by aligning it with the Federal Court process; and creating greater power to award costs against applicants.
6. **Sham contracting** – In a step that would increase the risk of penalties for employers, it is recommended that the requisite level of knowledge of an employer regarding unlawful involvement in sham contracting be reduced from “reckless” to “reasonably expected to know”.
7. **Greenfields agreements** – The PC recommends the introduction of additional mechanisms to overcome impasses in bargaining for greenfield agreements, including the adoption of a 3 month negotiation period (a similar proposal recently failed to pass the Senate), ‘last offer’ arbitration after the negotiation period, and the introduction of the no-disadvantage test against the relevant award.
8. **Transfer of business** – In the interests of ‘re-balancing’ protections for employees and

the need for business innovation and structural change, it is recommended that the transfer of business provisions be expanded to include the interest of continuing employment for transferring employees, and that the voluntary movements between associated entities be entirely exempt from the provisions.

The final report was handed to the Australian Government on 30 November 2015 and was publicly released on 18 December 2015. It can be viewed on the Productivity Website [here](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



NICHOLAS OGILVIE

PARTNER,
MELBOURNE

+61 3 9288 1380 | +61 2 9225
5708

Nicholas.Ogilvie@hsf.com

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