



# Queensland Council of Unions

---

Submission in response to Workplace  
Relations Framework – Productivity  
Commission Inquiry

---

Prepared by: John Martin

---

## Contents

Introduction .....	1
Labour Costs.....	2
Productivity .....	5
Protections for Employees .....	8
Workplace Relations Systems .....	11
Conclusion.....	12
Responses to Issues Paper 1 .....	13
Response to Issues Paper 2.....	16
Response to Issues Paper 3.....	26
Response to Issues Paper 4.....	34
Response to Issues Paper 5.....	40
Bibliography .....	49

## Introduction

The Queensland Council of Unions (QCU) is the peak union body in Queensland. It comprises 29 affiliated unions, representing over 370,000 union members. Our mission statement is: “Leading Unions to achieve industrial, political and social justice for Queensland workers”. The QCU has an Executive of 46 Officers, 13 of whom form the Management Committee.

The QCU was invited to make a submission by Senator the Hon. Eric Abetz, Minister for Employment. The submission is made on behalf of QCU affiliates and attempts to cover as many of the questions set out in the issues papers produced by the Productivity Commission in January 2015.

In reading the issues papers a number of recurrent themes emerge that provide cause for concern within the union movement. Those themes are:

- labour costs, including penalty rates;
- productivity;
- protections for employees; and
- the workplace relations system.

The tone of the questions asked in the issue papers, combined with equivocating and obfuscation by the Abbott Government and the on-going regressive approach adopted by a number of employer organisations, lead to the concerns set out under the various headings below.

## **Labour Costs**

### ***The Minimum Wage***

There has been substantial debate about the impact of minimum wages on employment levels (Berg 2015; Card and Krueger 1994; Freeman 1996; Gellie and Frost 2015; Gittins 2014; Leigh 2003; Manning 2014; Metcalf 2008; Stokes 1973; Stigler 1946). The argument contrary to minimum wages relies upon classical, free-market economic modelling based on the assumption that supply and demand within the labour market can ever be fully elastic, and that labour should, in the first place be treated as any other input/resource. This modelling postulates that if the price of the factor input (in this case labour) increases, subject to its demand price-elasticity the demand for labour will decrease accordingly (Metcalf 2008:493). The union movement also rejects any arguments or economic models that reduce workers to other abstract resources such as land or capital.

Further, the lower the level of wages it is reasonable to assume that the greater the price elasticity for that worker or group of workers. Low wages in the classic model would be assumed to be because of such factors as low skill, easy entry to the occupation and/or easy replacement of the labour with another factor of production (Metcalf 2008:493). The classical/free market theory then posits that propping up the wage for such workers will bring the labour market into disequilibrium with an associated over-supply of labour, in other words: unemployment (Stigler 1946:359). There are a number of substantial difficulties with this modelling. Unemployment can and does coexist with low wages. The result is that poverty is shared between the employed as well as the unemployed. This model also treats labour as a commodity and ignores the fact that the price of labour represents the ability of the provider of that labour to provide for his or her family. It pays no cognisance to the social issues, and wider community disturbance that ensues from workers having insufficient funds to meet the necessities of life. A number of the assumptions about low paid employees are not necessarily accurate. Some employees who are not highly paid are not easily replaced either. In addition, the jobs they do may provide a benefit to the community that is not reflected in their rate of pay (e.g. social work). Classic economic modelling also assumes the heterogeneity of labour supply and perfect market conditions within the labour market (Metcalf 2008:493/4). In Issues Paper number 1, the Productivity Commission makes the comment that “no nation aspires to be a low-wage economy”,

which is encouraging for the union movement to hear. It does not coincide with the reality of the global economy in which the easiest path to compete is often by providing the cheapest labour. It is also inconsistent with the commentary usually associated with some employer organisations in Australia.

### *Penalty Rates*

Closely linked to the issue of labour costs is that of penalty rates. It is a perennial issue that a number of Australian employer organisations want to see the removal of penalty rates (Workplace Express 2015a; 2015b; 2014; FWC 2013:45; FWC 2012:30; Barnes and Fields 2000:545). The removal or reduction in penalty rates has also been the subject of scores of cases before the Fair Work Commission (FWC) and its predecessors<sup>1</sup>. The most recent attempt by employer organisations to reduce penalty rates has been set for more than 100 days of hearing before the FWC (Workplace Express 2014). The QCU gives a conservative estimate that more than 700,000 employees in Queensland currently receive penalty rates. This figure is derived from the Australian Work and Life Index (AWALI) survey report (Daly 2014:9) and extrapolating the percentage of employees surveyed nationally to the Queensland workforce (QGSO 2014). The AWALI survey results also indicate that nearly three-quarters of employees currently in receipt of penalty rates would stop working unsociable hours if the extra payment was removed (Daly 2014:19). Of particular demographic interest to Queensland is that more than half of the employees in mining, retail and accommodation worked unsociable hours on a regular basis (Daly 2014:11) and employees in rural and regional locations were generally more likely to rely upon penalty rates (Daly 2014:15). The QCU holds grave concerns for the impact on rural and regional economies if penalty rates were removed.

The QCU is also concerned with the plight of those workers for whom penalty rates are not a luxury, but rather allow them to make ends meet (rent, bills, food, etc.). An estimated 34.6% of employees in receipt of penalty rates rely upon them to meet their household expenses (Daly 2014:13). The

---

<sup>1</sup> See for example Australian Industrial Relations Commission 1998 Penalty Rates Decision P9677

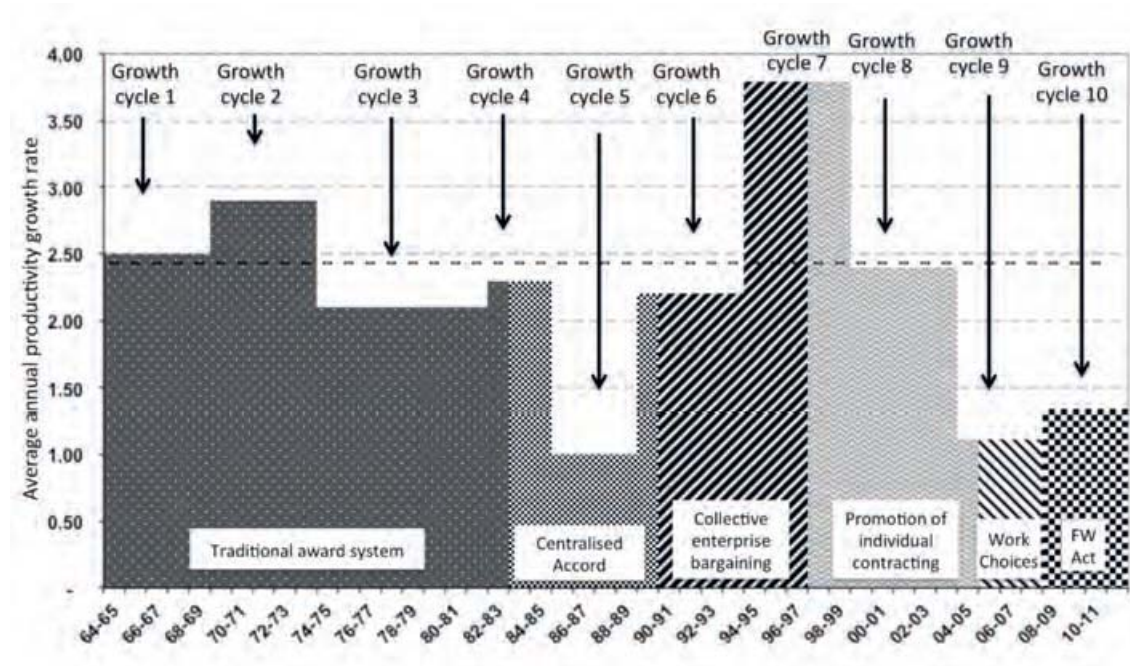
impact of reducing penalty rates for families relying upon them is potentially catastrophic. Additionally, any proposed impact on unemployment may be negative as these workers seek longer hours or additional jobs in order to make up lost income.

## Productivity

The QCU submissions are made against a backdrop of labour productivity increasing for 23 consecutive quarters (ABS 2015b). In addition the profit share of total factor income have for some time remained at a historical high levels reaching 26.9% in 2013-14 (ABS 2014a). Conversely, the Compensation of employees (COE) share of Total factor income has remained relatively stable with a slight fall in 2013-14 to 52.9% from 53.5% in 2012-13 compared to a record high of 62.1% in 1974-75 (ABS 2014). It follows, in our submission that there is no justification for the review of minimum rates, penalty rates or any other protection or condition that currently applies to the Australian workforce.

Peetz (2012:269) casts doubt on whether an industrial relations system impacts upon labour productivity at all and that there is a consensus that productivity improvement is a positive. Arguments for labour market reform “tend to be couched in terms of benefits to the economy”. He states that claims that a particular industrial relations policy positively impacts upon the economy should be treated sceptically “as there is a reasonable probability that the effects may be small, even non-existent, or perhaps the opposite of what is claimed” (Peetz 2012:269). Longitudinal, industry and international comparisons demonstrate that there is no macro-level relationship between an industrial relations system and productivity performance. At the international level, Peetz (2012) adopts the Varieties of Capitalism (Hall and Soskice 2001) approach to differentiate between co-ordinated and liberal market economies and establish that neither approach is associated with increased productivity. Conversely, and perhaps unsurprisingly, co-ordinated market economies outperform their liberal counterparts on unemployment and poverty levels. The longitudinal comparison undertaken by Peetz (2012:276) of average annual productivity growth rates is made for the various phases that have been earlier described in this paper ( Figure 1 - below).

Figure 1 Labour Productivity Growth over Productivity Cycles 12 Market-sector industries, 1964-65 to 2010-11 (as contained in Peetz 2012:276)



The figures show clearly that it was during the time of a traditional award system (supposed by the orthodox to be a drain on productivity) that the longest, most sustained period of productivity growth occurred. The Accord and WorkChoices phases demonstrate the lowest levels of productivity growth. Whilst the period immediately following the introduction of enterprise bargaining demonstrates the most marked increase in labour productivity, there are explanations other than enterprise bargaining for this phenomenon. The other possible explanation is that the surge in productivity that occurred in the 1990s was as a result of an unsustainable increase in work intensification that happened to coincide with that era (Balnave et al 2007:266; Quiggin 2006; Townsend et al 2013:103).

Evidence from specific industries also casts considerable doubt on the proposition that enterprise bargaining was responsible for the surge in productivity that occurred in the 1990s (Townsend et al 2013:102). One would have expected manufacturing to be where the boost would occur and no such boost occurred (Hancock 2012:296). Mining enjoyed an increase to productivity but that commenced well before the introduction of enterprise bargaining and fell off soon after and construction, similarly,



suffered a decline following enterprise bargaining's introduction (Hancock 2012:296). Hancock (2012:298) summarises the relationship between enterprise bargaining and productivity as follows:

“The supposition that it was due to enterprise bargaining is hard to sustain. Insofar as there was a surge, it seems either to have occurred in the wrong industries or, if it was in the right industries, to have been a continuation of a process that pre-dated enterprise bargaining.”

At the time of WorkChoices, Peetz (2005) compares productivity growth between Australia and New Zealand as well as the same longitudinal comparison within Australia. Prophetically Peetz (2005:37) predicts that WorkChoices would not provide for any improvement in productivity levels

In short, rates of productivity growth since the introduction of the Workplace Relations Act have been, if anything, inferior to the rates that were achieved under the traditional award system in the 1960s and 1970s. The New Zealand experience suggests that further moves to reduce the safety net under individual contracts are likely to lead to reductions in the rate of growth or productivity.

## Protections for Employees

The QCU considers the best way of protecting the rights and working conditions of employees is through membership of unions. Much has been made by employers, conservative commentators and conservative governments about the decline in union membership as justification to ignore the contribution that unions make both in providing representation for and protection to employees. As such, the decline in union membership becomes a self-fulfilling prophecy. This concept also seems to be implicit in the Productivity Commission's issues papers. The decline in union membership in itself should not be used a further excuse to attack unions and employees belonging to a union. Union membership is a basic human right (Article 22 - International Covenant on Civil and Political Rights; C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 No. 87<sup>2</sup>) that is essential for a civilised society.

Collective bargaining is also a basic human right (C098 - Right to Organise and Collective Bargaining Convention, 1949 No. 98). It has taken many forms in Australia but has since the early years of federation been underpinned by an arbitration system. Most recently a system of enterprise bargaining has had many of the features of collective bargaining but has placed significant limits on the capacity of unions to bargain effectively, while providing incentives for employers to actively avoid unions. Attempts to remove or diminish that bedrock arbitration system have not ended well for instigators. It is a political reality in Australia that the union movement has successfully campaigned in the past, and can and will campaign in the future to protect basic protections for the Australian workforce. This reality needs to be well understood by policy makers.

Use of statutory individual contracts have been used by conservative governments to undermine union membership and collective bargaining (Bray et al 2005:243; McCallum 1997:2; Rowse 2004:52; Watson et al 2003:112). This most prevalent form of statutory individual contracts was the Australian Workplace Agreement (AWAs) of WorkChoices at a national level. As is previously mentioned, the rhetoric of productivity was used to justify these attempts. Yet this rhetoric failed to match reality in

---

<sup>2</sup> Ratified by Australia 28 February 1973

any reasonable way. It is of some concern to the QCU that a number of the questions contained in Issue Paper 3 elicit responses about the adequacy of Individual Flexibility Agreements (IFAs). The unequivocal position of the union movement is that individual agreements should never be used in such a way to undermine union membership or the ability of workers to bargain collectively – which is the most effective way for workers to protect their rights and counter the power of employers. A considerable amount of issues paper 3 pertains to unfair dismissal. The propensity of this feature of the industrial relations system to be blown out of proportion by employers and conservative political parties and commentators is legendary. Most advanced economies will have similar protections for employees and it is the United States of America that stands alone without such protections (Forsyth 2009:725). The unfair dismissal jurisdiction is well used in Australia, however an objective assessment of the end results within the jurisdiction demonstrate it to be moderate and reasonable.

Employment security and precarious employment are also primary concerns of the union movement. The use of on-going casual employment, purported contracting and labour hire contribute to the general feeling of unease amongst the Australian workforce. The fact that some of those workers are able to reach agreement with their employers to place limitations on the use of precarious employment strategies is not something that should be discouraged. The path to a high wage productive economy is not by the lowest common denominator. Casual employment also leads to class of Australians unable to find credit, place their health at risk by working when ill, and fail to take holidays or participate fully in society. Recent statistics on the proportion of the Australian workforce in casual employment at close to one quarter of the work force (ABS 2011; 2013). Casual employment also reduces the ability of employees to bargain and campaign collectively. The high level of casual employment does not include other forms of non-standard employment, such as independent contractors, that when included place estimates of non-standard employment as high as 40% of the workforce (ACTU 2011).

The National Employment Standards (NES) are a relatively recent feature in the Australian industrial relations system, introduced as part of the WorkChoices regime. Conditions have largely been developed within the award system; however, the heterogeneity of such conditions enabled the creation of the NES without appearing to cause too much concern for employers or employees. It is

perhaps ironic that the WorkChoices legislation provided the capacity for such a far reaching set of minimum conditions.

## **Workplace Relations Systems**

The language used throughout the Productivity Commission issues papers is based on an assumption that the regulation of the employment relationship is necessarily complex or inefficient. Given the complexity of issues that are involved in an employment relationship (Balnave et al 2007:4) and by comparison to other legal relationships it is not necessarily the case that the Australian system is overly complex. The concern with this apparent presumption is that it will necessarily equate to a removal of conditions of employment and protections for employees.

A continued obsession with enterprise bargaining also appears inherent in the issues papers. If there is to be a truly honest appraisal of the Australian workplace relations system it would include an honest assessment of enterprise bargaining. The duplication necessitated by enterprise bargaining can only be viewed as a cost impost and a waste of resources. Some industries may well be suited to enterprise level negotiations but others clearly are not. For instance, the reason that site agreements are not permitted for major construction projects is a complete mystery to the QCU and its affiliates.

Finally, it needs to be said that the Australian workplace relations system represents decades of attempts by conservative governments to prohibit unions from effectively representing members' interests. Some of the efforts of conservative governments have been repealed by subsequent Labor governments but many measures have not. It is reasonable to say that a decline in union membership within the following these constant restriction is not surprising. Perhaps what is surprising is the resilience of organised labour in the context of these continued attacks.

## **Conclusion**

The QCU responses to the questions set out in the various issues papers are informed by the current state of the labour market and the existing conditions and protection enjoyed by the Australian workforce. The QCU rejects the notion that employment would be created by reducing rates of pay and penalty rates. It is our submission that reductions in wages, employment conditions and protections for employees will do nothing for creating employment, indeed such a policy prescription is certain to create further hardship for the most vulnerable members of the workforce.

## Responses to Issues Paper 1

***What are the biggest risks from changing the present WR system and how could these be moderated or avoided? What are the likely transitional costs associated with worthwhile reforms?***

The biggest risk of change to the WR system is a diminution in standards, protections, wages and conditions of Australian workers.

The way in which this question is posed presupposes a need for “reform”. Reform in this sense is euphemism for a diminution of existing employment standards. The “reforms” being pursued by this Inquiry are specifically aimed at reducing existing entitlements and protections for working Australians. As such they are not reforms but the removal of standards that have evolved and been fought for over several generations to avoid exploitation and poverty. It would not be reform, in our submission, to remove protections being enjoyed by working Australians but rather a retrograde step in the development of our nation.

The previous conservative government sought to introduce similar “reform” in the WorkChoices legislation introduced in 2005. The results of the 2007 federal election demonstrate that such reform is politically untenable in Australia. To introduce retrograde legislation would most probably bring about a similar result and behove an incoming government to repeal the repugnant legislation. Some might even speculate that this very Inquiry is because of an awareness of these political realities within the Abbott Government and the conclusions of any Productivity Commission report will allow the blame to be shifted from the electorally vulnerable government Members of Parliament to the Productivity Commission (ACTU 2013; Leigh 2015; QCU 2015).

Another risk in shifting the industrial relations landscape again is the further upheaval that it would cause. Australian workers and businesses would prefer some stability and as the response to a number of later questions indicates there is no need for wholesale change.

This question asks *what are the likely transitional costs*, when the QCU concerns are for the on-going and irreversible costs to working Australians that would ensue from a diminution of existing employment standards. This is particularly so for any suggestion to tamper with the minimum wage or penalty rates, with which much of the Productivity Commission's issue papers are concerned.

***The Commission invites participants' views on the best evidence about the impacts of the WR system. It also requests views about the mechanisms through which the WR affects aggregate economic outcomes, as well as impacts on particular regions, industries and firm sizes.***

***The Commission seeks feedback on major studies and databases relevant to this inquiry. How could new data and new methods help improve the assessment of policy choices?***

***Beyond their advantages in providing lessons about parts of the WR system and any of its flaws, are there broad lessons for Australia from overseas WR arrangements?***

***What are the most rigorous and comprehensive measures of the nature and impacts of international WR arrangements? What are the strengths and weaknesses of the existing measures?***

The greatest threat to the capture and retrieval of data concerning workplace relations is the cutting of funding to agencies, universities and programs. The Australian Bureau of Statistics (ABS) provide a range of quantitative measures but the regularity and specificity of these publications are limited by funding. The ABS holds the best data on pay movements in general, the data it collects for wage price/labour price index (ABS 2012). The Department of Employment provides data on wage movements in agreements (Department of Employment 2014).

Similarly the Australian Workplace Industrial Relations Survey (AWIRS) was a very useful survey that existed up until the 1990s when it was de-funded by the Howard Government. This survey is again



being undertaken by the FWC as the Australian Workplace Relations Study (AWRS) that explicitly carries on from the old AWIRS (FWC 2015).

## Response to Issues Paper 2

*What is the rationale for the minimum wage in contemporary Australia? How effective is the minimum wage in meeting that rationale?*

The rationale, as it has been for some time now is to provide a minimum income below which employees should not be subjected. The minimum wage is by any objective standard modest and is only adjusted by moderate increases having regard to a range of economic and social factors.

The union movement has from time to time expressed disappointment at what might be described as the cautious approach adopted by the FWC in adjusting the minimum wage. The Australian experience is however, vastly better than that of the United States of America for example where the minimum wage is manifestly inadequate.

There is currently a debate in the United States about minimum wages. The hopelessly inadequate minimum wage that exists in the United States (and in several of its states) is now in need of substantial adjustment. One of the problems associated with the political adjustment of the minimum wage is that political decisions to not increase the minimum wage will be made from time to time. The net result of failure to adjust the minimum wage is that to make the minimum wage relevant after years of neglect, increases to this minimum wage are by necessity large and therefore more likely to actually have an impact on employment levels, or at the very least, provide opponents of an increase with such an argument.

Typically, it is difficult get economists to agree on the impact of an increase to the minimum wage and a study undertaken by the Booth School of Business at the University of Chicago (IGM 2014). This study deals with the views of leading economists in the United States towards a proposition that raising the minimum wage would “make it noticeably harder for low-skilled workers to find employment”. The response of economists is not consistent with the supposed “general agreement” propagated by some. On whether the increase would make it harder to find employment the

respondents were evenly divided between agreeing and disagreeing. Of note is that when a further question is asked as to whether the “distortionary costs” are sufficiently small to justify the increase, a substantial 62% of respondents agreed (IGM 2014).

In the United Kingdom, the Thatcher Government dismantled the wages councils that had been in place to cover lower paid workers. The same arguments again proposed for the removal or lowering of the minimum wage in Australia were prevalent within the ideology of the Thatcher Government. Unsurprisingly the abolition of the wages councils was the subject of considerable research that “found that abolition of wage councils reduced pay but did not raise employment in affected occupations” (Freeman 1996:642). The election of a Labour Government in the United Kingdom brought about the creation of the Low Pay Commission which a subsequent Conservative Government has retained.

By contrast to the minimum wage in the US, in Australia independent tribunals have assessed the merits of increases to the minimum wage and have, with very few exceptions, granted increases of moderate or even modest level. The net result is the maintenance of decent minimum wage that has some possibility of fulfilling its intended purpose. Moreover there is no need for a substantial overhaul and moderate increases to minimum wages have proven not to be detrimental to employment levels. This very point has been the subject of on-going debate within FWC annual wage reviews. The expert panel that is charged with setting and increasing the minimum wage in Australia came to the following conclusion:

*“The research presented by parties to this Review has not convinced the Panel to alter its position from previous reviews that a modest increase in minimum wages has a very small or even zero, effect on employment.”<sup>3</sup>*

---

<sup>3</sup> FWC FB Annual Wage Review 2012-13 at [14]

***To what degree will the role and effects of the minimum wage change with likely future economic and demographic developments? How many people receive the minimum wage (and for how long)? What is the best measure of this share and why?***

It is perceivable that the application of the minimum wage will be reduced overtime as the workforce becomes more skilled. That perception is contingent upon the workforce becoming more skilled over time. This is unlikely if conservative attacks continue on training, apprenticeships, and higher education.

***What are the effects of minimum wages on different households, taking account of direct and indirect wage and price effects, and the tax and social transfer system?***

Recent minimum wage increases have not had an adverse inflationary impact as evidenced by the ongoing and historically low inflationary environment in Australia (ABS 2014b). Recent amendments to the minimum taxation threshold have worked to make the minimum wage more effective, a factor actually taken into consideration by the FWC in the 2013 national review. The existence of a decent minimum wage also negates the necessity for other social transfer measures.

***Are there any issues associated with the special minimum wage rate arrangements that apply to juniors, trainees and apprentices?***

Junior rates are discriminatory. There can be no clearer case of discrimination than paying someone a lesser rate of pay based purely on their age. Tribunals and governments however have adopted a cautious approach lest the removal of junior rates contributes to youth unemployment that is generally regarded as a problem, regardless of the prevailing economic conditions.

Junior rates are also an anathema to classical economics where the supposed determinant of a workers 'wage is the value of their marginal product (Stigler 1946:358). Unions likewise have sought

to remove junior rates in various instances because of a perception of them being irrelevant to the worth of an employee and/or discriminatory in nature. Recently a full bench of the FWC granted an application to remove junior rates for employee aged 20 years<sup>4</sup>. The rates of trainees and apprentices are also the subject of a recent review by the FWC<sup>5</sup>.

The rationale behind the decision of the FWC demonstrates a capacity of that tribunal to weigh up the competing arguments in relation to this question.

***What are the impacts of minimum wages on employment as a whole, and on particular groups of people (by age, skill, education, gender, and location, among other things)? How robust is the evidence? Are zero or positive employment effects from minimum wages for low-skill workers plausible for the industries in which minimum wages predominate, and if so why?***

The debate about the impact on employment levels by minimum wages is inconclusive. The doubt in relation to the impact of minimum wages on employment means that any perceived benefits in employment are outweighed by the social issues created by the removal of a minimum wage.

***What would be the best process for setting the minimum wage, and how (and why) does this vary from the decision-making processes used by the minimum wage Expert Panel of the Fair Work Commission? Are there grounds to vary the criteria used by the Panel? Should the ratio of the minimum wage to median wages change and, if so, in which direction?***

There seems to be little reason to depart from the existing system. The Howard Government introduced a separate specialist tribunal, the Fair Pay Commission, to investigate minimum wages as part of the WorkChoices legislation. If anything, the Fair Pay Commission experiment provided for more erratic outcomes than those provided the existing tribunal that had a charter of providing such

---

<sup>4</sup> Modern Awards Review 2012 – General retail Industry Award 2010 – Junior Rates [2014] FWCFB 1846

<sup>5</sup> Modern Awards Review 2012 – Apprentices, Trainees and Juniors [2013] FWCFB 5411

a public amenity for around 100 years. The relationship between the minimum wage and median income is a factor considered by the FWC in its consideration.

***What evidence is there about the effects of minimum wages on the incentives for employees and employers to increase employees' skills?***

The existence of a minimum wage provides incentive for employers to increase the standards expected of employees (Stokes 1973:137). It follows that a higher wage will justify or require a higher level of skill and provide the incentive for both employers and employees to increase skill levels. The alternative is for employers to seek to increase profit by continually reducing wage costs.

***How do minimum wages ripple throughout the wage system and over what time frame? Are any ripple effects desirable or undesirable and, if the latter, how would they be mitigated?***

The QCU is unable to provide evidence with respect to this question. One would presume however, that many of the arrangements that are described as being individual do bear some relationship to minimum rates for example by paying a certain amount above the award rate of pay.

***Should there be a process to allow the minimum wage to vary by state and territory or region? If so, on what basis? What would be the effects of such variations at the borders between states or regions? What would be the overall impacts?***

Up until the introduction of WorkChoices various state tribunals did have the capacity to set separate minimum rates within their distinct jurisdictions. It is instructive to consider that following the Structural Efficiency Principle, wages were set at similar rates throughout Australia. Additionally, State Wage benches have largely increased minimum rates by a similar amount to that of the FWC and its predecessors<sup>6</sup>. This process was taken one step further following WorkChoices where eventually all

---

<sup>6</sup> Exceptions within the Queensland jurisdiction include those increases brought down by the Fair Pay Commission that have elsewhere been described as erratic.

private sector Queensland employees were transferred to the national system. Whilst there might be arguments for the adjustment of minimum rates according to location, the contrary impact would be that of complexity.

***Are there grounds for an in-work benefit, taking into account their social and distributional impacts, effects on employment and economic efficiency, risks, administrative requirements, and compliance costs?***

***How would any in-work benefit be designed and implemented? How would it be targeted to minimise deadweight costs?***

Employers do and should have an obligation to pay a fair wage; this responsibility should not be handed to taxpayers.

***To what extent should an EITC or some other in-work payment serve as a complement or substitute for minimum wages?***

An EITC and a minimum wage are complements, not substitutes. In the absence of a binding minimum wage, an EITC induced additional labour supply, which in turn reduces wages relative to where they otherwise would've been, which means the EITC is effectively a subsidy to employers and does little to boost the living standards of the low paid.

***How should any such payments be funded, and what would be the economic and distributional outcomes of alternative funding mechanisms?***

An EITC increases EMTRs on middle-income households; when the withdrawal rates for an EITC are combined with those of existing payments (notably Family Tax Benefit), the result could be, at the margin, a significant disincentive to work for people in such households.

***What would be the budgetary implications of any in-work benefit, and how would this affect its desirability and possible timing?***

An EITC would be very expensive. It is unlikely that the Commonwealth will have sufficient fiscal room to enact an EITC given other competing demands.

***What reforms, if any, should be made to the processes used to determine the current minimum wage?***

There is no case made for any change to the existing process used to determine the current minimum wage. As previously submitted the Fair Pay Commission experiment was not considered a success. A specialist, independent tribunal has been in place for over a century and there are no grounds from departing from the existing model.

***Should the desired processes be more prescribed in regulation or law; or are guidelines preferable?***

As above, there is no case for departure and greater prescription has the potential for unforeseen consequences.

***What, if any, particular features of the NES should be changed?***

The NES appears to be a reasonably comprehensive set of minimum employment standards.

***How should penalty rates be determined?***

The existing arrangement of penalties existing within modern awards is adequate.



***What changes, if any, should be made to the modern awards objective in relation to remuneration for non-standard hours of working?***

No case is able to be made for change. Employers have been unsuccessful in an on-going campaign to remove penalty rates and are hopeful that a change to the objectives in the Act will improve their chances of success.

***What are the economic effects of current and alternative penalty rate arrangements on business profitability, prices, sales, opening hours, choice of employment type, rostering, hours worked, hiring, unemployment and incomes?***

Recent data from cafes, restaurants and takeaway food services (ABS 2015a) would indicate that the existence of penalty rates is not having any detrimental impact on an industry that is often held up as being one in which penalty rates are needed to be removed.

***Were penalty rates deregulated, would wages fall to those applying at other times, or would employers still have to pay a premium to attract labour on weekends and holidays?***

This question is speculative, however, the vigour with which some employer organisations pursue the removal and/or reduction of penalty rates would indicate that it is highly likely that rates would reduce to those being paid for other hours. This is the QCU's gravest concern with this proposition.

***What are the long-run effects of penalty rates on consumers and on the prices of goods and services?***

The long run effect would be to further reduce income and labour's share of the national income. This in turn would reduce the level of economic activity resulting from household spending and in some case might remove the little discretionary spending for some families reliant on penalty rates.

***To what extent does working on weekends or holidays affect families, employees and the community? Are penalty rates effective at addressing any concerns in this area?***

The argument that is presented in favour of the removal of penalty rates is that working on weekends no longer represents a rarity and therefore should not be compensated (Workplace Express 2015b). This argument was most recently rejected by the FWC in 2014 but is consistent with the same argument that has been run by employer organisations for decades (Barnes and Fields 2000:541). In the Productivity Commission's own issue paper 2 (p14) it is postulated that the extension of trading hours somehow equates to such hours no longer being unsociable.

The arguments are rejected by the QCU as they have been by the FWC and its predecessors. It is indisputable that the family and social activities such as sport and worship still continue to be prevalent on weekends.

Penalty rates provide some compensation for employees in undergoing such hardship. They also as the name suggests provide a disincentive for employers to roster employees on unsociable shifts unless it is a necessity.

***What do the experiences of countries like New Zealand, the United Kingdom and the United States — which generally do not require penalty rates for weekends — suggest about the impacts of penalty rates?***

One observation that might be made with respect to the United States in particular is the phenomenon of the working poor. Similar to the absence of decent minimum wage, the removal of penalty rates will compel some employees to work multiple jobs to make ends meet. There are adverse social implications for the creation of a working poor in Australia.

***What are the variations in profit margins and sales over the week, and to what extent does this affect the appropriate design of penalty rate arrangements?***

The QCU is unable to assist with this question.

## **Response to Issues Paper 3**

***Clearly, some processes are important to enable efficient bargaining, but it is an open question whether there should be changes to processes to meet the objectives set out in the first Issues Paper. The Commission seeks stakeholders' views.***

The extent to which unions and employers can truly reach agreements that can be considered as collective bargaining is limited by restricting the content of agreements. As with a number of other aspects of workplace relations regulation, these restrictions reached their zenith in the WorkChoices legislation. Whilst ostensibly promoting flexibility, restrictions on the content of agreements limit the extent to which agreements can be reached and an on-going improvement to employment relations at a workplace level.

As is discussed elsewhere there is an assumption that the current focus on the “enterprise” in some way improves productivity. This assumption is not backed by any evidence and existing limitation on industry-wide or site agreements may well be counter-productive. Industry level agreements may suit employers and employees in some industries but those industries are practically barred from industry-level negotiation.

***The Commission seeks views about the best arrangements for greenfields agreements (not just those contemplated in the recent Bill), including an assessment of the effects of any arrangement on the viability and efficiency of major projects on the one hand and, on the other, maintaining the appropriate level of bargaining power for employee representatives.***

There is support for greenfields agreements with the appropriate union. The employer greenfield agreement contained in the WorkChoices legislation constituted an employer agreeing with themselves and amounted to an employer unilaterally determining employment conditions.

***To what extent does the current system allow for bargaining with the most appropriate enterprise?***

The replication of bargaining at various sites is time consuming and often unnecessary.

***Would there be any advantages or disadvantages to employee groups negotiating a joint agreement with both the labour hire agency and the host business?***

One of the greatest sources of industrial conflict is where two groups of workers are paid differing rates of pay for performing the same job. Labour hire has been used in some instances to avoid existing legal obligations.

The advantages are quite simple. The ability to cover labour hire employees in an agreement negates the use of labour hire to simply drive wages down. If it is the case that labour hire has advantages for peak demands and specialist skill rather than to reduce existing conditions and entitlements.

***To the extent that it would be desirable, how could joint enterprise bargaining work in practice?***

Similar to any site agreement. Provisions could require that all employees are entitled to the agreement operating at the worksite irrespective of the employee's employer or employment status.

***The Commission seeks feedback on practical options in this area, and why they are needed within the current bargaining process. In particular, why are there not already sufficient commercial incentives (and competitive pressures) for parties to improve productivity, either as a commitment under an enterprise agreement or during the normal operation of the enterprise?***

One could presume that after more than 20 years of productivity based bargaining that there is at least some fatigue amongst the industrial parties. In the early years of enterprise bargaining genuine discussion concerning productivity there were included attempts to cultivate a cooperative agenda by which productivity could be improved. Initiatives like the Australian Centre for Best Practice Ltd were

created to facilitate employers and employees embarking on a mutually agreeable terms. This tripartite organisation was intended to assist employers and employees (in conjunction with their unions) implement workplace change through measurable productivity improvements. Worker involvement and flattening management structures were part of agenda to improve productivity in industry.

From a union perspective the introduction of the Workplace Relations Act 1996 also coincided with a distinctly different attitude adopted by many employers. The path of consensus was replaced with an anti-union attitude that focused more attention on excluding unions than it did for improving productivity. In the eyes of some, quite clearly excluding unions is the path to improving productivity. Experience would demonstrate that this proposition is not accurate and figure 1 demonstrates that the surge of productivity followed the early days of enterprise bargaining rather than later legislative models.

***The Commission also request views about the effectiveness of existing productivity clauses, and whether there are any features of the industries, unions and firms that explain why some forge such agreements and others do not.***

The QCU cannot assist with this question.

***To what extent are the good faith bargaining arrangements operating effectively and what if any changes are justified? What would be the effects of any changes?***

The concept of good faith bargaining is nothing new to the Australian industrial relations system (Casperz, Gillan and White 2011:633). The obligation to bargain in good faith was only removed in the Workplace Relations Act 1996 and it would follow that any system that encouraged an on-going and productive relationship would encourage parties to operate in good faith.

The provisions of section 229 of the *Fair Work Act 2009* appear to have been fairly well used by the parties since its introduction. A number of reported cases also point to the use of section 229 by employers, thereby demonstrating its utility as mechanism to break a deadlock rather than merely being a union-friendly provision.

***Are the FWC good faith bargaining orders effective in improving bargaining arrangements?***

The propensity of parties, both unions and employers, to use these provisions would tend to indicate their effectiveness. 96 applications under section 229 were dealt with by the FWC in the year 2013-14 (FWC 2014:59).

***How should a WR system address the desire by some employers and employees for flexibility in the workplace?***

The QCU remains unconvinced that flexibility is denied to employers and employees in the current system. When one speaks of flexibility with working arrangements expectations between employers and employees may differ (Skinner and Pocock 2011:68). Employees have some capacity to seek flexibility as a result of right to request provisions of section 65 of the *Fair Work Act 2009* (Skinner and Pocock 2011:78)

***What protections need to be in place for employees and employers in creating bespoke agreements?***

The QCU would argue that current provisions in the *Fair Work Act 2009* are sufficient. The incidence of take up of IFAs for example does not necessarily suggest a lack of opportunity but rather no inclination from employers and employees to enter into such arrangements.

***What are the benefits and costs of IFAs (or similar provisions)? Case studies would be very helpful.***

IFAs were intended to replace the statutory individual agreements, AWAs that were provided for by the *Workplace Relations Act 1996*. IFAs must be viewed in their historical context and in this regard it is constructive to consider the incidence of AWAs that only covered 2.4% of the Australian workforce (ABS 2004). Any argument for a return to AWAs based on the low take up of IFAs is fallacious. The difference between IFAs and AWAs is that the former do not impinge upon the ability of a union to obtain access to the employee covered and for the employee to take part in protected industrial action.

***Why are employers apparently reluctant to use IFAs (in both enterprise agreements and individual arrangements that seek to override an award)?***

Despite the rhetoric of individual agreements, it has been argued that AWAs were used by employers for three primary reasons that had nothing to do with flexibility or productivity (Martin 2014:6). AWAs despite their administrative inconvenience were used in some industries, most notably mining, in order to restrict the right of entry of union officials (Barnes 2006:373). Other uses of AWAs included the capacity to freeze wages for the duration of the agreement (thereby escaping escalation to wages by the Annual Wage Review) or in the case of the Commonwealth Government to actually increase the number of AWAs in currency.

***Should there be restrictions on the matters that parties can trade off in forming individually-tailored agreements, and if so, why?***

Conditions of employment exist for a reason. The rhetoric of employee choice in matters pertaining to trade-off of basic conditions of employment is viewed with suspicion by the trade union movement. Broadening of the scope for trading off conditions lends itself to cases in which employees are significantly disadvantaged.

***On the factual front:***



- ***How widespread are current IFAs?***
- ***Which industries and occupations are most likely to be subject to these agreements?***
- ***What sorts of matters are varied by IFAs?*** [The Commission is aware of the FWC's 2012 employer and employee surveys relating to IFAs, but is seeking any further evidence on these matters, as there have been changes to the arrangements for IFAs and potentially greater familiarity with them since then.]

The QCU is unable to assist with these questions. The experience of affiliates is that there is little call for such provisions.

***Are the enforcement arrangements for ensuring IFAs meet the FWA efficient and effective? If not, what are the remedies?***

As above.

***Are the notice provisions adequate?***

As above.

***To what extent are IFAs standardised across employees, rather than tailored to individual circumstances?***

As above we are unable to assist with IFAs, however the observation for AWAs is that by and large they were mass produced documents that did not vary from one employee to another (Bray et al 2005:282; Balnave et al 2007:181). As discussed above, the purpose of AWAs was not to provide for separate outcomes for individual employees.

***Are there better models for individual agreements internationally, and what evidence is there about their costs and benefits?***

The QCU is unable to assist with this question.

***Given the low current level of disputes, it is an open question whether there is any requirement for changes in the FWA's arrangements for industrial disputes, but the Commission is interested in:***

- ***any appropriate changes to what constitutes protected industrial action under the FWA***
- ***arrangements that might practically avoid industrial disputes***  
***the scope and desirability of creating more graduated options for industrial action beyond lock-outs for employers. Would options like this assist negotiation or increase disputation?***
- ***whether there are any problems in determining whether tactics in bargaining really amount to industrial action or not***
- ***any need to change the protected action ballot process***
- ***the role of the FWC in relation to disputes, especially in relation to cooling off periods and the test that determines whether such a period is justified***
- ***the prevalence of 'aborted strikes' (the capacity to withdraw notice of industrial action) as a negotiating tool, and the degree to which there is any practical response to this apart from the good faith bargaining requirements of the FWA***
- ***the degree to which adversarial workplace cultures — rather than bargaining per se — contribute to industrial action, and what could be done to address this***
- ***the adequacy of enforcement arrangements for disputes***
- ***the reasons for international variations in industrial action***
- ***data about the nature of disputes, such as lock-outs and go-slows (as ABS data is limited in its categorisation of disputes)***
- ***the degree to which working days lost provide an accurate reflection of industrial action.***

The QCU would rely upon the current, historically low level of disputation to suggest existing dispute resolution is working effectively.

On the topic of aborted strikes, the QCU would be unsure of the remedy. It would be absurd to suggest that a tribunal order union members to undertake industrial action that had been threatened as part of a campaign.

***The Commission requests information about the relative importance of common law and the FWA in establishing employment terms and conditions (by industry, skills and occupation). An associated issue is the extent to which such individual agreements do, in practice, lead to more flexible working arrangements.***

***The Commission is also interested in understanding:***

- ***the extent to which the common law provides a legal ‘safety net’ for employees and employers if there are flaws or omissions in statutory employment law***
- ***whether there should be greater (or lesser) reliance on individual arrangements, and why should this be so.***

The reason for workplace relations legislation is to intercede in the enormous power imbalance between employers on the one hand and employees on the other. To purely rely upon common law is to return the master and servant relationships of the nineteenth century.

***The Commission is interested in understanding whether employees and employers can effectively and efficiently resolve disputes over employment terms and conditions under the existing framework. How are existing dispute resolution pathways working? Do people know where they should seek assistance?***

The QCU would rely upon the current, historically low level of disputation to suggest existing dispute resolution is working effectively.

## **Response to Issues Paper 4**

***Do Australia's unfair dismissal processes achieve their purpose, and if not, what reforms should be adopted, including alternatives (or complements) to unfair dismissal provisions?***

The existence of an unfair dismissal jurisdiction is essential to protect employees from malicious and capricious termination of employment. Any debate concerning unfair dismissal legislation includes the inaccurate assertion that it is impossible to terminate an employee's employment. An examination of the FWC Annual Report (FWC 2014) indicates the extent to which such claims are exaggerated or completely inaccurate.

The vast majority of unfair dismissal claims result in an outcome other than reinstatement. Of the 10,972 unfair dismissal matters that were dealt with in 2013/14 (FWA 2014:41) a total of 34 (or 0.3%) resulted in reinstatement of the employees. Of 150 cases in both 2012/13 and 2013/14 in which the applicant was awarded compensation the most frequent amount granted was between \$2,000 and \$3,999 (FWA 2014:127).

The low incidence of reinstatements ordered combined with the relatively low level of compensation proves claims that it is impossible to terminate employees' employment to be inaccurate.

***Are the tests used by the FWC appropriate for determining whether conduct is unfair, and if not, what would be a workable test? Are the exemptions to unfair dismissal appropriate, and if not, how should they be adapted?***

The existing test of unfairness reflect those that have been developed over years of case law.

One of the most outrageous denials of workplace rights was the “100 employee” limit included in the WorkChoices legislation. The QCU would urge against any similarly ridiculous exclusion into the future.

***What are the strengths and weaknesses of the Small Business Fair Dismissal Code, and how, if at all, should the Australian Government amend it? Should the employment threshold be maintained, raised or lowered?***

The Small Business Fair Dismissal Code appears to be a useful guide for employers to follow. If an employer follows the processes set out in this code and the dismissal is for a genuine reason, it is difficult to see how that employer would get into any trouble.

As with any arbitrary limit there will be injustice arising out of cases that fall one side of the threshold or the other. The number 15 arose out of the termination change and redundancy provisions and legislation that became prevalent in Australia in the early 1980s. A cogent argument could be mounted that if a small business was defined as under 15 employees in the early 1980s, changes to the structure of industry and technological change mean a comparable figure some 30 years later would be far less than 15 employees.

***In cases where employers are required to pay compensation in lieu of reinstatement, are the current arrangements for a cap on these payments suitable?***

The existing cap on compensation is manifestly inadequate when compared to other jurisdictions (FWC 2014:127). The history of the six month cap comes from the introduction of unfair dismissal into the federal jurisdiction in the early 1990s. Early decisions that made front page news included compensation payments made to senior executives. The political reaction to the adverse publicity was to exclude high-paid employees and limit compensation to the equivalent of six months’ pay.

***What are the effects of unfair dismissal arrangements on firm costs, productivity, recruitment processes, employment, and employment structures?***

The QCU is unable to assist with this question.

***What are the impacts on employees of unfair dismissal, both personally and in terms of altered behaviours in workplaces?***

Workplaces in which unfair dismissal and termination is at the whim of the employer suffer poor morale and high turnover of productive employees. The existence of some form of protection from unfair dismissal is common within advanced economies (Forsyth 2009).

***What are the main sources of costs (including indirect costs), and how could these be reduced without undermining the fundamental goals of unfair dismissal legislation?***

The QCU is unable to assist with this question.

***Under current or previous arrangements, what evidence is there of the practice of 'go away money'? Have recent changes, such as those that provide the FWC with expanded powers in relation to costs orders and dismissing applications based on unreasonable behaviour, improved matters?***

For every employer that claims to have made payment to see an unfair dismissal application go away, there is an employee who considers that their claim to unfair dismissal has been justified by virtue of the payment. Most settlements will include a confidentiality caveat that makes the precise reasons for settlement unknown. In the order of 80% of applications are settled by conciliation (FWA 2014:42). This demonstrates a capacity of parties to make reasonable settlements based on their respective prospects had matters proceeded.

***Do unfair dismissal actions disproportionately affect any particular group of employees (for example, by gender, ethnicity, geographical location, industry, union affiliation, occupation or business size)?***

The QCU is unable to assist with this question.

***What are the main grounds on which people assert unfair dismissal, and what types of claims are most likely to succeed?***

The QCU is unable to assist with this question.

***How does Australia compare internationally with regard to the unfair dismissal protections? Are there elements of overseas approaches and frameworks that could usefully be applied to Australia?***

One unhelpful feature of the Australian jurisdiction is that it cannot be invoked prior to a termination of employment taking place. One feature of other jurisdictions that might be considered is to enable the enlivenment of the jurisdiction before a termination of employment takes place. For example, an employee who is concerned about the likelihood of having their employment terminated could negotiate an outcome before the dismissal takes place. Likewise, an employer wanting to sever the relationship in the fairest way possible could also call upon the expertise of the FWC to assist in the process.

***What are the likely utilisation rates of the anti-bullying provisions, and what factors are most likely to affect these rates?***

***What are the impacts, disadvantages and advantages of the anti-bullying provisions of the FWA for employers and workers?***

***Are there any unintended consequences of the anti-bullying provisions?***

***To what extent are the anti-bullying provisions of the FWA substitutes for, or complements to, state and federal WHS laws and other provisions of the FWA? What implications do overlaps have for the current arrangements?***

***How effective has the FWC been in assessing applications for orders to stop workplace bullying?***

***What, if any changes, should occur to the anti-bullying provisions of the FWA or in the processes used to address claims and to communicate with businesses and employees about the measures?***

The QCU is unable to assist with incidence or effectiveness of the anti-bullying provisions. We would however note that they represent an attempt to address an enormous problem within the Australian community. It should also be noted that provisions of this nature enjoyed bipartisan support when introduced.

***Do the general protections within the Fair Work Act 2009, and particularly the ‘adverse action’ provisions, afford adequate protections while also providing certainty and clarity to all parties?***

The introduction of the general protections into the Fair Work Act 2009 was a positive step in providing decent workplace rights for Australian employees. These provisions are not onerous and would only penalise employers engaging in vindictive conduct towards their workforce.

***What economic impacts do these protections have?***

The QCU is unable to assist with this question.

***To what extent has the removal of the ‘sole or dominant’ test that existed in previous legislation shifted the balance between employee protections and employer rights?***

The QCU is unable to assist with this question.



***Is there scope or argument for consolidating or clearly separating the mechanisms by which employees can seek redress for unfair conduct by others in the workplace?***

The QCU is not aware of any such argument.

***Are the discrimination provisions within the general protections effective, and are they consistent with other anti-discrimination regulations that currently apply in Australia?***

There is an argument for harmonisation of those attributes upon which it is illegal to discriminate. The *Queensland Anti-Discrimination Act 1991* is amongst the best legislation of its type for protecting employees from discrimination but it does not contain some of the attributes contained in legislation in other jurisdictions and vice versa. The obvious concern to the QCU is that any attempt at harmonisation would reduce employees' existing rights.

***In regard to the dismissal-related general protections, to what extent do the current arrangements for the awarding of costs and convening of conferences produce outcomes that are problematic?***

The QCU is unable to assist with this question.

***To what extent has the recent harmonisation of the time limits for lodgments of general protection dismissal disputes and unfair dismissal claims increased certainty for all parties involved and reduced the 'gaming' of such processes?***

The QCU is unable to assist with this question.

## Response to Issues Paper 5

*How are the FWC and FWO performing? Are there good metrics for objectively gauging their performance? Should there be any changes to the functions, spread of responsibility or jurisdiction, structure and governance of, and processes used by the various WR institutions?*

*Are any additional institutions required; or could functions be more effectively performed by other institutions outside the WR framework?*

*How effective are the FWO and FWC in dispute resolution between parties?*

*What, if any, changes should they make to their processes and roles in this area?*

The QCU would point to previous attempts to dilute the authority of the AIRC by the creation of the Fair Pay Commission and the Employment Advocate. These attempts were largely unsuccessful and rejected by the Australian public.

A general observation is that the FWC does keep to fairly good time frames (FWC 2014). Moreover the mammoth task of the award modernisation process was undertaken with good results. There is no apparent justification for interfering with the independent operation of the existing institutions other than an attempt to influence outcomes.

The FWO (2014:2) annual report makes the following statements in relation to its current operation for the year 2013/14:

- Responded to more than 595,000 enquiries received through Fair Work Infoline services.
- Resolved 99% of call enquiries at first contact.
- Answered almost 90,000 Small Business Helpline calls in seven months.
- Received more than 11 million visits to fairwork.gov.au and more than two million fact sheet, best practice guide and template downloads.
- Introduced our transformed website offering increased accessibility and customisation including tailored industry information.

- Received more than 1.57 million visits to pay tools.
- Expanded and updated our suite of online self-service resources, including developing ‘starting a new job’ and ‘hiring an employee’ guides.
- Implemented strategies to educate areas, industries and workers most in need of our assistance, including young hospitality workers, overseas Harvest Trail workers and small business operators.

At first glance, the FWO is providing a useful service to a large number of Australians. Given comments that are made by the Productivity Commission throughout the issues papers in relation to the complexity of the workplace relations system, such a service is obviously quite valuable.

***Should s. 569 remain in the FWA, and if so, should there be any modifications to it?***

The issues paper suggests that the right of the Minister to intervene has been “surrounded by considerable controversy” but does not cite any examples or evidence in support of this assertion. If one takes the QANTAS lock out in 2011, very few (if any) would argue that Gillard Government did not take the appropriate action to bring about a resolution that threatened the welfare of the Australian community and economy (Smith and Howard 2012).

***What are the main compliance costs faced by parties in the WR system (management time, costs of paying for expertise, delays in making decisions)? How big are they (in dollars or share of management time)?***

***To what extent do such compliance costs vary by enterprise size, by industry or by jurisdiction?***

The QCU is unable to assist with these questions.

***What aspects of the WR system are the main sources of compliance costs (for example, rules concerning enterprise bargaining, awards, industrial disputes)?***

Enterprise bargaining provides for a duplication of processes and considerable expense. To allow for industry level bargaining and site level agreements would overcome the need for this duplication.

***How could compliance costs be reduced?***

As above.

***To what extent do compliance costs or other barriers relating to the WR system represent a barrier for non-employers shifting to employers?***

The QCU is unable to assist with this question.

***To what extent do the existing secondary boycott arrangements in the CCA contribute to a well-functioning WR system? Should the Australian Government modify ss. 45D and 45E, and if so, how?***

The QCU would advocate that unions enjoy protection from these sections whilst undertaking protected industrial action under the Fair Work Act. The introduction of enterprise bargaining was meant to enable bargaining to take place at a workplace level. The use of secondary boycott legislation seriously impinges upon the ability of employees to bargain in such a process.

***Are there barriers of a regulatory or policy nature to enforcement of ss. 45D and 45E, and if so, what should be the remedies?***

The QCU is unaware of any such barriers.

***Are there grounds for widening the capacity of the CCA to address concerns about misuse of market power exerted through collective bargaining by employees and employer groups? If so:***

- *what would be the scope of any desirable changes and their linkages with the FWA?*
- *what would be the effect of any changes on the outcomes of the WR system (for example, workplace harmony, the power balance between employers and single employees, efficiency, productivity; wages and conditions, transaction costs), the existing industrial law system, and the resourcing of the ACCC?*
- *how would it be practically applied? For example, how would the ACCC identify restrictive trade practices, who could be the infringing parties, and what would be the role of authorisations and notifications for unions and employer groups?*
- *Are there grounds for changes to the CCA to address enterprise agreements that have the effect of limiting competition from contractors or labour hire businesses (and why would the CCA be preferred to the FWA in this respect)?*
- *what would be the benefits, costs and risks of any changes?*

*On the other hand, are there grounds for shifting some aspects currently covered by the CCA to the FWA?*

The QCU would advocate that all matters pertaining to the employment relationship be dealt with under the Fair Work Act. The use of competition legislation is at odds with the primary function of a union to collectively bargain. Both the right to join a union and collectively bargain are fundamental human rights and the use of competition legislation to regulate employment matters infringes those rights.

*How should WR arrangements in state and public services (and any relevant state-owned enterprises) be regulated? In particular, to what extent and why, should WR provisions vary with the public or private status of an enterprise?*

A range of views exist in relation to the capacity of the federal system to apply to employees of state governments. Constitutional barriers prevent a federal government from taking over this aspect of the respective jurisdictions and state governments have demonstrated little interest in handing over power over their own employees to the Commonwealth. Accordingly this would require significant dialogue at an inter-governmental level before it could be seriously contemplated.

***Are there any impediments in the current legislation to the efficient mix of independent contractors and ongoing workers?***

If contractors were truly independent there would be no issue. Problems arise because employees are being treated as independent contractors and working alongside genuine employees.

***Are there any general concerns about the WR system as it applies to independent contractors?***

This question appears incongruous. If contractors are to be truly independent there could be no question of the workplace relations system applying. The asking of this question indicates the ambiguity caused by the prevalent use of sham contractors.

***What are the advantages and disadvantages of creating a statutory definition of an 'independent contractor'? Do any aspects of the WR system represent a barrier to independent contractors?***

The legal meaning of independent contractors is reasonably well understood by virtue of case law<sup>7</sup>. The advantage of defining independent contractor would be for greater understanding of this legal concept. The disadvantage would be the risk of diminishing the term or creating ambiguity and broadening the scope for sham contractors.

***Are the current provisions in the Fair Work Act sufficient to discourage sham contracting?  
To the extent that the current provisions are insufficient, what changes could be made to strengthen the Act?***

---

<sup>7</sup> For example *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21; 75 ALJR 1356; 106 IR 80; 181 ALR 263 (9 August 2001)

Enforcement would be the key to discouraging sham contractors. This might be equally dealt with in terms of taxation rather than workplace relations regulation.

The Queensland and New South Wales state jurisdictions have included deeming provision that enabled workers to be correctly determined as employees rather than sham contractors. Both jurisdictions have also included the capacity for tribunals to interfere in a contract for service that is deemed to be unfair. Similar provisions might be considered federally.

***In what industries is sham contracting most prevalent? Have instances of sham contracting become more or less common over time? How much of sham contracting is deliberate rather than mistaken?***

Affiliates have advised that sham contracting is prevalent in contract cleaning, contract security and the building and construction industries.

***Are there any general concerns about the treatment of labour hire workers under the FWA?***

A constant cause of dispute is the treatment of labour hire workers. The use of labour hire employees is often associated with lower rates of pay and conditions as well as more precarious employment than employees directly employed by the guest business. As a result, those employees of the labour hire company do not necessarily enjoy the same entitlements as employees of the guest employer.

***What is the prevalence of provisions restricting the use of independent contracting and labour hire arrangements in enterprise agreements? What types of restrictions have been applied?***

Where agreement is reached over the way in which independent contracting and labour hire arrangements are engaged, one would presume that such agreements are either to avoid or in resolution of the type of dispute mentioned above.

***What are the arguments for and against any such provisions, and to what extent are there grounds for any legislative amendments?***

As above.

***What are the effects of such provisions on flexibility, productivity and costs in workplaces, and on the capacity of employers to manage labour? How have they affected independent contractors and labour hire businesses?***

The question posed is rather counter-intuitive. If contractors are to be truly independent then employers have no capacity to manage labour.

***To what extent do such provisions affect the mix of independent contractors / labour hire workers and ongoing workers?***

As above.

***How does the WR system affect the use of sponsored foreign workers?***

The relevant legislation needs to apply to all employees regardless of their residential status. The QCU has concerns as to why this question would be asked.

The proper application of the law to sponsored foreign workers is of some concern as the following statement from the FWO (2014:30) confirms:



“Overall, visa holder complaints accounted for more than 10% of all complaints completed in 2013–14. The most common complaints investigated involved subclass 417 working holiday (1,042) and subclass 457 temporary skilled work (404) visa holders.

We recovered more than \$1.1 million for 659 overseas workers, initiated 12 litigations relating to visa holders and executed three enforceable undertakings.”

With greater than 10% of all complaints coming from sponsored foreign workers and a recovery of more than \$1.1 million, the QCU considers that practices associated with visa holders should be subject to some investigation.

***Does any element of the WR system affect the incentives of employers either towards or away from the use of sponsored worker visas?***

The QCU is surprised at this question given that the only justification for a sponsored work visa would be a skill shortage in a particular occupation for a particular geographic location. The very asking of this question implies that employers are using sponsored worker visas to avoid obligations. Responses to this question should be very interesting, having regard to the inordinately high number of complaints to the FWO from this group of employees.

***Do the existing rights of entry laws sufficiently balance the interests of employees and employers, and if not, what are the appropriate reforms?***

The existing laws are what would be described as red tape in that an unnecessary level of paperwork is required from union officials every time they wish to enter a workplace. Up until the introduction of provisions contained in the *Workplace Relations Act 1996* there was no obligations for union officials to provide 24 hours’ notice of their intention to enter a workplace. The case for the requirement of 24 hours’ notice was never made and only appears to be a mechanism for employers to make efforts to undermine the visit amongst the workforce. Subsequently this standard of 24 hours’ notice has been used to justify delaying union officials’ right of entry in the case of suspected contraventions of the Workplace Health Safety Act in at least one Australian jurisdiction.

***What are the problems, if any, about the WR arrangements for the transfer of business, what are the appropriate changes and what effects would these have?***

We are not aware of any problems associated with transfer of business. The existing provisions go some way towards safeguarding employee entitlements and discouraging employers to outsource for the purpose of avoiding existing obligations.

***What are the costs associated with existing differences in long service leave entitlements across states? Do these costs justify the adoption of a uniform national standard?***

Being a state based organisation, the QCU is unable to assist with this question.

***If a uniform national standard for long service leave was to be adopted, how should the existing disparities between state and territory laws be resolved?***

As above.

***What are the implications of international labour standards (including those in trade agreements) for Australia's WR system?***

Australia is rightly signatory to a number of conventions containing international labour standards. It is important that Australia meets its international obligations and it is of some concern that this question is even being asked.

## Bibliography

- Australian Bureau of Statistics (2004) 6306.0 - *Employee Earnings and Hours*, Australia, May 2014
- Australian Bureau of Statistics (2011) 6359.0 – *Forms of Employment*, Australia, November 2011
- 6351.0.55.001 - Wage Price Index: Concepts, Sources and Methods, 2012
- Australian Bureau of Statistics (2012) Australian Bureau of Statistics (2013) 6359.0 - *Forms of Employment*, Australia, November 2013
- Australian Bureau of Statistics (2014) 5204.0 - *Australian System of National Accounts, 2013-14*
- Australian Bureau of Statistics (2014b) 6401.0 - *Consumer Price Index*, Australia, Dec 2014
- Australian Bureau of Statistics (2015a) 8501.0 - *Retail Trade, Australia*, Jan 2015
- Australian Bureau of Statistics (2015b) *Australian National Accounts: National Income, Expenditure and Product*, December 2014, 5206.0
- Australian Council of Trade Unions (2011) *Secure Jobs; Better Future Fact Sheet* September 2011
- Australian Council of Trade Unions (2013) *Business push to cut penalty rates: Where does Tony Abbott stand?* Media Release 30 August, 2013
- Balnave, N., J. Brown, G. Maconachie and R. Stone (2007) *Employment Relations in Australia* John Wiley and Sons Milton Australia 2007
- Barnes, A “(2006) “Trade Unionism in 2005” *Journal of Industrial Relations* 48:369
- Barnes, A and D Fields (2000) “‘Monday I’ve Got Friday On My Mind’ Working Time in the Hospitality Industry” *Journal of Industrial Relations* 42:4
- Berg, C (2015) *Minimum wages and the path to poverty* ABC news 27 Jan 2015, 3:14pm
- Bray, M., S. Deery, J. Walsh and P. Waring (2005) *Industrial Relations: a Contemporary Approach* McGraw-Hill Irwin North Ryde 2005
- Card, D and A Krueger (1994) “Minimum Wages and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania” *The American Economic Review* Vol. 84 No 4
- Caspersz, D, M Gillan and D White (2011) “State, Ideology and the Emergence of ‘Good Faith’ Collective Bargaining in Australia” *Journal of Industrial Relations* 53 (5)
- Daly, T (2014) *Evenings, nights and penalty rates: Working unsocial hours and penalty rates* Centre for Work + Life University of South Australia

Department of Employment (2014) *Trends in Federal Enterprise Bargaining, December Quarter 2013*, March 21, 2014

Fair Work Commission (2014) *Annual Report 2013-14*

Fair Work Commission (2015) *Australian Workplace Relations Study*

Forsyth, A (2009) "Protection Against Economic Dismissals: Australian Law Compared with Five Other OECD Countries" *Journal of Industrial Relations* 51 (5)

Freeman, R (1996) "The Minimum Wage as a Redistributive Tool" *The Economic Journal* May 1996

Gellie, C and P Frost (2015) Local economy will suffer if penalty rates go: union Gladstone Observer 5th Mar 2015 6:21 AM

Giitns, R (2014) Minimum wage rises don't lift unemployment, analysts agree Sydney Morning Herald 11 July 2014

Hancock, K (2012) "Enterprise Bargaining and Productivity" *Labour and Industry* 22:289

Leigh, A "Employment Effects of Minimum Wages: Evidence from a Quasi-Experiment" *The Australian Economic Review* Vol. 36 No. 4

Leigh A (2015) *Penalty rates based on family values* - Hobart Mercury 23 February 2015

Manning, A (2014) Increasing the minimum wage does not necessarily reduce employment. LSE American Politics and Policy (27 Jan 2014) Blog Entry

Martin, J (2014) *The Productivity Obsession* Australian Labour and Employment Relations Association National Conference 2014

McCallum, R (1997) "Australian Workplace Agreements – an Analysis" *Australian Journal of Labour Law* (1997) 10

Metcalf, D (2008) "Why has the British National Minimum Wage had Little or No Impact on Employment?" *Journal of Industrial Relations* 50 (3)

Peetz, D (2012) "Does Industrial Relations Policy Affect Productivity" *Australian Bulletin of Labour* 38:268

Queensland Council of Unions (2015) Union hold March 4 rallies to blast federal Libs for evading weekend rates question Media Release 27 february 2015

Queensland Government Statistician's Office (2014) Labour force status by region (a), Queensland, 2003–04 to 2013–14 (b)(c)(d)

Quiggin, J (2006) "Stories About Productivity" *Australian Bulletin of Labour* 32:18

Rowse, T (2004) "Elusive Middle Ground a Political History" in Isaac, J and S Macintyre (eds) *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* Cambridge University Press Melbourne 2004

Skinner, N and B Pocock (2011) "Flexibility and Work-Life Interference in Australia" *Journal of Industrial Relations* 53 (1)

Smith G and L Howard (2012) *The Qantas dispute: employer's lockout, ministerial intervention and Fair Work Australia's decision* Clayton Utz communications 01 May 2012

Stigler, G (1946) "The Economic of Minimum Wage Legislation" *The American Economic Review* June 1946

Stokes, N (1973) Unemployment, Employment Standards and the Minimum Wage" *Journal of Industrial Relations* June 1973

Townsend, K., A. Wilkinson and J. Burgess (2013) "Is Enterprise Bargaining Still a Better Way of Bargaining" *Journal of Industrial Relations* 30:155

Watson, I, J Buchanan, I Campbell and C Briggs (2003) *Fragmented Futures: New Challenges in Working Life* The Federation Press Sydney 2003

Workplace Express (2014) *100 days of hearings for penalty rates case* 18 December 2014

Workplace Express (2015a) *Government's penalty rates stance "disappointing": ACCI* Tuesday, February 24, 2015, 4:27pm

Workplace Express (2015b) *Employers line up experts for penalty rate assault* Wednesday, February 18, 2015, 12:13pm