

Submission to The Productivity Commission

Response to the Workplace Relations Framework
Draft Report

September, 2015

Contents

1.	Introduction	4
2.	Institutions	5
3.	Unfair Dismissal	7
4.	General Protections	9
5.	Minimum Wages	11
6.	Regulated Weekend Penalty Rates for the Hospitality, Entertainment, Retail, Restaurants and Café Industries	12
7.	Enterprise Bargaining	14
8.	Pattern Bargaining	15
9.	Industrial Disputes and Right of Entry	16
10.	Alternative Forms of Employment	18
11.	Compliance Costs	19
12.	Other matters not directly addressed in the draft recommendations	21
	<i>Pay equity</i>	
	<i>Public sector bargaining</i>	
13.	References	22

1. Introduction

The Queensland Nurses' Union (QNU) thanks the Productivity Commission (the Commission) for the opportunity to respond to the *Workplace Relations Framework Draft Report* (the draft report). Although we cannot accept many of the Commission's recommendations, we recognise the significant effort the Commission has made in compiling such an extensive report.

The Commission will be aware that the QNU made a comprehensive submission to the Inquiry into Australia's Workplace Relations Framework in which we put forward a number of recommendations regarding regulation of the employment relationship.

Unfortunately we find many aspects of the Committee's draft report suggest its understanding of the purpose of the review was to enable employers to increase 'productivity' and hence their profit margin. This inevitably comes at a cost to workers—their incomes, welfare and conditions of employment.

Employers and employees do not have the same motivations and capacity for control within the employment relationship, i.e. this is not a relationship between equals. There is inherent imbalance in the power of the two parties to bargain directly with each other and this leads to conflict. Institutional regulation of the employment relationship through collective labour law is central to the workplace relations framework and aims to protect employees from the possibility of employer exploitation.

The draft report states 'Australia's workplace relations system is not systemically dysfunctional. It needs repair not replacement' (Productivity Commission, 2015a, p.45). We question why the Commission would even contemplate that a system which finds its origins in the *Constitution* and has been a foundation for social harmony since 1904 is 'dysfunctional'. Clearly, this connotation stems from a belief that the current system somehow favours workers and this is an anomaly that the review must address. Thus the 'repairs' the Commission has identified overwhelmingly act to further the interests of employers. It is therefore apparent that the draft recommendations will produce a reassertion of managerial prerogative by eroding union bargaining power, withdrawing workplace rights and entitlements, promoting the individual over the collective and undermining the independence of the Fair Work Commission (FWC).

These are significant changes that will yet again work towards a more employer centred system of industrial relations. Equity and fairness for all parties should be the basis for the Australian industrial relations framework. The draft recommendations are supported by economic modelling and theory that emphasise labour market exchange as the major factor informing industrial relations.

But what of history, philosophy, law and sociology? These academic disciplines also inform labour relations practice and scholarship. Economics is but one part, one that is constantly favoured by the political right. We do not discount the economic empirical modelling the Commission has undertaken, but to make this the major influence for recommending changes to the industrial relations system denies the impact of other disciplines that are just as important.

Institutional regulation of the employment relationship has been a major factor in maintaining industrial peace, wage justice and social harmony in this country. Our system is unique. However, because its federal origins are now over 100 years old, it has increasingly become a target that must be dismantled in favour of an economic rationalist approach to the labour market.

We argue employers do not need further regulatory enhancements to control their workforce. This is not the way to greater productivity. The *Fair Work Act 2009* (FWA) and an array of federal and state based employment law inherently recognise the 'bargain' between an employer and an employee is essentially unequal, absent the intervention of the state in the form of legislation and the existence of trade unions. Labour law seeks not only to address the inequity in bargaining power between employers and employees, but also to encompass the needs of the economy. Labour law is concerned with the justice of the exchange, not its profitability. This is the essential point of departure in the Commission's recommendations and our view of fairness.

It is our role as a trade union to protect and advance the interests of our members, hence our submission responds to several of the draft recommendations that we believe will disadvantage Australian workers.

We ask the Commission to read our submission in conjunction with that of our peak bodies the Australian Nursing and Midwifery Federation (ANMF), the Australian Council of Trade Unions (ACTU) and the Queensland Council of Unions (QCU).

2. Institutions

DRAFT RECOMMENDATION 3.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.

Concepts of tribunal independence in Australia, the United Kingdom, Canada and New Zealand have developed by analogy with judicial independence (O'Connor, 2013, p.6). Judicial independence comprises multiple elements, which are commonly reduced to an individual and a collective aspect.¹ In *Valente v The Queen*², Le Dain J explained the duality thus:

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the Executive and legislative branches of government.

At a practical level, the principal activity of courts and tribunals is dispute resolution (Cotterell, 1992). The primary method by which they resolve disputes is adjudication, whether or not other methods such as mediation are also practised. In adjudication, the court or tribunal is empowered, whether by statute or by the prior agreement of the parties, to resolve the dispute by deciding the outcome. It reaches its decision by making findings of fact based on the evidence, and by applying the law to the facts as found (Cane & McDonald, 2012).

An explicit requirement for the proposed minimum standards division is that the members have expertise in economics, social science and commerce, but not in law. Setting minimum standards requires an understanding of all these disciplines because they relate to the practical

application of workplace standards within a legal context. 'Lay' people, i.e. those who do not necessarily hold legal qualifications have traditionally held positions on industrial tribunals. However, given the *Constitution* and subordinate legislation guide the formulation of industrial awards and indeed the workplace relations framework itself, explicitly excluding those with relevant legal knowledge in favour of other specific qualifications may not provide the breadth of experience necessary to setting minimum standards.

DRAFT RECOMMENDATION 3.2

The Australian Government should amend s. 629 of the *Fair Work Act 2009* (Cth) to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President.

Current non-judicial Members should also be subject to a performance review based on the duration of their current appointment. Existing Members with five or more years of service would be subject to review within three years from the commencement of these appointment processes with reviews to be staggered to reduce disruption. Non-judicial Members with fewer than five years of service would be reviewed at between three to five years, depending on the date of their appointment.

The FWC and its predecessors were established on a judicial model reflecting varying degrees of legalism. Like judges, members of the FWC are appointed to tenured positions and are expected to be independent of government influence. The federal government cannot direct the FWC's independent statutory authority in its determinations. The integrity of the FWC's operation relies on the assumption it is subject to undue pressure from external forces.

Tenured appointments of those with practical experience in the operation of labour standards has been the hallmark of the FWC and one of the reasons it has

1 See *R v Beauregard* (1986) 2 SCR 56 [23] (Supreme Court of Canada, Dickson CJ).

2 *Valente v The Queen* [1985] 2 SCR 673, 685, 687 (Le Dain J).

achieved industrial peace and fair working conditions in this country. To replace such appointments with individuals whose expertise lies in research and analysis could put decision-making in the hands of bureaucrats rather than practitioners. Where FW Commissioners are subject to reviews by the Minister, it would be a distinct possibility that political bias could interfere in performance assessment.

Institutional independence is critical to the credibility, transparency and accountability of the FWC. FWC members must be able to make fair and impartial decisions without fear of interference or retribution from the executive arm of government. Tenure of appointment is an essential element of that. They may deal with politically sensitive cases, particularly when the State as employer is involved in a dispute or other matter. This has been an essential feature of the FWC and its predecessors and one that has added to its stability and longevity.

DRAFT RECOMMENDATION 3.3

The Australian Government should amend the *Fair Work Act 2009* (Cth) to change the appointment processes for Members of the Fair Work Commission. The amendments would stipulate that:

- an independent expert appointment panel should be established by the Australian Government and state and territory governments
- members of the appointment panel should not have had previous direct roles in industrial representation or advocacy
- the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4
- the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.

Given the judicial nature of the FWC's work it is not feasible to suggest that members should not have previous direct roles in industrial advocacy. Members of the judiciary and the FWC bring experience and knowledge as practitioners to their role on the panel. Such a proposition in other jurisdictions would not be

entertained. The FWC operates within a judicial framework where Commissioners' decisions can be the subject of appeal to a superior jurisdiction. Their expertise must be in the practice of industrial relations to give credibility and authority to their decisions.

3. Unfair dismissal

DRAFT RECOMMENDATION 5.2

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct
- procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.

Employees and employers are parties to a contract of employment under the common law as well as statutory and other forms of regulation. Although some employers may prefer to disregard their obligations under these instruments when they are unsatisfied with the performance of an employee, they must still take the processes of labour law as seriously as any other form of law.

An essential element of the FWC's role is the 'trust' or 'confidence' arising from its perceived independence and the fairness of its procedures. 'Trust' involves the idea that by consenting to (or at least accepting) the rules and the process for the adjudication, parties indirectly consent to the decision that results from it, whether the outcome is favourable or unfavourable to them (Shapiro, 1981)

The importance of trust is recognised in the common law rules of natural justice.¹ The rules require fair procedures and opportunities to participate, independently of the justice of the decision outcome (O'Connor, 2013). Empirical research repeated in diverse settings has found that a participant's assessment of the fairness of the procedures of a court has an independent effect on the participant's response to the decision outcome, and may even be the more important determinant of satisfaction (Adler, 2010; Moorhead, Sefton & Scanlan, 2008). In effect, participants are more likely to accept a decision if they perceive that it was arrived at through fair procedures.

Procedural fairness affords both parties the opportunities to put forward their side of the argument and to have the

matter heard independently. Some employers may find this onerous, but it is an obligation they should take seriously. Legal boundaries bind the parties to a set of actions arising from the contract of employment. If an employer is unable or unwilling to follow dismissal procedures then the outcome for both parties may be flawed. The onus for compliance must lie with the parties even when the outcome may inevitably disappoint one of them. There is no reason to deny procedural fairness to employees just because an employer feels aggrieved with the outcome of an unfair dismissal case. Many workers are also unsatisfied with these outcomes. Serving the needs of a vocal minority of employers by denying reinstatement or compensation to a dismissed worker because the employer has failed in their obligation to follow due process is no grounds for change.

The draft report refers to *one* case where the FWC concluded there was a valid reason for dismissal, but because the employer failed to follow due process, the FWC deemed the employee to have been unfairly dismissed.²

Relying on the outcome of one case as a means of introducing changes to industrial practice that have effectively served the community in many jurisdictions over a long period in order to accommodate employers is unfair and inequitable. If an employee or their representative fails to engage properly in the dismissal process, for example, not attending a conciliation conference, then inevitably the FWC will uphold the dismissal. Therefore the draft recommendation not only undermines the principles of natural justice upon which the FWA and the jurisdiction of the FWC are based, it gives special consideration to employers by allowing them to abrogate their responsibilities. The FWC can only reach a decision that an employee should have been dismissed when due process has been followed.

Section 387 of the FWA sets out the criteria for considering whether a dismissal was harsh, unjust or unreasonable. Implicit in this section is the concept of natural justice.

Section 387 - Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- a. whether there was a valid reason for the dismissal related to the person's capacity or

¹ Also referred to as 'due process' or 'procedural fairness'.

² See *Sheng He v Peacock Brothers & Wilson Lac v Peacock Brothers* (2013) FWC 7541.

conduct (including its effect on the safety and welfare of other employees); and

- b. whether the person was notified of that reason; and
- c. whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- d. any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- e. if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- f. the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- g. the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- h. any other matters that FWA considers relevant.

To that end, these criteria are consistent with object (e) of section 3 of the FWA that reads -

- e. enabling fairness and representation at work and the prevention of discrimination by

recognising the right to freedom of association and *the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes* and providing effective compliance mechanisms (our emphasis).

The QNU does not support this recommendation.

DRAFT RECOMMENDATION 5.3

The Australian Government should remove the emphasis on reinstatement as the *primary* goal of the unfair dismissal provisions in the *Fair Work Act 2009* (Cth).

In our view, reinstatement should always be the primary goal of unfair dismissal procedures because it aims to restore the initial status of the contract of employment. It is the employee's mechanism for attempting to uphold their contractual obligation to perform the work required in the job even where the relationship has deteriorated to the point where there is limited prospect of this occurring. From the perspective of the FWC, restoring the terms of the employment contract must be the first consideration.

If reinstatement is not possible, then other forms of redress are available but it must be the first point of consideration in conciliation hearings.

The QNU does not support this recommendation.

4. General protections

DRAFT RECOMMENDATION 6.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to formally align the discovery processes used in general protection cases with those provided in the Federal Court's Rules and Practice Note 5 CM5.

We are concerned that the Federal Court processes are complex. Cases being heard by this Court often require involvement of external lawyers in order to ensure that unions comply fully with their processes. This recommendation could increase complexity and costs, and therefore dissuade unrepresented applicants who may not be able to prosecute such claims.

DRAFT RECOMMENDATION 6.2

The Australian Government should modify s. 341 of the *Fair Work Act 2009* (Cth), which deals with the meaning and application of a workplace right. Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment. The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.

We find this draft recommendation to be completely inconsistent with the fact that a reverse onus of proof applies to applications made pursuant to the General Protections - section 341 of the FWA. If the FWC conducts a preliminary interview to decide if a complaint is made in good faith, there would need to be an appeal mechanism because a complainant may still be aggrieved and the employer has not even been part of the process.

We reiterate the comments we made in our earlier submission regarding the need to ensure that the protections surrounding the exercise of workplace rights explicitly include reference to situations where workers are raising concerns in accordance with their professional obligations (whether this be nurses, teachers, engineers, pilots, etc).

The current General Protections/Adverse Action provisions protect employees who make a complaint or inquiry as an employee to their employer regarding their employment or who engage in lawful industrial activities from unlawful discrimination.

At all times in their employment, nurses and midwives are required to comply with their professional obligations.¹ In doing so, they may find they are unable to follow a direction of their employer if such a direction could make them liable for disciplinary action in relation to their registration (for example, a management direction that a Registered Nurse must 'delegate' to Assistants in Nursing or Personal Carers the 'task' of medication administration). In such situations, the nurse is not protected against disciplinary or 'detrimental action' against them for failing to follow such a direction.

The overview of the draft report has noted the skill mix of the workforce is shifting, with future projections of a large increase in the proportion of 'professionals' in Australian workplaces (Productivity Commission, 2015c, p.5). Other professions that may experience similar issues include, but are not limited to, engineers and teachers.

In our view, Division 5 of Chapter 3 Part 3-1 of the *Fair Work Act 2009* should be expanded to include protections for employees who must exercise their rights to comply with their professional obligations.

DRAFT RECOMMENDATION 6.3

The Australian Government should amend Part 3-1 of the *Fair Work Act 2009* (Cth) to introduce exclusions for complaints that are frivolous and vexatious.

A party can, at any time, make an application to the FWC to dismiss on application on the basis that it has made been made frivolously and vexatiously. In addition, s.375 - *Advice on general protections court application* - of the FWA provides:

If the FWC considers, taking into account all the materials before it, that a general protections court application in relation to the dispute would not have a reasonable prospect of success, it must advise the parties accordingly.

¹ See *Health Practitioner Regulation National Law Act 2009* (the National Law) and *Health Ombudsman Act 2013*.

We therefore argue that s.375 of the FWA already contains an in-built mechanism for an applicant to be informed that their application is considered to have been made frivolously and/or vexatiously. In such a situation, it would again be open to an employer, having received the FWC's advice that it considers the application to have been made frivolously and vexatiously and therefore holding no prospects of success, to make an application seeking dismissal of the original application.

Alternatively, if such a recommendation were to proceed, there would have to be an in-built appeal mechanism for the applicant to appeal the decision of the FWC in dismissing their application at the outset.

DRAFT RECOMMENDATION 6.4

The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the *Fair Work Act 2009* (Cth).

This recommendation fails to appreciate that employer breaches of the General Protections section of the FWA are considered to be the most egregious conduct that an employer can engage in. Therefore, having no compensation cap is necessary to deter employers from engaging in such conduct in the first place.

If a cap on compensation were introduced, employers would likely engage in these forms of behaviour more often, knowing that their potential liability is limited.

DRAFT RECOMMENDATION 6.5

The Australian Government should amend Schedule 5.2 of the *Fair Work Regulations 2009* (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and reporting processes in this area.

We agree that the FWC would need additional resourcing if it were to report more information. In practice, the reporting of such information would be limited as the Federal Circuit Court deals with unresolved applications. The FWC would only be able to report on the number of applications conciliated and settled but not on the outcome of applications determined by the Federal Circuit Court.

5. Minimum wages

DRAFT RECOMMENDATION 8.1

In making its annual national wage decision, the Fair Work Commission should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid.

According to the Commission's assessment of ABS data, lower weekly hours correspond with higher rates of minimum wage reliance (Productivity Commission, 2015a, p.314). For example, employees working less than 15 hours per week are much more likely to be on the minimum wage compared with employees working 30 to 40 hours per week. Further, based on HILDA Release 13 data the draft report recognises that employees in the lowest income groups are more likely to be on the minimum wage than those in higher income groups (Productivity Commission, 2015a, p. 316).

So some of the lowest paid are also working the least and are in the poorest 10% of households. The draft report notes that the minimum wage (measured as a ratio to the median wage rate) has declined in the last decade and that "no other OECD country has shown such a strong trend decline", yet proposes a system for minimum wage adjustment they acknowledge may be flawed (Productivity Commission, 2015a, p.13).

The QNU supports the current arrangement for the review and adjustment of minimum wages i.e. annually and by the FWC. There is no reason to move towards an Earned Income Tax Credit (EITC), an idea the Commission has explored. The draft report (2015a, p.17) acknowledges there are drawbacks to such a scheme, including that 'they must also be financed through taxes, which have their own economic effects'. Introducing a mechanism for minimum wage adjustment dependent on the tax system will complicate the process. This may be an option for the US, but Australia already has an efficient system.

6. Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurants and café industries

DRAFT RECOMMENDATION 14.1

Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and café industries. Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and café industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.

DRAFT RECOMMENDATION 14.2

The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.

In making its recommendation to implement a two-tiered labour market structure for penalty rates the draft report claims that cutting penalty rates will:

- cause Employment and hours to rise on Sundays;
- provide greater capacity to employ more experienced, often permanent, employees;
- reduce incidence of weekend work by small business owners.

Despite the Commission's preference for an employer argument that a 24/7 economy must drive social behaviour, the statistical evidence points to the contrary. In the past 20 years there has only been a 1% change in the number of people working weekdays only from 70% to 69% (ABS, 2013). Surely this a telling factor in making any recommendations for changes to penalty rates.

The draft report (2015a, p.25) states that 'employment and hours worked on Sundays would rise after the change', but where is the evidence for this? And at whose expense? Even if we presuppose that lower wages will mean lower prices and employers will not pocket the savings from paying their employees less, the lowest paid will have their

incomes reduced. The inequity in this type of exchange is staggering. Again those who can least afford it will lose out.

According to the draft report, businesses would not be the beneficiaries of deregulated penalty rates given the high levels of competition in the relevant industries. Instead, consumers would benefit. Can we seriously believe the employers who have lobbied consistently over many years for the reduction or abolition of penalty rates did so for the benefit of consumers? This is a disingenuous proposition and one that undermines the case for any change to penalties.

By whose reckoning is it fair that hospitality and retail workers are not entitled to a weekend because their employers choose to trade 24/7? These same employers profit by extended hours trading because the majority of other workers are not at work when they offer their goods and services. So employers in these industries are not only content to profit through the operation of a 24/7 economy, they want their workforces to rearrange their lifestyles to suit 'the market' but receive no compensation for it. Equity and fairness, not market forces underpin the payment of penalties and the industrial relations framework generally.

Although there is a view that workers should now be available to work around the clock at the behest of employers, the expectation remains that work outside the standard weekly hours should be duly compensated. The payment of penalty rates has never been justified on the basis of the availability of labour. Its primary rationale lies principally on the grounds that it acts as compensation to employees for the inconvenience of working non-standard hours. Because teenagers in the fast food or retail industry have little choice but to work outside school hours does not mean that their claim for premium rates for evening and weekend work is any less valid.

A reduction or withdrawal of penalty rates for work performed outside standard hours would leave the way open for employers to make even more use of part-time and casual labour at the expense of full time or permanent workers. In this regard, the recent inquiry into insecure work in Australia was revealing in its findings. At present 40% of Australian workers are employed in insecure working arrangements (Independent Inquiry into Insecure Work in Australia, 2012).

The new divide in the Australian workforce is between those who are in full-time permanent employment and those who work on the periphery in various insecure arrangements of casual, contract or labour hire. Many do not know the hours they will be required to work from week to week, often juggle multiple jobs and are frequently in low paid positions in restaurants, catering or retail. According to the report from the Inquiry -

Their work is not a “career”; it is a series of unrelated temporary positions that they need to pay rent, bills and food. For them, flexibility is not knowing when and where they will work, facing the risk of being laid off with no warning, and being required to fit family responsibilities around unpredictable periods of work (Independent Inquiry into Insecure Work in Australia, 2012).

Changes to penalty rates will greatly increase the ability of employers to exercise ‘flexibility’ in the workplace by requiring employees, many of whom are already vulnerable, to work at times and rates of pay that suit the business, not necessarily those that suit workers with caring responsibilities or those who prefer to work in some form of standard hours arrangement. Most sections of the health sector must operate continuously or across extended hours. They sacrifice time with their own families to treat and care for other families and individuals.

‘Flexibility’ for employers should not be at the expense of the personal lives and incomes of the workforce.

The QNU will not support the introduction of any changes to penalty rates for any sector of labour market.

7. Enterprise Bargaining

In summary, the draft recommendations:

- permit employers to vary an Award or Agreement for a class or particular group of employees without negotiation, or ballot and with no protected action;
- exclude union involvement unless the employer invites it;
- allow existing employees in theory to opt in or out;
- enable contracts to be lodged with FWC but with no formal approval process;
- require a 'no disadvantage test' against the Award but there is no scrutiny;
- require a non union bargaining representative to secure the support of a reasonable share of the workforce (e.g. 5%);
- make it unlawful to include terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement;
- extend the term of an Enterprise Agreement to up to five years (potential for longer term for Greenfield Agreements).

Enterprise bargaining is an important exchange between workers, their representatives and employers. It is a core activity that determines wages and conditions for the enterprise and one that often tests the boundaries of the employment relationship. Yet here we find a range of recommendations designed to increase the already formidable bargaining power of employers at the expense of their workers. At every turn, these recommendations will favour employers.

As a means of providing even more secrecy and less accountability for employers, the Commission has explored

the idea of 'enterprise contracts' while failing to adequately address acknowledged problems like sham contracting.

The draft report describes the enterprise contract as -

... a new statutory arrangement that would provide a 'safe harbour' agreement to vary awards. Such an arrangement could have features of enterprise and individual agreements but avoid the elements that are a disincentive to their use. The new hybrid could vary the award for a class, or a particular group of employees. The FWC would provide sample templates, but no FWC approval would be required. The FWC could publish and report on the content of enterprise contracts. Employees could choose to opt out and return to a pre-existing arrangement after a specified period or choose to stay on the enterprise contract (Productivity Commission, 2015a, p. 615).

The QNU opposes the introduction of these arrangements. We see this as a regressive method of reinstating non-union agreements, on a 'take it or leave it' basis. We note the proposal to introduce enterprise contracts does not confine them to small or medium size businesses and the proposed arrangements envisage no real role for unions or the tribunal. Enterprise contracts, amended Individual Flexibility Agreements (IFAs) and less constrained flexibility terms in enterprise bargaining agreements will inevitably deliver employers a non-union, individualised, compliant workforce.

We contend Section 193 of the FWA already provides for a 'no-disadvantage' test - the Better Off Overall Test (BOOT). There is no reason why workers should accept a change that will no doubt work to favour employers. We note the irony here of a recommendation to use a 'like class' or series of classes of employees as the benchmark for a no-disadvantage test, while at the same time seeking methods to constrain pattern bargaining.

8. Pattern Bargaining

The QNU believes there is a legitimate role for pattern bargaining in health and aged care and supports its extension according to the same arrangements that apply in enterprise specific bargaining. We do not support pattern bargaining only applying to circumstances where each and every employer agrees.

The draft report has observed that in some sectors—most notably health services—multi-enterprise collective agreements (effectively pattern bargaining) have achieved much the same as in New Zealand, even though that system is often seen as lightly regulated. In other words, the processes for determining wages in many countries are different from those in Australia, but the outcomes may be less so (Productivity Commission, 2015a, p. 421).

We note the draft report has referred to the Australian Shipowners Association's suggestion (submission no. 206) that the FWC be empowered and required to look to the character of a union's conduct and look beyond (whether) the claims advanced on paper has merit in principle (Productivity Commission, 2015a, p.563). The Commission has acknowledged that in practice this may not be widely enforceable, but is interested in further exploring whether a similarly nuanced approach to pattern bargaining is possible.

We do not describe as 'nuanced' an approach to pattern bargaining that deems it fit for the FWC to judge the character of unions without applying a similar test to employers and their business dealings.

9. Industrial disputes and right of entry

DRAFT RECOMMENDATION 19.1

The Australian Government should amend s. 443 of the *Fair Work Act 2009* (Cth), clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination.

The draft report outlines a view that it would not be in the communities' interests to allow employees to undertake protected industrial action prior to the commencement of bargaining when the FWA provides other avenues to compel a recalcitrant employer to commence bargaining. Citing Jessup J in his decision in *JJ Richards*¹, the draft report notes that the availability of majority support determinations and scope orders indicated the government had envisioned other avenues be utilised to commence the bargaining process in the event of an employer's refusal to bargain (Productivity Commission, 2015a, p. 672). The FWA review panel supported this position in its conclusion that

... while the *JJ Richards* settled the law, it was not an appropriate outcome from a policy perspective, and that the capacity for industrial action to be taken to compel employers to bargain would undermine the use of majority support determinations. As such, the panel recommended: ... that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced....

The QNU upholds the view that to remove this right rewards a non-responsive employer with immunity from industrial action. The Commission has asked submitters to outline concerns with the utilisation of majority support determinations to achieve the outcome of forcing a non-responsive employer to bargain.

As pointed out in the draft report, the right for employees to take protected action to genuinely reach agreement

¹ See *J.J. Richards & Sons Pty Ltd and Australian Mines and Metals Association Inc. v Fair Work Australian and Transport Workers' Union of Australia* [2012] FCAFC 53.

has been a long held feature of the industrial relations landscape in Australia. This right is not premised on union recognition but rather as a right available to all employees regardless of union membership. Protected industrial action for a proposed agreement is a lawful right of employees and a core principle of the statutory regime. The freedom to strike should not be solely replaced with a majority support determination order. The right to strike is recognised under Art 8(1) (d) of the *International Covenant on Economic, Social and Cultural Rights* underscored by the International Labour Organisation's (ILO) 1998 *Declaration of Fundamental Principles and Rights at Work*. The facilitation of collective bargaining should not have unreasonable limitations placed on it.

We believe employees should be afforded the widest range of options to bring an employer to the bargaining table including the right to take protected industrial action. To remove the ability to take protected action to compel an employer to bargain limits the opportunity of employees to negotiate better conditions and conversely rewards the employer. The public interest is best served by affording employees a broad range of options to redress the power imbalance between employees and employers not by limiting the available avenues.

The QNU does not support recommendation 19.1 and submits the current wording of the provision should remain.

DRAFT RECOMMENDATION 19.2

The Australian Government should amend s. 423(2) of the *Fair Work Act 2009* (Cth) such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer **or** the employees who will be covered by the agreement, rather than both parties (as is currently the case).

Section 423 - Suspension or termination of protected industrial action - currently reads in part:

1. The FWC may make an order suspending or terminating protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

Requirement—significant economic harm

2. If the protected industrial action is employee claim action, the FWC must be satisfied that the action is causing, or is threatening to cause, significant economic harm to:
 - a. the employer, or any of the employers, that will be covered by the agreement; and
 - b. any of the employees who will be covered by the agreement.

In other words, in making a determination on the effects of industrial action, the FWC must establish that both the employer and the employees may be significantly harmed by the actions of either one.

Stipulating that only one of the parties must be harmed undermines the reason for taking action in the first place. If employees take strike action, they will lose pay for the duration of the action. The reason they take this action is to have an economic effect on the employer. That is and always has been the primary rationale for striking. If this change is made to the legislation, only the party taking action will be penalised. The consequences will be much more significant for employees because it is unlawful for employers to pay employees during a period of industrial action or for employees to request or accept 'strike pay' while taking action (Division 9 of the FWA).

Workers need to be able to take effective industrial action in support of agreements where appropriate therefore we do not support this recommendation.

DRAFT RECOMMENDATION 19.8

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days.

The Commission has proposed this draft recommendation as a means to overcome an alleged potential abuse of current provisions which could lead to multiple entries for the purposes of recruitment. The QNU contends that unions should be allowed to communicate with employees who could become potential members. However the QNU does not believe limiting right of entry in the circumstances outlined to two visits every 90 days achieves the proportionate approach sought by the Commission.

The proposed restriction fails to take into account continuous roster patterns in workforces such as nursing and midwifery. To impose two visits every 90 days in a work environment that has up to three shifts in every 24 hour period would fall well short of a proportionate approach. A proportionate approach in a continuous shift roster work environment would require at least six visits every 90 days as a minimum to achieve the same outcome as that proposed under this recommendation.

The QNU does not support this recommendation.

10. Alternative forms of employment

DRAFT RECOMMENDATION 20.1

Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the *Fair Work Act 2009* (Cth).

This recommendation will:

- undermine existing conditions for a cohort of workers who are already in precarious employment;
- increase insecure work arrangements;

- allow employers to abrogate their employment responsibilities and move towards further casualisation of the workforce. If it becomes 'unlawful' to restrict the engagement of casuals, independent contractors and labour hire workers, employers will have even greater motivation to engage a workforce that is totally casualised, individualised, has no entitlement to penalty rates, no protection from unfair dismissal, no minimum wage, no union representation and no independent umpire.

We do not support further restrictions on the content of Agreements, particularly relating to the employment of casuals.

11. Compliance costs

INFORMATION REQUEST

The Productivity Commission seeks data or other information on the extent to which the workplace relations system imposes unnecessary ongoing costs on unions, and how these costs are likely to be affected by draft recommendations proposed in this inquiry.

INFORMATION REQUEST

The Productivity Commission seeks further views on possible changes to lodgement fees for unfair dismissal claims.

It is the role of trade unions to represent members in a range of jurisdictions and forums. Where this is necessary to promoting or defending members' rights then they are considered operational costs. However, there are many cases where we act on behalf of our members where an employer has not been reasonable in their actions and this in turn requires significant resources.

The QNU aims to assist the Commission by providing the following information on processing applications for unfair dismissal based on:

- internal QNU pay rates with a 40% loading for on costs associated with sick leave, annual leave. Long service leave and superannuation;
- an estimate of the number of official hours and administrative hours required for each unfair dismissal matter broken down into 5 categories of unfair dismissal matters;
- the number of dismissal matters dealt with per annum;
- an estimate of the average number dealt with in each unfair dismissal category;
- the current filing fee.

Table 1 compares the estimated current internal QNU costs with the costs we would have to cover as a union if the increase in filing fee is implemented and arbitration fees introduced.

No matter how conservative (generous) the estimates are for this exercise, we cannot see how the internal costs quoted by employers can be accurate. Unless their staffing costs are twelve times that of the QNU (or 8 times that of the QNU taking into account the average \$4000 or less settlement amount) we are of the view that employers appear to have significantly overstated their costs.

TABLE 1

Unfair dismissals – internal Union costs associated with unfair dismissals in the federal jurisdiction

- Official hourly rate plus on costs = \$90
- Admin hourly rate plus on costs = \$50

Costs with increased filing and arbitration fees as per UK model

- UK model = \$480 per unfair dismissal application
- \$1800 for cases going to arbitration

Matters settled prior to conciliation occurring

- 6 official hours + 2.5 admin hours = 540 + 125 = 665
- + 70 filing fee = \$735
- With UK model filing fee = \$1215

Matters settled at conciliation conference

- 10 official hours + 3 admin hours = 900 + 150 = 1050
- + 70 filing fee = \$1120
- With UK model filing fee = \$1600

(continued over page...)

TABLE 1 (CONTINUED)***Matter proceeding to arbitration and settled prior at pre-hearing conference***

- 20 official hours + 8 admin hours = 1800 + 400 = 2200
- + 70 filing fee = 2270
- With UK filing fee and arbitration fee = \$4550

To arbitration end

- 34+ official hours + 16 admin hours = 3060 + 800 = 3860
- + 70 filing fee = 3930
- With UK filing fee and minimum two days arbitration (1 pre-hearing conference and 1 day of full hearings) - \$6210

Filing fees generally:

- Out of approximately 100 dismissal matters dealt with per year, approximately 20-30% not eligible to make an application (valid reason; no prospects; not eligible to make the application)
- Therefore approx. 70-80 applications filed at \$70 per application = \$4900 - \$5600 in filing fees
- Under UK model this would increase to \$33,600 - \$38,400 per annum in filing fees for QNU (i.e. close to 7 times the current filing fee costs).

Total estimates costs to QNU per annum – unfair dismissals

Out of approximately 100 dismissal matters dealt with per year, approximately 20 are not eligible to make an application (valid reason; no prospects; not eligible to make the application).

- 2 official hours of work per ineligible matter = 20 matters = \$3,600.00 per annum
- Matters settled prior to conciliation = approximately 25% of 80 = 20 per annum (i.e. \$14,700 p/a under current model; would increase to \$24,300 p/a with UK fees)
- Matters settled at conciliation = approximately 66% of 80 = 53 per annum (i.e. \$59,360 p/a under current model; \$84,800 p/a with UK fees)
- Matters settled prior to arbitration = approximately 7% of 80 = 5 per annum (i.e. \$11,350 p/a under current model; \$22,750 p/a under UK model)
- Matters proceeding to arbitration end = approximately 2.5% of 80 = 2 per annum (i.e. \$7,860 p/a under current model; \$12,420 p/a with UK fees)

Matter type	Current cost to QNU p/a (est)	Costs to QNU with UK fees p/a (est)	Difference
Not eligible	\$3,600	\$3,600	None
Settled before conciliation	\$14,700	\$24,300	65%+
Settled at conciliation	\$59,360	\$84,800	43%+
Settled before arbitration	\$11,350	\$22,750	100%+
Proceeds to full arbitration	\$7,860	\$12,420	58%+
Total	\$96,870	\$147,870	53%+
Estimated cost per case averaged	\$968.70	\$1,478.70	53%+

12. Other matters not directly addressed in the draft recommendations

Pay equity

The QNU notes the Draft Report has made very limited comments to address the gender pay gap currently around 18%. The draft report concluded that it is “very difficult” and essentially proposes pay equity be left to the market. Unfortunately the pay gap remains high precisely because it has been left to the market. Indeed winding back penalty rates will exacerbate this gap because a disproportionate number of women work on Sundays particularly in areas where they are overrepresented such as hospitality and retail.

Gender inequity in the labour market is a challenge faced by other countries, yet we see no specific recommendations to address it. The draft report (Chapter 2) notes female workforce participation rates have increased dramatically over the past decades. According to the draft report

Women have long been the dominant purchasers of food and other weekly necessities, and their growing participation in the workforce has meant that families have needed other times to perform these domestic tasks. Men have increased their time engaged in household errands (of which a prime component is shopping), which may have been partly caused by changing gender roles, but also by the capacity for them to also shop at times that do not clash with typical work times (Wilkins 2014, p. 99ff). Moreover, as norms about female workforce participation have changed, it has made it easier for businesses to find labour for weekend work (Productivity Commission, 2015a, p.437)

Apparently weekend shopping must take precedence over fair wages for those who are required to provide this convenience. We refer to the recent comments of Professor Barbara Pocock (2015) regarding the gender pay gap in relation to the recommendation to reduce Sunday penalty rates.

According to Pocock (2015) reducing penalty rates on Sundays in designated sectors (e.g. hospitality, retail) will disproportionately affect women in low paid work. The sectors that are protected due to “long held community expectations” (e.g. mining) are male dominated and much better paid. Pocock claims her own Australian Work and Life Index (AWALI) data have been misused

to support the assertion that workers in the designated sectors are happy to work on Sundays and it is not detrimental to involvement in family or community. Pocock advocates a different institutional approach to gender workplace equality where there is organised collective action, good research and politicians are held accountable.

Public sector bargaining

The QNU is disappointed the draft report makes only passing reference to public sector employment despite its significant size, diverse occupational make-up and the high percentage of women workers. Workplace relations in the public and private sectors vary because as ‘enterprises’ their funding, motivations and purpose are in stark contrast. Although the draft report acknowledges there are many challenges in bargaining in the public sector that are less evident for private employers, they offer no way forward other than to defer to the agency level for solutions.

In our original submission the QNU recommended there should be no weakening of state administrative law in the state Public Sector. Workplace relations arrangements in state and public services (and any relevant state-owned enterprises) should be standardised across the entire public sector entity (i.e. no differences based on location).

We do not accept the Commission’s assertion that ‘management control in the public sector is less clear-cut than in the private sector’ (Productivity Commission, 2015b, p.8). The public sector has highly regulated classification and delegation structures that make clear the lines of control, who has the delegated authority to act and the circumstances in which they must do so.

In our experience it is management’s inconsistent interpretation and application of industrial instruments across Hospital and Health Services districts that call for greater scrutiny.

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