

13 March 2015
PRODUCTIVITY COMMISSION

INQUIRY INTO THE WORKPLACE RELATIONS FRAMEWORK

SUBMISSION FROM THE AUSTRALIAN WORKERS' UNION



Background

The Australian Workers' Union (AWU) is an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Organisation Code 002N).¹

The AWU has approximately 120,000 members and has coverage of a wide range of industries including but not limited to: gas, steel, aluminium, glass, civil construction, metalliferous mining, oil refining, agricultural, aviation, cement and concrete products, nurseries, alpine resorts, asphalt, wine, aquaculture, seafood processing, sugar, quarrying, pharmaceutical, hair and beauty and laundry workers.²

The AWU relies upon and supports the comprehensive submissions of the Australian Council of Trade Unions (ACTU) to the Productivity Commission. These submissions do not address all the matters raised in the Issues Papers but focus upon some specific issues of importance to the AWU. The matters dealt with in these submissions are:

Issues Paper 1: The Inquiry in Context

- General points about the current workplace relations system (page 2)

Issues Paper 2 – Safety Nets (page 8)

- General comments
- Redundancy
- Long service leave

Issues Paper 3 - The Bargaining Framework (page 18)

Issues Paper 4 – Employee Protections (page 37)

- Sham contracting
- General protections

Issues Paper 5 – Other Workplace Relations Issues (page 47)

- General points on institutions and compliance costs

¹ See <https://www.fwc.gov.au/registered-organisations/find-registered-organisations>

² See <http://www.e-airc.gov.au/002N/>

ISSUES PAPER 1: THE INQUIRY IN CONTEXT

GENERAL POINTS ABOUT THE CURRENT WORKPLACE RELATIONS SYSTEM

Current performance indicators

1. The following data relates to matters identified in the Terms of Reference as relevant to the Productivity Commission's inquiry into the workplace relations framework.

Productivity

2. In Australia Gross Domestic Product (GDP) per hour worked increased by 1.7% from December 2013 until December 2014.³
3. Australia's GDP per person employed was the highest amongst identified Organisation for Economic Co-operation and Development (OECD) countries at the end of the third quarter in 2014.⁴

Wages growth

4. The Australian Wage Price Index (WPI) increased by only 2.5% from December 2013 to December 2014.⁵
5. The All Groups Consumer Price Index (CPI) increased by 1.7% during the same December 2013 to December 2014 period.⁶

³ See

[http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/D428E24B8D92FE97CA257DFD000D4618/\\$File/52060_dec%202014.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/D428E24B8D92FE97CA257DFD000D4618/$File/52060_dec%202014.pdf)

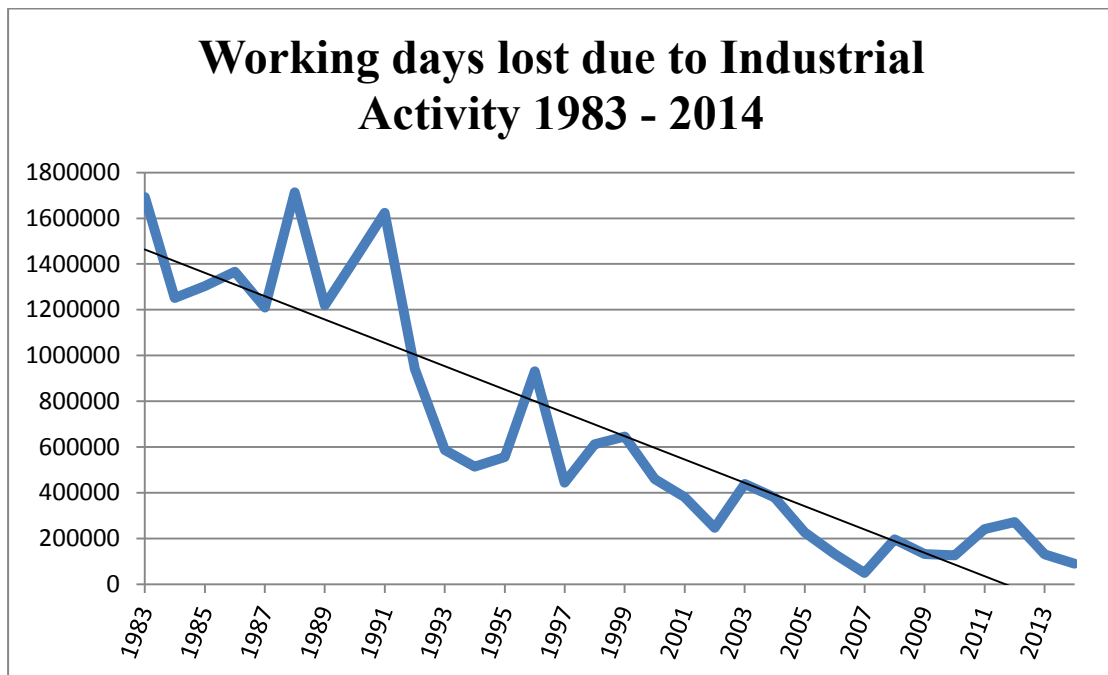
⁴ See http://stats.oecd.org/Index.aspx?DataSetCode=ULC_EEQ

⁵ See <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0>

⁶ See <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6401.0>

Days lost due to industrial action

6. The table below shows a decrease of over 1,850% in the number of working days lost due to industrial activity in Australia over the past 30 years.
7. 1,691,900 working days were lost due to industrial activity in 1983⁷ compared to the 90,600 working days in the year ending September 2014,⁸ despite increases in the number of working Australians.



Casualisation of the workforce

8. Parliament of Australia figures indicate the prevalence of casual employment has remained high in the Australian economy for the last 20 years and has generally fluctuated from 22% to 25%.⁹

⁷ Macintyre S & Issac J, *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, 21 Sep 2004

⁸ Australian Bureau of Statistics, *Industrial Disputes*, Australia, Sept 2014, Catalogue No. 6321.0.55.001

⁹ See

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/Quick_Guides/CasualEmploy

The shift of power in the workplace relations system

9. These figures demonstrate that the current workplace relations system is producing significant benefits for employers and only modest gains for employees.
10. Employers are benefitting from sound productivity performance, minimal days lost due to industrial action and a high level of casual employment.
11. Despite these improvements for employers, employees are on average receiving wage increases which are only barely above the level of inflation.
12. In addition, 14% of Australians are working what the OECD considers to be “very long hours”.¹⁰
13. These outcomes indicate the current workplace relations system is unreasonably skewed in favour of employers.
14. The shift of power within the Australian workplace relations system in favour of employers is illustrated by the use of “no extra claims” clauses. The Commission seeks comments on no extra claims provisions in Issues Paper 3.
15. A Full Court of the Federal Court of Australia summarised the history of no extra claims provisions in *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84 from [38] to [56].
16. The Full Court stated in relation to the history of no extra claims provisions at [55]:

The purpose was to require the parties – usually the relevant union and its members – to foreswear any attempt to improve upon the wages,

¹⁰ See <http://www.oecdbetterlifeindex.org/countries/australia/>

conditions and other benefits for which the relevant industrial instrument provided

17. However, as was the case in the *Toyota* litigation, no extra claims clauses are increasingly being relied upon by unions to prevent additional claims by employers during the term of an agreement.¹¹
18. The pursuit of additional claims by unions during the life of an agreement is generally no longer considered to be an option.
19. Another good example of where the power balance in the Australian workplace relations framework has shifted towards employers is in relation to right of entry provisions.
20. In 1973 the *Conciliation and Arbitration Act 1904* was amended to include a single provision which prescribed a limited entry right for officials of federally registered unions who were not already covered by right of entry provisions in existing awards.
21. The legislative regulation of union right of entry has increased dramatically over the last 40 years to the extent that there were 42 different right of entry provisions under the *Workplace Relations Act 1996* following the *WorkChoices* amendments. Many of these have been retained under the *Fair Work Act 2009* (Act).
22. Further, the International Trade Union Confederation's (ITUC) Global Rights Index provides a range of information about the world's worst countries for workers.

¹¹ For examples, see *Australian Municipal, Administrative, Clerical and Services Union v North East Water* [2014] FWC 6922; *CEPU, AMWU v Fonterra Australia Pty Ltd* [2015] FWC 1486 (4 March 2015); *United Voice v Foster's Australia Limited t/a Carlton and United Breweries Limited* [2014] FWCFB 4104; *Aurora Energy Pty Ltd* [2014] FWCA 1580 (6 March 2014)

23. The 2014 edition¹² gives countries a ranking of between 1 and 5+ with 1 being a country that has irregular violations of rights and 5+ being a country where there is no guarantee of rights due to the breakdown of the rule of law.
24. Australia received a ranking of 3 under this index in 2014. This means Australia has been assessed as a country where there are repeated violations of rights.
25. Countries that outperformed Australia in terms of working rights include:
- Angola
 - Cameroon
 - Bosnia and Herzegovina
 - Jamaica
 - Dominican Republic
 - Russian Federation
 - Lithuania
 - Togo
 - Rwanda
 - Uruguay
 - South Africa
 - New Zealand

Conclusion

26. We submit the Commission should be reluctant to recommend any changes to the current Australian workplace relations system which shift the balance of power any further in favour of employers.
27. The Australian public has previously demonstrated in the 2007 Federal election that there is a limit to how far they will allow this power imbalance to extend.

¹² See http://www.ituc-csi.org/IMG/pdf/survey_ra_2014_eng_v2.pdf

28. The current workplace relations system provides employers with ample scope to be successful.
29. The ultimate success or failure of businesses will be determined by a range of factors other than the workplace relations system.
30. Australia would be better placed directing its resources and attention to these other factors.

ISSUES PAPER 2: SAFETY NETS

General comment on the safety net

31. The AWU believes the current safety net in Australia strikes a fair balance between the interests of employers and employees.
32. The National Employment Standards (NES) and modern awards provide employees with guaranteed minimum employment conditions which ensure they can maintain a reasonable standard of living.
33. However, the NES and modern awards also provide employers with flexibility regarding the structuring of hours of work, the use of casual labour, the ability to stand down employees, requiring evidence about forms of leave and requesting that employees work reasonable additional hours.

Specific issues – redundancy

Redundancy and the Ordinary and Customary Turnover of Labour

34. Section 119(1)(a) of the Act provides for an entitlement to redundancy pay in circumstances where an employee is terminated at the initiative of the employer because the employer no longer requires the job done by the employee to be done by anyone.
35. However, an employee is not entitled to redundancy where the termination is due to the “ordinary and customary turnover of labour” (OCTL).
36. The concept of OCTL is not new and existed in the common law before it was enshrined in workplace relations legislation.¹³ *In Re: F.W. Hercus Pty Ltd and Andrew John Short* (Hercus),¹⁴ Justice O’Loughlin made the following

¹³ See for example [1984] AIRC 132

¹⁴ [1992] FCA 246

comment:

“In my opinion, the phrase [the ordinary and customary turnover of labour] is intended to cover such employees as seasonal workers or those who, by virtue of the industry in which they work, know that their employment is intended to be of limited duration; sections of the building industry may, for example, fall into this category.”¹⁵

37. However, the Act provides that redundancy payments, regardless of whether they fall within the OCTL exception, do not apply to casual employees or employees who are “employed for a specified period of time, for a specified task, or for the duration of a specified season.”¹⁶
38. With this in mind, the circumstances in which redundancy entitlements will not be payable under the OCTL exception is uncertain, although employers are now increasingly relying on the exception where a contract for services has been lost. The bulk of proceedings in the Fair Work Commission (FWC), regarding OCTL, have been focussed on whether the exception applies in these circumstances.
39. In *Fashion Fair Pty Limited v Department of Industrial Relations (Insp Rouse)*¹⁷ a Full Bench of the New South Wales Industrial Relations Commission said:

“It has frequently been observed that whether an entitlement to redundancy or severance pay accrues upon termination depends upon whether there was “settled” expectation of continued employment or whether the employees were aware that their employment was for a specified period or task ... It is necessary to examine the circumstances of each case and the course of the dismissals (and also the cause of any loss of contract) to determine if the dismissals were truly part of the

¹⁵ *ibid* at [7]

¹⁶ FW Act, s. 123(1)(a) and (c)

¹⁷ [1999] NSWIRComm 560

*ordinary and customary turnover of labour.”*¹⁸

40. The principles have developed over time, and now include the following considerations:

- Whether the employee knew the contract was of a limited duration,¹⁹
- Whether the employee had a settled expectation of ongoing employment,²⁰ which includes the objective indicia:
 - Length of the employee’s service,²¹ and
 - Whether it is customary for the employer to retain labour when a contract is lost,²²
- Whether the employer’s ability to retain labour is dependent on the winning or retaining of contracts,²³
- Whether the employer offered alternative employment (regardless of whether it was a suitable alternative),²⁴ and
- The cause of the loss of a contract, including whether the employer handed in the contract or made a legitimate attempt in the tendering

¹⁸ Ibid at pg 20-21

¹⁹ *Fashion Fair Pty Limited v Department of Industrial Relations (Insp Rouse)* [1999] NSWIRComm 560; *Transport Workers' Union v Veolia Environmental Service (Australia) Pty Ltd* [2013] NSWIRComm 22; *AMEPKU v James Engineering Pty Ltd* [2000] QIRComm 163

²⁰ Ibid

²¹ *Australian Liquor, Hospitality and Miscellaneous Workers Union (Tasmanian Branch) v Chubb Security Tasmania* (T6038 of 1996); *Re: F.W. Hercus Pty Ltd and Andrew John Short* [1992] FCA 246

²² *Transport Workers' Union v Veolia Environmental Service (Australia) Pty Ltd* [2013] NSWIRComm 22; *AMEPKU v James Engineering Pty Ltd* [2000] QIRComm 163

²³ *Kilsby v MSS Security Pty Limited* [2014] FWC 7475

²⁴ Ibid

process.²⁵

41. Relevantly, a Full Bench of the FWC has recently found:

*“The meaning of the word ‘redundancy’ is not fixed and the term will take colour from its context. However, in any relevant context it is the abolition of a position which leads to that position being redundant. The cause of the abolition of the position – whether business restructure, technological advance, loss of contract/ordinary turnover or otherwise – is a separate matter, albeit one which may determine the entitlements of the redundant employee. Indeed the presence of the express exclusion in s.119 (and in the predecessor TCR case) demonstrates that the abolition of a position as a result of ordinary and customary turnover is a redundancy; albeit one that does not give rise to an entitlement to redundancy pay.”*²⁶

42. This means that if an employee disputes the characterisation of their termination as part of the OCTL, they may be precluded from pursuing the matter through the unfair dismissal provisions, as the termination will still be a genuine redundancy.²⁷

43. These developments pose a significant threat to the application of redundancy pay in all service industries. It is difficult to imagine a situation in which a company in the services industries does not rely on some form client contract to continue operations. Similar sentiments have been expressed in the context of OCTL decisions.²⁸

44. An increasing number of employers are drafting enterprise agreements and other employment documents to specifically include the OCTL exception, and

²⁵ *DIR v Delaware North (Australia) Pty Ltd* (2002) 171 QGIG 395

²⁶ *CFMEU; CEPU; and AMWU v Spotless Facility Services Pty Ltd* [2015] FWCFB 1162 at [66]

²⁷ FW Act, s. 385(d)

²⁸ See: *Transport Workers' Union v Veolia Environmental Service (Australia) Pty Ltd* [2013]

NSWIRComm 22 at [76] per Haylen J

are ensuring that their employees are specifically informed that their continued employment is dependent solely on the maintenance of a particular contract.²⁹

45. If this trend continues, taking into account the criteria for determining whether a termination is part of the OCTL, redundancy payments in the services industries will become more akin to a discretionary gratuity, rather than an entitlement.
46. Provided a relevant employer makes a reasonable effort to find suitable alternative employment, it can avoid redundancy pay obligations simply by carefully drafting engagement documents.
47. Further, the uncertainty about whether a termination is part of the OCTL means that employees may be unsure of their entitlements and may be reluctant to challenge an employer who incorrectly applies the exception and withholds redundancy payments.

Removal of the OCTL exception in s. 119

48. We submit the OCTL exception in s. 119 should be removed. The traditional purpose of the exception, as outlined by O'Loughlin J in *Hercus*, is sufficiently met by s. 123 of the Act, such that the exception in s. 119 is superfluous to that purpose.
49. While it is clear from the authorities that a determination of each case will be dependent on the facts, we submit the development of the OCTL principles has provided employers, particularly in the services industries, with an avenue to avoid redundancy payments in almost all circumstances, without alternative compensation for employees.
50. Employers will not be unfairly prejudiced by the removal of the OCTL

²⁹ for example: *Kilsby v MSS Security Pty Limited* [2014] FWC 7475; *Delta Coal Mining Pty Limited* [2014] FWC 3697

exception, as they may still engage employees under one of the exceptions in s. 123 of the Act, but in circumstances where the employee is certain of their entitlements and certain of the nature of their employment.

Specific issues - long service leave

National standard

51. The NES provide for universal entitlements across all jurisdictions in Australia, including entitlements for annual leave, maternity leave, parental leave, sick leave, compassionate leave, etc. However, long service leave (LSL) entitlements are determined in different jurisdictions by state legislation.
52. There are currently eight legislative frameworks relating to long service leave operating across the various Australian jurisdictions. This makes the existing long service leave provisions in Australia highly complex and prescriptive:

Jurisdiction	Current Legislation	Entitlement
NSW	Long Service Leave Act 1955	2 months after 10 years' service. Then 1 month leave for each subsequent 5 years' service
NSW	Long Service Leave (Metalliferous Mining Industry) Act 1963 No 48	3 months after each 10 years' service.
VIC	Long Service Leave Act 1992	8.67 weeks after 10 years' service. Then 4.33 weeks after each additional 5 years' service
QLD	Industrial Relations Act 1999	8.67 weeks leave after 10 years' service. Then further leave after each additional 5 years' service.
SA	Long Service Leave Act 1987	13 weeks leave after 10 years' service. Then 1.3 weeks leave for each subsequent year.
WA	Long Service Leave Act 1958	8.67 weeks leave after 10 years' service. Then 4.33 weeks leave after

		additional 5 years' service
TAS	Long Service Leave Act 1976	8.67 weeks leave after 10 years' service. Then 4.33 weeks leave for each additional 5 years employment
NT	Long Service Leave Act 1981	13 weeks leave after 10 years' service. Then 6.5 weeks after each additional 5 years' service
ACT	Long Service Leave Act 1976	0.2 months leave for each year of service, with leave available to be taken after 7 years' service

NOTE: Service means continuous service with one employer.

53. We support the adoption of a National standard for long service leave, which should be implemented in a manner that ensures no employees are disadvantaged.

Portability of LSL entitlement

54. There has been a significant shift in the nature of the employment in Australia over the past 30 years. The following trends have emerged:

- Australians are remaining in the workforce for an increasing length of time, reflecting increasing life expectancy;
- Mobility amongst workers has increased, with almost 1 in 5 workers employed by their current employer for less than one year;
- Mobility differs across different industries, with the highest amongst sales, labourers, machine operators and drivers, and community and personal service workers (those industries which tend to have higher rates of casual and contract labour).³⁰

55. According to ABS data, approximately 67% of Australian workers are eligible

³⁰ McKell Institute; *The Case for a National Portable Long Service Leave Scheme in Australia*; 20 June 2013

for LSL³¹, but under the current arrangements, most will only become entitled to LSL if they remain with the same employer for more than 10 years.

56. Of all currently employed workers who have been in the workforce for at least 10 years, only 24.5% have been with their current employer for at least 10 years, whereas 45.9% have less than 10 years of service with their current employer.

	Currently employed workers who have been with their current employer for at least 10 years	Currently employed workers who have been in the workforce for at least 10 years but have less than 10 years service with current employer
All	24.5%	45.9%
AGE		
15 to 24	0.1%	0.0%
25 to 34	7.9%	39.7%
35 to 44	25.3%	69.8%
45 to 54	39.1%	57.6%
55 to 64	51.7%	46.6%
65 and above	65.6%	32.4%

Source: McKell Institute: *The Case for a National Portable Long Service Leave Scheme in Australia*: 20 June 2013

57. It is relevant to note that the industries in which mobility is high are also predominantly those that are more physically and/or emotionally demanding and which have a disproportionately high rate of work related illness and injury.³²

³¹ Ibid

³² *Compendium of Workers' Compensation Statistics, Australia 2009-10*, Safe Work Australia, 2012, p6.

58. To combat the difficulties faced by many workers in these industries in qualifying for LSL entitlements, we recommend the introduction of additional portable contribution schemes.
59. Portable long service leave schemes already exist in a number of industries. These industry schemes present a good structural model that could be adopted to introduce portability at a National safety net level.
60. The advantages of portability include:
- flexibility for employees who may wish to take a break from physically and emotionally demanding roles to avoid burnout, which will have the effect of reducing workers compensation claims,
 - equality for workers in industries with high rates of casual or contract labour, in which workers may find it difficult to reach the threshold length of service with one employer for LSL eligibility,
 - greater flexibility to workers who wish to move between employers or leave the workforce for short periods in order to care for family members, without having to forfeit accumulated LSL,
 - greater scope for career enhancement and productivity in that employees will not be inclined to stay in a position longer than they would otherwise stay but for the forfeit of their accumulated LSL,
 - reduced non-compliance problems, as employers would pay into the fund as it accrues. It would also reduce the instances of employers terminating employees before they reach the LSL vesting threshold, and
 - reduced administrative burden on employees, as the fund would provide for a majority of record keeping.

61. Further, national standards would provide greater flexibility for employment across different states and territories, and reduce the administrative burden for employers who operate across more than one jurisdiction.

ISSUES PAPER 3: THE BARGAINING FRAMEWORK

Bargaining and Industrial Disputes

62. Australia's current workplace relations (WR) framework is the product of many decades of development.
63. It has evolved following tireless campaigning by unions and workers for the rightful, legal recognition of fair rights for workers, from learning from the marked, comprehensive failure and rejection of the Work Choices experiment and from understanding what role legislation can play on fairness and economic prosperity in our local communities.
64. Indeed, Australia has come a long way and Australians should be proud of our present industrial position.
65. The current rules governing workplace relations, to which the enterprise bargaining and dispute resolution framework is central, reflect a maturing Australia.
66. Seemingly, we had finally begun to understand the effectiveness of long-term policy approaches to economic growth and social cohesion, the danger that the pace of globalised economic forces can have on the very foundations and principles on which our communities are built, and therefore, the need to enshrine fairness in our industrial relations laws.

The aims of the inquiry

67. Despite this progress, the Productivity Commission has been asked by a Government – far out-of-touch with the millions of hardworking Australians it should represent – to yet again review key aspects of the bargaining and industrial framework.

68. Specifically, the issue of productivity has again resurfaced and the call to increase employers' industrial powers has again been made. More generally, it seeks to water down laws governing workplace fairness, which Australians overwhelmingly support, and reduce employee entitlements in favour of laws designed to financially benefit large business owners, shareholders, and multinational companies.
69. Nonetheless, the AWU asserts that mounting evidence demonstrates that the current bargaining and industrial framework is economically and socially responsible, and right for Australia. The terms in which the Commission's review has been framed only add further weight to this claim.
70. For example, the inquiry is to "consider the type of system that might best suit the Australian community over the long-term". As discussed below in more detail, a system designed to do this will have to support and encourage businesses to invest in its workforce so that its management has the capability to drive innovation and its workers the skills to adapt to a changing economy. This framework would help drive productivity.
71. The Commission is also seeking to review the capacity of the bargaining and industrial disputes framework to adapt over the longer term to "changes in the global economy". This must include the growing pressure from large corporations to drive down Australia's labour terms and conditions in an effort to compete with developing nations.
72. A 'race to the bottom'³³ is not an option for Australia – our commitment to fairness, our living standards and cohesive communities must be protected. Indeed the Commission is right to extend this inquiry to looking at international examples of workplace legislation.

³³ A race that, for example, Walmart in America (<http://makingchangeatwalmart.org/about/>) and Apple in China (<http://www.bbc.com/news/business-30532463>) have been leading

73. Those countries with weak legislation enable companies to exploit their workers, and in the worst cases, to force workers to work long hours in unsafe conditions and live in poverty. A framework adapted to the global economy would prevent a ‘race to the bottom’.
74. It is the AWU’s belief that Australia’s current bargaining and industrial dispute framework addresses the inherent power imbalance that exists between employers and workers to do exactly what the Commission has expressed that it should: “regulate how employers and employees can bargain for ***better conditions***”.
75. In our submission below, we explain why the current system addresses the Commission’s overarching concern and delivers “bargaining arrangements [that] allow *employees* and *employers* to genuinely craft arrangements suited to them”.

Procedural steps and minimum conditions

76. The Act sets out procedural steps for employers to take before they can ask employees to approve an enterprise agreement, alongside a set of obligations that they must adhere to in terms of basic rights and provisions for their workers.
77. These include the recognition of representatives of employees, time limits for lodgement, provisions to establish informed consent by parties to the agreement, an obligation to bargain in good faith, and compliance with the National Employment Standards (NES) and minimum conditions as per relevant awards.³⁴
78. The procedural steps establish the ‘rules of the game’ so that all parties know what to expect throughout the bargaining process. They are rules that have been carefully considered and agreed to by each party during the development

³⁴ FW Act (Part 2-4)

of the Act and proceeding legislation, and which therefore facilitate smooth, effective and amical bargaining negotiations. Clear and mutually agreed, these rules underpin the industrial relations system in Australia.

79. The NES consist of ten minimum conditions of employment that all 'National System Employers' must provide to their employees, including weekly working hours, staff leave entitlements, termination and redundancy pay. These sit alongside minimum award conditions.
80. Debates on minimum conditions ultimately affect lower paid workers. Minimum conditions exist to safeguard against the exploitation of vulnerable workers.
81. For example, in Australia the minimum wage does not just protect young and transient workers; it protects a significant proportion of older adults whose lives have been spent working in low paid employment.³⁵
82. Penalty rates have been put in place as a fairer exchange for the loss of valuable time workers could have spent with their families, friends or recuperating during public holidays. They reflect a fair work contract that Australians understand, respect and expect.
83. Since every employer must meet them, these minimum conditions establish a fair playing field for all employers.
84. They help ensure that, for example, Australian businesses cannot be 'out-competed' by multinational companies who might seek to strip away certain worker entitlements in an effort to become more profitable.
85. They are also fair for employees by ensuring key aspects of their employment are guaranteed, regardless of their employer. Importantly, these conditions represent a minimum safety net which - having been developed and agreed

³⁵ <http://www.theguardian.com/business/grogonomics/2015/jan/28/inequality-should-be-at-the-forefront-of-a-debate-on-the-minimum-wage>

over time - reflect the founding principles of Australian communities around fairness, which Australians overwhelmingly endorsed following their outright rejection of the 'Unfair Work Act'; Work Choices.

86. It is right that all parties, including those who move to set up business here or to work here, must adhere to and benefit from them.

Greenfield Sites

87. For these same reasons, it is right that current regulatory structures do not allow employers to unilaterally determine the conditions for future employees in new work sites.
88. By having to negotiate Greenfield agreements with relevant employee representatives, certain checks and balances ensure that no employer can 'out-compete' other local employers through slashing workers' terms and conditions. Instead the new employer must apply and respect not just the rules of the game, but also the incremental and mutually agreed conditions that have been formalised in the industry locally.
89. The AWU sees the certainty of new employers having to follow these rules as not just fair for the local communities the employer is setting up in or just for the existing local employers that the new employer may tender against, but also as helpful fixed costs that any investor into the project can expect.
90. Indeed, to enable a new employer to unilaterally determine conditions at Greenfield sites would only mean that employment costs down the line become hard to forecast if the employees' conditions are out of kilter with those of their peers – workers will rightly expect and ask for the same as their peers and their conditions will have to increase.
91. In addition, it is simply not acceptable that the only parties to profit for short-term construction contracts are the employer and investor. Many remote and

rural communities depend on short-term construction projects and they must benefit fairly from its inception.

92. The AWU does not accept that major project investment is adversely affected by fair terms and conditions for workers. It is an assertion often made by the owners of multinational mining companies, yet regardless of our fair work regulation these same owners still invest in Australia and draw significant profits from these projects.³⁶
93. Moreover, Greenfield agreements often cover high-risk industries such as construction, mining and engineering, further compounding the need for well-developed worker protections and appropriate reward.

Restrictions on agreement content

94. The re-emergence of the debate on permitted matters, as seen by this Inquiry's sole focus on permitted matters in relation to the employee/union-employer relationship only, can be seen as no other than a continued, ideologically-driven effort by the Coalition to legislate for the weakening and/or eradication of unions.
95. The AWU is deeply saddened that the Coalition Government continues to fail to value or respect:
- 1) the work that unions do in ensuring that Australian workers are afforded fair terms and conditions - essential for the creation of prosperous and self-sustaining communities as well as for national prosperity and revenue raising; and
 - 2) the choice of Australians to affiliate and be represented by a union and thereby, for example, choose payroll deductions to pay their fees.

³⁶ <http://www.theguardian.com/business/grogonomics/2014/jul/31/business-leaders-should-stop-whinging-about-australias-competitiveness>

96. In a globalised commercial world, unions have never been so vital for the preservation and promotion of Australian values, communities and workers' terms and conditions.
97. Research shows that government policies discouraging unions do little to change our economic performance, but they do affect the distribution of power or income distribution (see below section for a further discussion on the implications of income inequality on the Australian economy), and hence fairness.³⁷
98. In addition, equipping employees with the means to have their say and appropriately respecting and rewarding their contributions has been found to benefit business productivity as "there is a greater incentive to actively participate in productivity enhancing changes when you have a reasonable belief that you will benefit from them".³⁸
99. In 2012, the Department of Education, Employment and Workplace Relations commissioned research that compared workplaces, which performed well on employee satisfaction, wellbeing and commitment, with workplaces that were not performing as well.³⁹
100. The results were conclusive:

"The high-performing workplaces were 12 per cent more productive than the low-performing. They had 23 per cent less staff turnover. They spent 30 per cent more time with their employees. Their average profit margin ratio was 15 per cent

³⁷ http://www98.griffith.edu.au/dspace/bitstream/handle/10072/49919/83134_1.pdf?sequence=1

³⁸ <http://www.actu.org.au/Images/Dynamic/attachments/7852/Shrinking%20Slice%20of%20the%20Pie%202013%20Final.pdf>

³⁹ <http://www.theaustralian.com.au/archive/national-affairs/creating-great-workplaces/story-fng387xs-1226504182811>

compared with 5 per cent in the low-performing workplaces, amounting to a \$40,000 difference per full-time employee a year”.

101. Fair workplace laws do not just reflect a socially responsible approach to industrial and community relations - they also reflect an economically responsible approach.
102. From as far back as 1984 unions were found to have a direct, positive correlation with productivity, by for example, helping to reduce resignation rates, improve workers' morale and develop more efficient working practices.⁴⁰
103. The AWU makes no bones about the work we will continue to do to defend key minimum conditions and rights and prevent a 'race-to-the-bottom'.
104. Legislation should be in place – as it is currently – to enable trade unions to exist and to “bargain for **better conditions**”. The Coalition's approach of restricting matters pertaining to the employment relationship is outdated, illogical and highly prescriptive.
105. Why should legislation be developed so that employers do not have to accommodate employees who wish to belong to unions or provide training for their workforce? How would such legislation help develop harmonious and productive workplaces?
106. It makes no sense to make training a non-allowable matter, for example, given it is mutually beneficial for employers and employees to equip them to adapt and provide better, more productive services. At the same time, it makes no sense that employees are prevented from bargaining for better job security or for restrictions on the use of contractors.

⁴⁰ Freeman, Richard B. and James L. Medoff. What Do Unions Do? New York: Basic Books, 1984.

“Reply.” Industrial and Labor Relations Review 382 (January 1985): 259–63.)

107. In addition, the process of bargaining requires that there be provisions to bargain for, and if legislation is to enable employers “to genuinely craft arrangements suited to them” then it must be as non-prescriptive as possible, so that they can have a broad range of provisions from which they can draw.

Agreements need to make employees ‘better off overall’

108. The AWU firmly believes that the requirement that agreements need to make employees ‘better off overall’ (BOOT) must remain in place.

109. Firstly, this measure directly responds to one of this Inquiry’s chief concerns that regulation must determine “how employers and employees can bargain for **better conditions**” and importantly, goes some way to address the staggering, increasing inequality in Australia, which has been found to be bad for Australia’s economy.⁴¹ Indeed, evidence demonstrates that rules promoting inequality in industrial legislation are a significant part of the problem.⁴²

110. The International Monetary Fund has conducted research over the last 50 years and found that “more unequal countries tend to have lower and less durable economic growth”.⁴³

111. The Organisation for Economic Cooperation and Development (OECD) shows that in 2002, just 13.8% of Australian workers were low paid,⁴⁴ much lower than the OECD average of 17.2%.⁴⁵ Yet by 2012, the percentage of low paid Australian workers had risen to 18.9% – the biggest rise in the OECD over that period – whilst the OECD average had fallen to 16.3%. This is despite Australia having a better performing economy than its peers over this time.

⁴¹ <http://www.theguardian.com/commentisfree/2014/dec/22/the-liberals-review-of-workplace-relations-is-critical-to-unmaking-our-social-democracy>

⁴² [Ibid](#)

⁴³ [Ibid](#)

⁴⁴ Defined as earning less than two-thirds the median wage

⁴⁵ <http://www.theguardian.com/business/grogonomics/2015/jan/28/inequality-should-be-at-the-forefront-of-a-debate-on-the-minimum-wage>

112. More recently, Oxfam released a report on Australia “Still the Lucky Country?” in which it reveals that the richest 1% of Australians own the same wealth as the bottom 60%.⁴⁶ Indeed, Australia’s richest person owns more than the bottom 10% of the population combined (2.27 million people) whilst the nine richest individuals own more than the bottom 20% (4.54 million people).⁴⁷
113. Last year, the IMF’s Managing Director, Christine Lagarde, warned us of the importance of “making sure that growth is more inclusive and that the rules of the game lead to a level playing field—favouring the many, not just the few; prizing broad participation over narrow patronage”.⁴⁸ She continued calling for greater regulation and closer supervision of business undertakings, stating: “If we want capitalism to do its job—enabling as many people as possible to participate and benefit from the economy—then it needs to be more inclusive. That means addressing extreme income disparity.”⁴⁹
114. The Australian Government must learn from the analysis of the GFC and seek to regulate our economy so that all Australians can profit from their hard work. The BOOT test is an important example of how legislation can help address inequality and it must be retained.
115. Secondly, sufficient flexibility already exists in the current system to accommodate “exceptional circumstances”, such as short-term financial crises, whereby the FWC may approve an agreement that does not pass the BOOT test.⁵⁰
116. Finally, the AWU also strongly believes that the BOOT should be met for all employees subject to the agreement, rather than focus on the collective welfare improvement of employees.

⁴⁶ https://www.oxfam.org.au/wp-content/uploads/2014/06/2014-66-g20-report_fa_web-2.pdf

⁴⁷ Ibid

⁴⁸ <https://www.imf.org/external/np/speeches/2014/052714.htm>

⁴⁹ Ibid

⁵⁰ FW Act, s.189

117. Notwithstanding the fact that if the agreement meets the former, it will also meet the latter, the latter alone would simply not be fair; a focus on collective welfare could result in collective welfare improvements overall that hide losses to individual employees whilst others benefit at their expense.

Requirements to consider productivity improvements

118. There are many reasons why the AWU believes that the Inquiry has not appropriately framed its discussion on the bargaining framework and productivity improvements.
119. Firstly, the Inquiry has applied the Government's blinkered view on industrial relations and productivity – the neoclassical belief that the work unions and industrial legislation perform in defending workers' rights and fighting for fair terms and conditions is in some way contrary to the economic success of Australia's businesses.
120. As discussed above, research shows that Australia's increasingly unequal society is likely to jeopardise our economic prosperity, as well as community cohesion and democracy in the long-term.
121. Rather than facilitate a 'race-to-the-bottom' as advocated by short-sighted business interests, Government and its agencies should ensure that not only are appropriate safeguards in place to protect the most vulnerable, but that industrial relations legislation supports employers to build engaged, satisfied, skilled and innovative workforces.
122. This is important not just for the well-being of the workers and communities concerned, but for the long-term prosperity and productivity of Australia.
123. Much research exists around why an engaged, satisfied, skilled and innovative workforce is good for economic productivity. In addition to the research

conducted by the Department of Education, Employment and Workplace Relations mentioned above, outlined below are findings of some key reports:

- Commissioned in 2008 by the UK Labour Government as an investigation into how to improve UK competitiveness and performance following the global financial crisis, the MacLeod Report 'Engage for Success' concluded that effective employer engagement would result in "a step-change in workplace performance and in employee wellbeing", which would result in "a triple win: for the individual at work, the enterprise or service, and for the country as a whole".⁵¹
- According to research by the McKell Institute in 2012, Government, industry and trade unions should "look to innovate, improve management capability and focus on workforce development and upskilling in order to deliver long-term productivity growth." The report describes a recurrent fundamental policy choice – the 'low road' of "narrow cost-cutting and an unwinnable race to the bottom", or the 'high road' of "longer term dynamic efficiency gains in a knowledge-based high wage, high productivity economy". The report revealed how Australia lags behind its international peers in terms of investing in research and innovation, in improving its management capability and in workforce development and skills. Investments were found to be vital for long-term productivity gains. As an example, its research showed that in Australia, superior management performance was positively correlated with "enhanced management sales, productivity, market valuation and employment growth".
- A 2009 report by Carol Gill on High Performance Work Practices (HPWP) demonstrates that Australian businesses are failing to appropriately invest in HPWP to the detriment of their competitiveness. Gill showed how short-term profit interests often trumped a company's long-term interests, and acted as barriers to applying an 'invest-to-save' approach. Investing in the workforce

⁵¹ http://www.engageforsuccess.org/ideas-tools/employee-engagement-the-macleod-report/#.VOvvN_mUcSU

was a key HPWP that companies were deterred in making, as their competitors were failing to do so also or, for instance, management were unwilling to delegate their power. Interestingly, her research revealed that HPWP are more likely to be present in union workplaces and critically, that productivity gains from HPWP were significantly higher when a union was present, with no productivity boost from HPWP when no union was present.

124. The AWU urges the Inquiry to seriously look at the mounting research on this issue and consider how the Australian Government, its agencies and legislation can support businesses to deliver long-term productivity, which is beneficial for employers, employees and communities, addresses staggering rising income inequality and will better prepare Australian companies - through research, innovation, management and workforce training investment - to compete globally.
125. It must consider that industrial relations legislation is not, and cannot, become the driving force of productivity. A multi-agency approach to tackling these issues will be needed.
126. Not only have critical aspects of how legislation can support productivity improvements been overlooked by this Inquiry, but the Government's proposal of introducing rules that require discussion of productivity improvements as part of the bargaining process is inconsistent with the argument (made by the Government and some employers) that they require flexibility in legislation and less regulation.
127. How would prescribing what must be discussed during bargaining negotiations help meet this end, or the stated chief concern of this Inquiry to develop "bargaining arrangements [that] allow *employees* and *employers* to genuinely craft arrangements suited to them"?
128. Furthermore, as the Inquiry notes, even though agreements can contain clauses that specify commitments to productivity improvements under current

legislation, only one third of agreements include specific productivity measures and around half make general commitments to such measures.

129. The AWU is perplexed by the Inquiry's inference that for some reason this non-mandatory element is inappropriate, and by the question posed implying incentives under the normal operation of a business are insufficient to improve productivity.
130. The suggestion is made that the business community "has sometimes expressed concern that agreements do not give enough emphasis to productivity". Yet it is currently in their gift to be able to negotiate productivity improvements into agreements should they wish – as the Inquiry will be aware good faith bargaining does not mean that parties have to make concessions during bargaining or agree on the terms to be included in an agreement.
131. Finally, notable by its absence is any discussion of the fact that labour productivity has been rising faster under the Fair Work system than it did under Work Choices.⁵² In fact, labour productivity growth in 2012 was the strongest in a decade, with Australian workers generating an average of \$53 per hour they work, well above the OECD average of US\$46 per hour.⁵³ Over the past five years, Australian labour productivity has grown faster than productivity in any G7 country, including the US, and has been more than twice the OECD average.⁵⁴
132. For this reason, the AWU is extremely confused why the Inquiry and the Australian Government are looking to reduce labour laws as a way to increase productivity, when clearly current legislation has not hindered its growth.

Requiring parties to bargain in good faith

⁵² <http://www.theguardian.com/commentisfree/2014/dec/22/the-liberals-review-of-workplace-relations-is-critical-to-unmaking-our-social-democracy>

⁵³ <http://www.actu.org.au/Publications/EconomicBulletins/ACTUEconomicBulletinJuly2013.aspx>

⁵⁴ Ibid

133. The six good faith bargaining requirements include⁵⁵:

- Attending and participating in meetings at reasonable times
- Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- Responding to proposals made by bargaining representatives for the agreement, and giving reasons for the bargaining representatives' responses to those proposals
- Giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representatives responses to those proposals
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
- Recognising and bargaining with the other bargaining representatives for the agreement

134. The AWU believes that these requirements help facilitate bargaining negotiations and, where concerns exist that good faith bargaining requirements are not being met, that there are appropriate measures in place for the FWC to act.

135. The AWU is struggling to understand on what basis any changes to these requirements would be necessary, with only a very loose reference being made by the Inquiry to a general debate on the issue during the 2012 Review.

Individual Flexibility Arrangements

⁵⁵ FW Act, s. 228

136. The AWU is not clear what the alleged problem is that the Inquiry is seeking to resolve through its work in relation to IFAs. As noted by the Inquiry, 90% of employers do not have a single IFA with many employers having not heard of IFAs, whilst “the evidence suggests that most employers do not use IFAs because they see no need for them (51%) or have had not request from an employee (33%)”.⁵⁶
137. Less than 1% of employers think IFA provisions are too inflexible.⁵⁷ When faced with such statistics, the AWU is surprised that the Inquiry is not instead considering whether IFAs are in fact obsolete and, therefore, still necessary.
138. More worryingly, the Inquiry seems to be intently focusing on how to facilitate the uptake of IFAs but has completely overlooked many concerns that currently exist around IFAs, which have emerged following the FWC’s survey in 2011.⁵⁸
139. Firstly, most IFAs are initiated by employers, not employees, and of particular concern – many employees were required to sign them as a condition of getting or keeping their job. Not only is the latter a breach of the Act, but as many as half the employers who used IFAs were found to take this approach.
140. In addition, it is alleged that many employers use IFAs (three quarters of them) to formalise previously informal/ illegal practices.⁵⁹
141. The AWU would ask that the Inquiry urgently looks into these findings and assesses what can be done to ensure that employers are not forcing workers to accept IFAs. There appears to be gap in the scrutiny of these practices, with many of the agreements made behind closed doors (particularly in non-unionised workplaces) and the Inquiry must consider how they can be better regulated.

⁵⁶ <http://www.pc.gov.au/inquiries/current/workplace-relations/issues>

⁵⁷ <https://www.fwc.gov.au/documents/documents/IFA.pdf>

⁵⁸ [Ibid](#)

⁵⁹ <http://www.miningaustralia.com.au/features/individual-contracts-come-back-but-don-t-mention-t>

142. The AWU firmly believes that no amendments should be made to IFAs to facilitate the reduction of entitlements by employers or to make them harder for employees to rescind.
143. The BOOT test must not only be applied to IFAs, but IFAs should be also assessed to ensure that they are meeting the BOOT test requirements.
144. That employees are better off overall when accepting an IFA is crucial to the integrity of the entire fair work system, and the FWC or other agency must robustly enforce this element for the protection of all workers' rights.

Industrial action associated with enterprise bargaining

145. Whilst the AWU fully supports the Inquiry's assertion that "industrial action is one of the most important forms of bargaining muscle flexed by... employees and their representatives", the assertion that this applies to employers also is risible.
146. Employers by their very nature have all the cards stacked in their favour. It is for this very reason that unions came to be and legislation was put into place to protect workers from employers, who too often put profit-making before the wellbeing and safety of their workers.
147. Indeed, the power of employers has grown given today's globalised economy so that employers can now either directly threaten industrially advanced and well-regulated economies with the withdrawal of their investment to low-waged economies, with poor health and safety and workers' rights or refer to international competition as a reason for the need to reduce workers' terms and conditions.
148. Unions and industrial action legislation has never been so integral to the fair working of today's economy, and legislation must not be weakened in favour of employers seeking a 'race to the bottom'.

149. The AWU does not therefore believe that employers need “a wider set of options in bargaining that mirror those available to employees” and is concerned by the Inquiry’s efforts to suggest employee industrial action options are wider than the reality: “some forms of industrial action may not show up in ABS estimates”.⁶⁰
150. Not only is this wildly speculative but how can the Inquiry make this assertion yet then fail to suggest that employers may use informal industrial action options also?
151. Indeed, the AWU is concerned that the Inquiry is failing to understand some very fundamental aspects of employer-employee relationships in Australia.

Taking protected industrial action - employee protected action

152. The AWU would like to see more streamlined bureaucratic processes in relation to secret ballots for protected industrial action.
153. This would not lead to an increase in industrial action but rather make the bargaining process more efficient, which is beneficial for both employers and employees.⁶¹

Limited conciliation and arbitration

154. Any changes the Fair Work Commission’s (FWC) powers, particularly enabling the FWC to apply greater discretion or subjectivity in relation to specific cases, must be grounded by the FWC’s strict independence from the Government.

Individual arrangements outside enterprise agreements

⁶⁰ <http://www.pc.gov.au/inquiries/current/workplace-relations/issues>

⁶¹ http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP0708/08rp33

155. Further to the discussion above on IFAs, the AWU does not believe that legislation should seek to promote or encourage the use of individual arrangements outside enterprise agreements.
156. Divisive by their very nature, they do not help to foster engaged workplaces, which help to drive productivity. The current legislation as it stands allows sufficient flexibility for business and employees seeking to establish individual arrangements, although the Inquiry must urgently look into whether some employers using IFAs are currently breaching the Act requirements.
157. The AWU reiterates the evidence above that shows an employer's provision of and investment in workforce training will afford it greater flexibility and adaptability to economic uncertainties, better innovation and improved productivity than any individually negotiated employee arrangement.
158. It requires an abandonment of short-termism by employers and the AWU would strongly urge the Inquiry to support employers in applying a long-term approach to business planning and success.

ISSUES PAPER 4: EMPLOYEE PROTECTIONS

Specific issue: Are the current provisions in the Fair Work Act sufficient to discourage sham contracting?

s. 357 - Misrepresenting Employment as Independent Contracting Arrangement

159. An employer who engages an employee as an independent contractor avoids statutory obligations like superannuation payments, annual leave, sick leave, leave loading etc., which the employer is otherwise obliged to provide to an employee.

160. The Fair Work Ombudsman (FWO) targeted sham contracting in 2011 and identified the cleaning services, hair and beauty, and call centre industries⁶² as those in which sham contracting is most prevalent. These are industries with some of the lowest paid and most vulnerable employees in Australia.

161. Section 357(1) does not prohibit employers engaging employees as independent contractors, only the making of representations to an individual who is, or should be an employee, that they are an independent contractor.

162. However, a defence to s. 357(1) is available to an employer who makes such a representation but:

- a. did not know; and*
- b. was not reckless as to whether;*

the individual was an employee and not an independent contractor.⁶³

⁶² *Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries: Report on the preliminary outcomes of the Fair Work Ombudsman Sham Contracting Operational Intervention*, November 2011

⁶³ FW Act, s. 357(2)

163. There are three distinct problems we have identified with the defence in s. 357(2) of the Act, that invariably provide employers a valid legislative defence in all but the most blatant and egregious of breaches:

1. There is no clear definition of the term “reckless”;
2. Once the employer relies on the subjective defence, the onus of proving the employer knew or was reckless, rests with the person alleging the breach; and
3. The defences are made out on purely subjective grounds.

1. Definition of the term “reckless”:

164. The sham contracting provisions of the Act are intended to broadly mirror those that existed in the Workplace Relations Act 1996 (WR Act),⁶⁴ in which the government stipulated that: ‘Recklessness will take its common law meaning as the Commonwealth Criminal Code does not apply to the civil remedy provisions in the WR Act’.⁶⁵

165. As the term “reckless” is not defined in the Act, a relevant court must rely on the common law for guidance.

166. However, the term “reckless” has a number of different definitions across civil law, depending on the cause of action⁶⁶ and while the meaning is settled in the context of the criminal law, that settled meaning cannot apply to a breach of the sham contracting provisions, because it is not an offence.⁶⁷

⁶⁴ Explanatory Memorandum to the Fair Work Bill 2008, item 1447

⁶⁵ Supplementary Explanatory Memorandum, Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006, p 4

⁶⁶ See commentary of Justices Gummow, Hayne and Heydon in *Banditt v R* (2005) 224 CLR 262 at [1]–[2]

⁶⁷ FW Act, S. 549

167. It is yet to be settled which, if any, of the civil law definitions of the term “reckless” should apply to s. 357. In *CFMEU v Nubrick Pty Ltd*,⁶⁸ the union relied on an existing definition that applies in the context of insurance policies, while the employer did not rely on any particular definition but referred to the observations made by the High Court in *Banditt v R*.⁶⁹ However, the court did not ultimately decide what definition should apply as it found the employer was not reckless under any definition.

168. It is essential that the obligations imposed on employers be clear, particularly because s. 357(1) is a civil penalty provision.⁷⁰ The absence of a clear definition of the term “reckless” means that both employers and employees cannot be sure of their rights and obligations under s. 357.

2. Onus of proving the defence

169. The onus of proving the defence in s. 357(2) rests with the employer. In practice, however, the person alleging the breach will likely be required to provide evidence that the employer actually knew.

170. Following the principles outlined in the High Court decision in *Barclay*,⁷¹ an employer may give evidence that they simply did not know the representations they made were false and, if that evidence is accepted by the court, the employer will be taken to have discharged the onus of proof.

171. Therefore, unless the employer makes admissions, it is up to the person alleging that the employer knew or was reckless in making the misrepresentations (the Applicant), to adduce evidence of the employer’s knowledge.

172. This is highlighted by the recent decision in *Director of the Fair Work Building*

⁶⁸ [2009] FMCA 981

⁶⁹ (2005) 224 CLR 262 at [1]–[2]

⁷⁰ FW Act, s. 539

⁷¹ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.

*Industry Inspectorate v Bavco Pty Ltd & Ors (No.2)*⁷² in which the Federal Circuit Court listed the three potentially relevant classes of evidence from which a person's knowledge may be inferred:

- *One is the conduct or behaviour of the person who is alleged to have knowledge. A generalisation that is applied to such evidence is that the manner in which a person acts is a reflection of a person's state of mind. At least in some circumstances, then, it is possible to rationally infer from a persons' behaviour the state of mind that has produced it.*
- *A second class of evidence is external circumstances; that is, circumstances that are likely to bring to the persons' mind the matters about which it is alleged the person has knowledge. Examples include evidence of direct exposure to the fact, the making of a communication to the person about the fact, and reputation about the existence of a fact.*
- *And a third class of evidence is that which shows a person had knowledge of a fact at a time before or after the time at which it is necessary to prove that person had that knowledge. Knowing a fact at one point in time may be a basis for inferring knowledge of the fact at a later or earlier time.*⁷³

173. These elements put the onus back on the Applicant to adduce evidence of the employer's likely knowledge of particular facts, such that a court may determine that the employer knew or was reckless in making the representations.

174. This is a particularly difficult hurdle to overcome for an Applicant, and provides an employer with an almost assured defence, except in the most flagrant of breaches.

⁷² [2014] FCCA 2712

⁷³ Ibid at [71]

3. The subjective nature of the defence

175. The defence in s. 357(2) has two limbs, both of which apply subjective tests. In deciding whether a defence to a breach of s. 357(1) exists, the court must only consider what the employer knew, not what a reasonable person should know.
176. The subjective nature of this defence encourages an employer to be ignorant of the law surrounding independent contractors and/or covert when proposing changes in the workplace, rather than including and consulting with employees. The less an employer knows (or can be proven to know) about the operation and existence of laws relating to independent contractors, the less likely they will be found to have breached the provisions of the Act.
177. The concept of reasonableness would introduce an objective element to the test for recklessness in the sham contracting provisions. This objective test is well understood by the courts and is the test for recklessness for the common law tort of negligence,⁷⁴ as well as a director's duty to not trade whilst insolvent.⁷⁵
178. As such, we propose the following amendment of subclause 375(2):

Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

- a. did not know;*
- b. could not reasonably be expected to know; and*
- c. was not reckless as to whether;*

the contract was a contract of employment rather than a contract for services.

179. This amendment would provide clarity as to the definition of the term "reckless"

⁷⁴ *Banditt v R* (2005) 224 CLR 262 at [1]–[2]

⁷⁵ *Corporations Act 2001* (Cth), s 588G.

in the context of the sham contracting provisions, as it would be possible for the courts to adopt a fixed common law definition. Thus, it would clarify the obligations imposed on employers, and the rights afforded employees, by these provisions.

180. Further, the amendment would put the evidential burden back on the employer to prove the reasonableness of their belief, which we submit is fairer than requiring an Applicant to provide evidence of surrounding circumstances from which a court may infer an employer's knowledge.
181. It is true that the Act applies the subjective test for recklessness on employers in other provisions,⁷⁶ but we believe that clarity and practicality must take precedence over legislative consistency. Further, the concept of reasonableness already exists in the Act,⁷⁷ which is evidence that an objective standard can be effectively used.
182. In the context of striking a balance between the protection of employee interests (particularly low-paid, vulnerable employees) and not punishing employers who have made a legitimate attempt to engage independent contractors under the law, an objective standard of the reasonableness of an employer's knowledge, is appropriate.

s. 358 - Dismissing to Engage as Independent Contractor

183. A determination of whether an individual is an employee or an independent contractor is not a simple matter, it involves complex considerations about, among others, the nature of the relationship between the parties, the work performed and any agreement between the parties.
184. A state of the law governing the determination of whether an individual is an

⁷⁶ FW Act, ss. 345 and 348

⁷⁷ FW Act, ss. 707, 708, 711, 715, 716 and 718

employee or an independent contractor can be found in *Hollis v Vabu*.⁷⁸

185. This High Court decision shows that it may not be clear, even to experienced members of the court, whether or not a particular individual is an employee or an independent contractor.

186. Nevertheless, an employee who is dismissed and re-engaged as an independent contractor to perform the same or similar work has only 21 days from the date of the dismissal to make an application seeking remedy.⁷⁹

187. Such a timeframe for making an application is inappropriate for sham contracting. It may take weeks before a worker realises that by becoming an independent contractor they are in a substantially less beneficial position than they were as an employee, by which time, they will no longer be eligible to make an application.

188. Further, the term “dismissal” is defined in the Act as a situation where:

- *a person’s employment has been terminated at the employer’s initiative, or*
- *a person was forced to resign because of the conduct or course of conduct engaged in by the employer.*⁸⁰

189. However, this definition does not encompass situations where an employee has been pressured to “agree” to resign in order to be engaged as an independent contractor. For example, an employer may apply undue pressure on an employee seeking flexibility in their working arrangements in order to care for their family to resign and be reengaged as an independent contractor

⁷⁸ [2001] HCA 44; 207 CLR 21

⁷⁹ FW Act, s. 366

⁸⁰ FW Act, s. 386. NOTE: While this definition is used only for determining whether an applicant is eligible for protection under the unfair dismissal provisions of the Act, it is likely to provide guidance for a court in an application made under s. 358.

performing the same or similar work. An employee who agrees to be terminated or resigns would not be eligible for relief under s. 358, as there is no dismissal.

190. To remedy these anomalies, we recommend s. 358 be amended to allow relief in circumstances where an employer has unduly influenced or applied undue pressure on an employee to agree to termination or resignation.

191. Further, we recommend an extension of the 21-day limit in which to make an application for relief, due to the complex nature of the determination of whether an employee has in fact been improperly engaged as an independent contractor.

s. 359: Misrepresentations to engage as Independent Contractor

192. Similar issues arise under this section as those in s. 357(2) (discussed above). In order to be in breach of this provision, the employer must actually know that the representations they made were false. This is a purely subjective test and does not even include an element of recklessness.

193. Like s. 357(2), this provision also encourages ignorance of the law. Further, after the decision in *Barclay*⁸¹ (also discussed above), unless the employer makes admissions, the practical onus of proving the employer knew, rests with the Applicant.

194. We recommend the addition of an objective test for the determination of whether a statement was false. The inclusion of a test for reasonableness would encourage employers to seek advice or do their own research before making such statements to employees, and would encourage an appropriate level of prudence in their dealing with employees.

195. As such, we recommend s. 359 be amended to:

⁸¹ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.

A person (the employer) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows, or ought reasonably know, is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

Specific issue: General protections

196. We note that attempts have been made to increase the scope for the Fair Work Commission to determine general protections disputes.

197. The Fair Work Commission can now arbitrate general protections disputes if both parties agree.⁸²

198. However, the normal course of action is still for general protections matters to be determined in the Federal Court or Federal Circuit Court.

199. Our experience is that this operates as a disincentive to employees prosecuting applications because of the inevitable time and expense involved in having the matter determined in a Federal Court.

200. We note an object of the Act is⁸³:

“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)

⁸² See FW Act, s. 369

⁸³ See FW Act, s. 3(e)

201. We submit this object will be better achieved if the scope for the Fair Work Commission to deal with general protections disputes is further expanded.

ISSUES PAPER 5: OTHER WORKPLACE RELATIONS ISSUES

General points on institutions and compliance costs

202. We note Issues Paper 1 refers to declining rates of union membership as potentially providing an impetus for further change to the workplace relations system.
203. Unfortunately, this is not a new phenomenon and institutional adjustments have already been made.
204. Specifically, the role of the Fair Work Ombudsman has become prominent and the Fair Work Commission has had to adopt procedures that take into account an increased number of self-represented litigants.
205. For example, the Fair Work Commission has developed Benchbooks which provide simple but detailed legal information on subjects such as unfair dismissal, general protections and bullying.⁸⁴
206. It is apparent that the Fair Work Commission has been devoting considerable resources in recent times to trying to make the workplace relations system simpler and more accessible for all participants.
207. This has been demonstrated via their comprehensive approach to the modern awards review, the development of Benchbooks and continuous improvement processes regarding their website and internal Commission processes.
208. In these circumstances, there does not appear to be any reason for the Productivity Commission to recommend a departure from the current course.

END

⁸⁴ See <https://www.fwc.gov.au/creating-fair-workplaces/commission-engagement-strategy/international-engagement/resources>