



WORKPLACE AND SAFETY LAW COMMITTEE

Submission to the Productivity Commission's Workplace Relations Framework Inquiry

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Workplace Relations Inquiry
Productivity Commission
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New South Wales Young Lawyers – Workplace and Safety Law Committee

New South Wales Young Lawyers is a division of the Law Society of New South Wales. Members include legal practitioners in their first five years of practice and/or under the age of 36, and law students. There are currently over 15,000 members.

The Workplace and Safety Law Committee (**the Committee**) is responsible for the development and support of members of NSW Young Lawyers who practice in or are interested in industrial relations law. The Committee takes a keen interest in providing comment and feedback on legal and policy issues that relate to industrial relations law and the development and support of it, and considers the provision of submissions to be an important contribution to the working community.

The Committee is drawn from lawyers working in academia, government, private, and other areas of practice that intersect with Industrial Relations law. The combined knowledge base of the Committee is therefore diverse and substantial. The objectives of the Committee are to raise awareness about workplace and safety issues and provide education to the legal profession and wider community about Industrial Relations law. Members of the Committee share a commitment to promoting and protecting these objectives.

The Committee is grateful for the opportunity to make this submission.

The Productivity Commission's Workplace Relations Framework Inquiry

Introduction

In response to the Productivity Commission's call for submissions for the Workplace Relations Framework Inquiry, the Committee makes submissions on the following topics:

Workplace Relations Framework: Safety Nets – Issues Paper 2

- 2.2 The Federal Minimum Wage
- 2.5 Penalty Rates

Workplace Relations Framework: Other Workplace Relations Issues – Issues Paper 5

- 5.4 Is competition law a neglected limb of the WR system?

2.2 The Federal Minimum Wage

When considering how to arrive at the federal minimum wage, it is fundamentally important to keep in mind that the federal minimum wage is a protection. The principle that it protects is commonly known as 'a fair day's pay for a fair day's work'. In other words, the federal minimum wage should always protect fairness in the workplace and specifically protect fairness for the worker. It is a principle upon which labor movements around the globe have been built. Moreover, the implementation of a minimum wage is largely a thing of the twentieth century.¹ That is to say, it is a feature of a modern society. It would be fair to say that political conversations about the minimum wage begin when an economy is under strain. However, the Productivity Commission has called for submissions regarding Australia's federal minimum wage, including the current rationale for it and whether the rationale justifies the current federal minimum wage. These submissions now turn to those specific issues.

In Australia, '[a] minimum wage is an employee's base rate of pay for ordinary hours worked, and is generally dependent on the industrial instrument that applies to their employment (for example, a modern award, enterprise agreement, transitional pay scale, or national minimum wage order).'² It is determined by a specialist minimum wage panel on the Fair Work Commission (**the FWC**)³ Minimum wages generally come under a modern award. Modern awards vary according to profession. Even though modern awards may vary according to the profession, the rates of pay for the modern awards concerning those professions are, as per the definition above, at the bottom of possible rates of pay for those professions. However, if someone does not come under a modern award but is still entitled to the federal minimum wage, then they are paid \$16.87 per hour or \$640.90 per 38 hour week (before tax),⁴ as at the time of writing.

Some aspects of the present situation should change for the following reasons. Whilst the seminal decision in *Ex parte H.V. McKay* (1907) 2 CAR 1 (**Harvester**) is over a hundred years old, its rationale has not dated. This is because Higgins J reasoned as follows:

The provision for 'fair and reasonable' remuneration is obviously designed for the benefit of the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers...

*The standard of 'fair and reasonable' must therefore be something else, and I cannot think of any other standard appropriate than the normal needs of an average employee, regarded as a human being in a civilised community. If, instead of individual bargaining, one can conceive of a collective agreement - an agreement between all the employers in a given trade on the one side, and all the employees on the other - it seems to me that the framers of the agreement would have to take as **the first and dominant factor the cost of living as a civilised being**. If A lets B have the use of his horses on the terms that he gives them fair and reasonable treatment, I have no doubt that it is B's duty to give them*

¹ Australia's minimum wage, and the rationale for it, came about in 1907 with the *Harvester decision: Ex parte H.V. McKay* (1907) 2 CAR 1. This decision was quickly overturned, however. But its impact is still recognised today.

² <http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages>

³ Ibid.

⁴ Ibid.

*proper food and water, and such shelter and rest as they need; and, as wages are the means of obtaining commodities, **surely the State in stipulating for fair and reasonable remuneration for the employees means that the wages shall be sufficient to provide these things, and clothing and a condition of frugal comfort estimated by current human standards.***⁵ (Emphasis added.)

It is true to say that the *Harvester* decision has not been followed by courts or commissions in Australia. But this does not detract from the quality of the principle which it expounds in a social and political sense. It merely calls for '*frugal comfort estimated by current human standards*' in addition to meeting the basic necessities in a civilised society. In other words, the starting point for evaluating the appropriateness of the amount which should be paid as the minimum wage is the cost of day to day living in Australian society. The FWC currently does this through periodic reviews of the federal minimum wage conducted by its expert panel who exercise expert knowledge with regard to the surrounding circumstances of workers on the minimum wage. Moreover, modest increases are made to the minimum wage at shorter intervals rather than steeper increases at fewer intervals which helps facilitate employment retention.

Looking to other countries for guidance is not particularly useful. For example, the 2010 minimum wage increase was considered disproportionate to other countries at the time but the Australian economy weathered the Global Financial Crisis better than most other OECD countries.⁶ However, international forces are at play in the Australian economy so the economies of other countries should not be disregarded altogether. In other words, it is important not to take international statistics out of context to serve a partisan political purpose when considering the appropriate federal minimum wage in Australia.

A more controversial issue is the combination of the federal minimum wage and welfare for the individual in Australia. This is a point that presently needs to change. The confusion that the wage and tax/transfer systems creates is this: if the minimum wage is lowered and that person is still to receive welfare benefits, although higher and thus their net wages are higher overall, then they are more likely to supply labor and take up that employment, even if that job pays less. It should not be the role of the tax payer to support people who already have a fulltime job or have a part-time job but simply choose not to work as many hours as they could. Both the employer, through paying adequate wages to meet the costs of the worker living in a civilised society while allowing frugal comfort, and the worker, through bringing a committed attitude to the quality of their work including the improvement of skills, should come together on this point to alleviate the welfare system. The reasoning behind the minimum wage and tax transfer system also makes assumptions about the monetary motivations and career aspirations of people at the bottom of the employment ladder which may not necessarily be found in the attitudes of these workers to the requisite degree to justify such a system. However, on the other hand, if a minimum wage worker has a dependent who is not able to work and the worker is not able to meet the needs and frugal comfort of that dependent, then it is the role of welfare to meet that gap and cover the additional cost of living and frugal comfort.⁷ This point differs from Higgins J's reasoning that a man should be able to support his wife and child on his own wage. But, of course, the welfare system that we have now did not exist in 1907.

⁵ *Ex parte H.V. McKay* (1907) 2 CAR 1.

⁶ PJ Sloane "The Fair Work Australia Minimum Wage Decision Viewed From Afar" *Australian Bulletin of Labor* Vol 36 No 3 (2010), 346, 346-7.

⁷ Martin J Watts "How Should Minimum Wages Be Set in Australia" *Journal of Industrial Relations* 52(2) (2010) 131, 145.

2.5 Penalty Rates

How should penalty rates be determined?

The Committee submits that penalty rates should continue to be determined by the FWC as part of its legislative mandate to conduct two⁸ and four-yearly⁹ reviews of each Modern Award. There are several reasons provided in support of this submission:

- Award-dependent employees who are the beneficiaries of weekend penalty-rate payments are amongst some of the lowest paid workers in the economy¹⁰ and rely upon penalty rates to 'make ends meet'.¹¹ Given the vulnerability of, often low skilled, Award-dependent employees the task of determining penalty rates should remain with an independent body, such as the FWC, which has the capacity to consider, in addition to the economic factors, social factors inherent in setting of wages (i.e. ensuring that wages are set at a level which allows for the maintenance of a satisfactory living standard, even at the lowest end of the pay scale)¹² as opposed to the market which is purely receptive to the factors of supply and demand.
- The FWC is the best placed entity to undertake the task of setting penalty rates as it is an independent tribunal which already has the framework and clear legislative process and guidelines in place to frame and direct the course of review (for example, and as previously alluded to, the legislatively-mandated two and four-yearly Modern Award reviews, as well as the Modern Award Objective) and its members possess the knowledge, expertise and experience appropriate to undertaking such a task.
- As the FWC's power to amend Modern Awards, including penalty rates, is conditioned by the Modern Award Objective, its ability to enact sweeping changes is significantly curtailed. The exercise of the FWC's discretion with regards to amending Modern Awards is also limited by the supervisory jurisdiction exercised over its decisions by the Federal Court of Australia.¹³ Such a narrow jurisdiction limits the FWC's ability to make drastic changes to Modern Awards which, in turn, promotes economic stability as the system tends to adapt incrementally rather than disruptively. This also reduces the regulatory burden on employers who are only required to make small changes to ensure compliance. The merits of this approach are most evident in the measured and thorough method adopted by the Full Bench of the FWC in the *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 decision of last year.

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

The Committee submits that whether employers would have to pay a premium to attract labour on weekends and holidays in the absence of penalty rates would depend upon the skill level of employees and the industrial context in which the employer operates. For example, employees in the healthcare and social assistance industries, which enjoy 23.6% union membership,¹⁴ and a large proportion of whom possess vocational or tertiary qualifications, would have greater bargaining power and ability to negotiate

⁸ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Item 6, Sch 5.

⁹ *Fair Work Act 2009* (Cth), s 156.

¹⁰ *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996, [139] (VP Hatcher, Justice Boulton and Commissioner McKenna).

¹¹ *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996, [132] (VP Hatcher, Justice Boulton and Commissioner McKenna).

¹² *Fair Work Act 2009* (Cth), s 134.

¹³ *Fair Work Act 2009* (Cth), s 562.

¹⁴ Australian Bureau of Statistics, 'Employee Earnings, Benefits and Trade Union Membership Australia' (Data series 6310.0, Australian Bureau of Statistics, August 2013) table 11.

the terms and conditions of their employment than workers in the retail industry, for example, which enjoys only 11.8% trade union membership across its workforce,¹⁵ and in which the majority of employees are low-skilled and, therefore, easily replaced.

That is to say, employees with higher skill levels and stronger union backing have greater social mobility and are better placed to leverage the '*work-life interference*' caused by work on weekends and holidays¹⁶ in order to negotiate higher wages with employers.

In light of the limited, reliable statistical data available,¹⁷ and notwithstanding the current Liberal Federal Government's position not to make any changes to penalty rates,¹⁸ the Committee is of the view that the Commission should, in its research capacity, undertake a broad-ranging study into the impact of penalty rates on employers, individuals and Australian society and the economy at large. Such a report would be of great assistance to the FWC¹⁹ given that Senator the Honourable Eric Abetz, Federal Minister for Employment, has indicated that (at least during the term of the current Federal Government) the task of determining Award-based penalty rates will remain the responsibility of the FWC.²⁰

¹⁵ Ibid.

¹⁶ Natalie Skinner and Barbara Pocock, 'The Persistent Challenge: Living, Working and Caring in Australia in 2014' (The Australian Work and Life Index 2014, Centre for Work + Life University of South Australia, September 2014), 6 and 28.

¹⁷ *Safety Net Review – Wages 2005* (2005) 142 IR 1, [21].

¹⁸ James Massola, 'Abbott government rules out changes to penalty rates, minimum wage', *The Sydney Morning Herald* (online), 24 February 2015 <<http://www.smh.com.au/federal-politics/political-news/abbott-government-rules-out-changes-to-penalty-rates-minimum-wage-20150224-13n139.html>>.

¹⁹ *Restaurant and Catering Association of Victoria* [2014] FWCFCB 1996, [103] – [104], [118] (VP Hatcher, Justice Boulton and Commissioner McKenna).

²⁰ 'Abbott government rules out changes to penalty rates, minimum wage', above n 11.

5.4 Is competition law a neglected limb of the WR system?

Secondary Boycotts

This part of the submission addresses the following question put forth at 5.4 of Issues Paper 5: *'Are there grounds for shifting some aspects currently covered by the Competition and Consumer Act 2010 (Cth) (CCA) to the Fair Work Act 2009 (Cth) (FWA)?'*²¹

Firstly, the panel of the Harper Review into competition laws iterated that it is in the interest of the public that the objectives of sections 45D to 45EA of the CCA prohibit secondary boycotts for the purpose of causing substantial loss or damage or causing substantial lessening of competition, but that some of these sections also make allowances for certain types of conduct that would otherwise be a contravention of the CCA.²² The Harper review of the competition policy – which commenced in late 2013 and a draft of the report was released on 22 September 2014 – found that there was not a sufficient case made for changing these provisions,²³ and particularly with respect to widening the employment exceptions applicable to secondary boycotts under the CCA.²⁴

The draft review reported that, between mid-2012 and mid-2014, the Australian Competition and Consumer Commission (ACCC) was contacted nine times about secondary boycotts, with four of them relating to unions and that the ACCC had investigated all of them.²⁵ However, there have also been reports that the ACCC has not frequently been involved in secondary boycott matters relating to sections 45D and 45E enforcement because of varying reasons including that, *"it has not often been asked to investigate these matters"*²⁶; that, *"[t]he ACCC initiates investigations on the basis of complaints received, rather than undertaking investigations on its own initiative - it just does not have sufficient resources to do that"*²⁷; and also from the competition regulator itself, that it had found that enforcement was challenging due a variety of factors often involving *'difficulties in obtaining documentary evidence, lack of cooperation of witnesses; and potential overlaps between the ACCC and the Fair Work Commission and Fair Work Building and Construction.'*²⁸

The lack of evidence and lack of cooperation of witnesses are reasons that are outside the control of the competition regulator; however, the lack of resources for the ACCC to appropriately conduct enforcement-related procedures can be addressed by an increase in its annual funding.²⁹ In addition, one of the recommendations from the draft report of the review is to extend the jurisdiction in respect to these prohibition sections of the CCA – which is currently in the exclusive jurisdiction of the Federal Court – to the State and Territory Supreme Court,³⁰ rather than shifting the sections governing secondary boycotts over to the FWA and risk duplication of legislative provisions.

Thus, if recommendation 32 is adopted and implemented and if the ACCC receives an appropriate level of increase in funding for such enforcement purposes then this may address some of the issues being faced by the competition regulator, being the statutory agency appropriately charged with promoting

²¹ Page 8 of the Issues Paper 5 issued by the Productivity Commission.

²² See page 243 of the draft review

²³ Page 242 of the draft review: <http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf>

²⁴ See page 242 of the section of the draft review under the Employment-related Matters via the link provided: <http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf>

²⁵ See page 243 of the Employment-related Matters of the draft report of the review.

²⁶ <http://www.ipa.org.au/publications/1306/the-last-frontier-enforcement-issues>

²⁷ <http://www.ipa.org.au/publications/1306/the-last-frontier-enforcement-issues>

²⁸ 'Let state courts hear secondary boycott cases: Competition review', *Workplace Express*, 22 September 2014.

²⁹ <http://www.ipa.org.au/publications/1306/the-last-frontier-enforcement-issues>

³⁰ Recommendation 32 recommended that the *"[j]urisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA should be extended to the state and territory Supreme Courts"*: see page 50 of the draft review relating to Competition Laws - access to the draft report via the link provided: <http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf>

competition in the market place. The overlaps as were identified by the ACCC will not be alleviated by shifting the jurisdiction of the secondary boycott sections from the CCA to the FWA as explained above.

Conclusion: the view in response to the above question

The Committee submits that the current legislative regime for secondary boycott is adequately contained in the CCA and does not require a shift of the secondary boycott sections over to the FWA. However, there may be enforcement-related challenges faced by the competition regulator, but these may be better addressed by, for example, an increase to its annual funding for enforcement-related procedures to ensure that the competition regulator has an adequate and appropriate level of resources to conduct investigation into complaints received relating to secondary boycotts in respect to employment-related industry.

Conclusion

The Workplace and Safety Law Committee thanks the Productivity Commission for the opportunity to be heard on this submission.

The Committee would be pleased to provide further information or comment in this inquiry. To this end, Elias Yamine, President of New South Wales Young Lawyers, and Clare Kerley, Chair of the New South Wales Young Lawyers Workplace and Safety Committee, may be contacted via the details below.

Sincerely,

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