

**STRONGER  
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**NATIONAL OFFICE**

Level 10, 377-383 Sussex Street Sydney NSW 2000

T: (02) 8005 3333 F: (02) 8005 3300

E: [members@awu.net.au](mailto:members@awu.net.au) W: [www.awu.net.au](http://www.awu.net.au)

Members Hotline: 1300 885 653

Scott McDine National Secretary



ABN 28 853 022 982

**THE AUSTRALIAN WORKERS' UNION  
REPLY TO PRODUCTIVITY COMMISSION DRAFT  
REPORT OVERVIEW**

**Productivity Commission**

18 September 2015

# **1. Australia's recent labour market performance does not suggest a dysfunctional system**

## **General point on industrial regulation**

1. The Draft Report contains some important general insights about recurring issues within Australian industrial relations.
2. In relation to productivity, the Draft Report states: "there is little robust evidence that the different variants of WR systems over the last 20 years have had detectable effects on measured economy wide productivity".<sup>1</sup>
3. The Draft Report also later states:

*Most employers constantly look for ways to improve productivity in ways that do not require any quid pro quo in terms of increased wages and conditions (for example, if the business invests in more productive equipment or innovates). Where there are gains from cooperation, employers, employees and their representatives already have strong incentives to commit to productivity improvements and, where possible, to specify ways in which this might be achieved through enterprise agreements without resorting to new regulation.*<sup>2</sup>

4. The conservative side of politics in Australia needs to grasp this important point: the seemingly endless time and resources that are poured into proposed legislative amendments would be better spent focusing on ways to improve productivity at the enterprise level.
5. The Draft Report expands upon this point by identifying the need to improve relationship management at the enterprise level:

*In fact, a missing story is that the toxic relationships that can surface between employers and employees are sometimes the result of poor relationship management – a key skill for both employers and employee representatives – not a fault of the WR system.*<sup>3</sup>

6. The amendments proposed in other parts of the Draft Report need to be considered in the context of the fundamental point that the current system is generally satisfactory and industrial parties would be better placed focusing on improving industrial relations in Australia at the enterprise level.

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<sup>1</sup> Productivity Commission Draft Report *Overview 'Workplace Relations Framework'* page 9

<sup>2</sup> Ibid at page 34

<sup>3</sup> Ibid at page 41

## **2. Institutional reform**

### **Performance of the Fair Work Commission**

7. The Draft Report does not appear to appropriately recognise the role of the Fair Work Commission and its recent predecessors in dramatically simplifying the award system in Australia.
8. The Draft Report states in relation to the Fair Work Commission: “Its approach to the current Modern Award Review acknowledges some of the glaring problems that still beset awards (but do not go far enough)”.<sup>4</sup>
9. However, the current situation must be viewed in context of the award system, which operated in Australia before 2010. As the Draft Report notes: “Through the award modernisation process, thousands of awards were collapsed to just 122, so the system is simpler than earlier”.<sup>5</sup>
10. Although the content of the current awards is certainly not perfect, it is unrealistic to expect anything different when the process, which led to their creation, is properly taken into account.
11. The Draft Report acknowledges that the process of further simplifying awards is “already partly underway”<sup>6</sup>.
12. This is correct and the Fair Work Commission is certainly devoting considerable resources (as are major industrial parties) towards trying to make awards easier to understand.
13. During the 4 yearly review process the Fair Work Commission has undertaken to redraft all existing modern awards to try and achieve greater levels of simplicity and consistency in some areas.
14. Therefore, it appears reasonable to assume that when the current 4 yearly review of modern awards process eventually concludes, Australia will be left with only around 120 modern awards which have been carefully drafted with more attention to detail than has ever been the case before.
15. We say this because many historical awards (and even the current modern awards), have been drafted by industrial parties with the relevant industrial tribunal merely approving the consent terms.

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<sup>4</sup> Productivity Commission Draft Report *Overview ‘Workplace Relations Framework’* page 10

<sup>5</sup> Ibid at page 21

<sup>6</sup> Ibid at page 21

16. Further, the transitional arrangements that have allowed for a relatively economic neutral transition into the modern award system have now largely disappeared. This in itself makes the system far less cumbersome than has been the case since 2010.
17. These are all extremely positive developments for industrial relations in Australia that should be properly recognised by the Productivity Commission.
18. We respectfully doubt that an array of economists and social scientists would have been able to manage this difficult process with the same degree of success as the Fair Work Commission and its predecessors.
19. Further, our recent experience with the compliance arm of the Fair Work Commission has suggested they are taking a very diligent and comprehensive approach to regulating trade unions and employer associations.
20. Whilst they obviously operate on a smaller scale, the compliance arm of the Fair Work Commission appears to be having greater success in creating a transparent and proper operating environment for unions and employer associations than the Australian Securities and Investments Commission (ASIC) is achieving for corporations.
21. We say this because it still seems remarkably easy for individuals to establish new companies despite having a clear history of abusing the corporate system.
22. This is increasingly leaving the taxpayer to fund employee entitlements<sup>7</sup> that should have been paid by individuals who simply transition from company to company when financial difficulties arise.

### **Composition of the Fair Work Commission**

23. The Draft Report is broadly critical about the background of Fair Work Commission members and states:

*The governance of the FWC needs reform. Some of the primary causes of inconsistencies in its determinations reflect the choices made by successive governments, particularly the emphasis on*

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<sup>7</sup> This occurs through the Fair Entitlements Guarantee scheme. We note the Coalition Government's response was to try and reduce employee entitlements under the scheme rather than targeting the corporations who are actually benefitting the most.

*appointing persons with perspectives oriented more to one side or the other of industrial relations debates.*<sup>8</sup>

24. The apparent solution is to have minimum wage and award matters determined by those who have expertise in “economic, social science and commerce, not the law”.<sup>9</sup>
25. We submit it is somewhat naïve to suggest that economists and social scientists do not have political views which impact upon their work.
26. Many economists and social scientists are renowned for their left<sup>10</sup> or right<sup>11</sup> wing perspectives.
27. A cursory glance of the various academic materials filed in relation to penalty rates proceedings in the Fair Work Commission highlights that equally qualified academics can have completely divergent views on a particular issue largely because of their political persuasion.<sup>12</sup>
28. We also note that even High Court judges are often considered to have political persuasions, which can be identified through an assessment of their judgments.<sup>13</sup>
29. We interact with the Fair Work Commission on a daily basis and do not accept a case has been made out for the significant reforms identified in the Draft Report.
30. Our view is the critical factors in determining appointment to the Fair Work Commission should be demonstrated expertise in industrial relations and the capacity to bring an independent mind to the resolution of issues.
31. We consider the current selection process has produced Commission members that meet this criterion in the overwhelming majority of cases.

### **3. The safety net**

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<sup>8</sup> Productivity Commission Draft Report *Overview* ‘Workplace Relations Framework’ at page 12

<sup>9</sup> Ibid at page 12

<sup>10</sup> For example - Karl Marx, Andrew Glyn and Noam Chomsky

<sup>11</sup> For example - Milton Friedman, Karl Popper and Friedrich Hayek

<sup>12</sup> See <https://www.fwc.gov.au/awards-and-agreements/modern-award-reviews/am2014305-penalty-rates-case>

<sup>13</sup> For a recent example, many identify Deyson Heydon as being a conservative judge: see <http://www.abc.net.au/worldtoday/stories/s749981.htm> and Michael Kirby as being left-wing: see <http://www.theaustralian.com.au/arts/review/flaws-serve-to-make-michael-kirby-the-man/story-fn9n8gph-1226544038983>

## **Penalty rates**

32. We strongly disagree with the Draft Report's recommendation that penalty rates in the hospitality, entertainment, retailing, restaurants and café industries be brought into line with Saturday rates.
33. A Full Bench of the Fair Work Commission in 2014 specifically rejected the general proposition that the level of disability for working on Sundays is no higher than that for Saturdays.<sup>14</sup>
34. Even the dissenting minority decision in that case did not determine that penalty rates should be exactly the same for Saturdays and Sundays.<sup>15</sup>

## **4. Protecting employees**

### **Unfair dismissal**

35. We submit the Draft Report affords unwarranted attention to the issue of employees being unfairly dismissed because of procedural shortcomings.
36. There is one example identified in the Draft Report whereby an employee was found to have been unfairly dismissed despite having assaulted a supervisor.
37. The Fair Work Commission's own data for the 2013/2014 financial year<sup>16</sup> suggests there is not a widespread phenomenon of employees successfully prosecuting unfair dismissal cases when they have "clearly breached the normal expectations of appropriate work behaviour".<sup>17</sup>
38. The data shows 84% of the unfair dismissal cases, which proceeded to arbitration, were dismissed.
39. This is consistent with our anecdotal experience that is that procedural shortcomings alone will seldom lead to an unfair dismissal finding when a valid reason for dismissal is established.
40. We believe the current test which is whether the dismissal was "harsh, unjust or unreasonable"<sup>18</sup> is appropriate and gives Commission members the discretion which is needed to take all the relevant circumstances into account.

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<sup>14</sup> See *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 at [154]

<sup>15</sup> Ibid at [312]

<sup>16</sup> See <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

<sup>17</sup> Productivity Commission Draft Report *Overview 'Workplace Relations Framework'* at page 27

<sup>18</sup> See s 385 of the *Fair Work Act 2009*

41. Further, explicitly undermining the significance of procedural fairness in the unfair dismissal decision-making process as proposed by the Draft Report<sup>19</sup> would be a retrograde step in Australian industrial relations as it would damage an important principle as cited by a Full Bench of the Australian Industrial Relations Commission in *Crozier*:

*The relevant principle is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case.*<sup>20</sup>

42. We also disagree with the Draft Report's recommendation that reinstatement should not be the primary remedy for unfair dismissal applications.
43. Given reinstatement is currently the primary remedy and yet was only ordered in 1% of the arbitrated cases in the 2013/2014 financial year, we would be extremely concerned that removing the emphasis on reinstatement would lead to this remedy never actually being granted.
44. This would be a shame because we have been involved in a number of cases whereby unfairly dismissed employees have been reinstated and then been able to provide loyal and dedicated service to their employer without issue for many years.<sup>21</sup>

## **5. Enterprise bargaining**

### **Procedural defects**

45. The Draft Report recommends that the Fair Work Commission should have discretion to approve enterprise agreements if there are procedural defects, which pose no risk to employees.
46. This recommendation is not without merit. However, compliance with the procedures specified in the legislation must be strongly encouraged so any discretion should be confined to exceptional circumstances.

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<sup>19</sup> Productivity Commission Draft Report *Overview 'Workplace Relations Framework'* at page 28

<sup>20</sup> *P. Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Dec 524/00 M Print S5897

<sup>21</sup> For example, see *Flanagan and others v Thales Australia Limited T/A Thales Australia* [2012] FWA 6291

47. We also note that discretion inevitably leads to more subjective decision-making, which is something the Fair Work Commission is criticised for earlier in the Draft Report.<sup>22</sup>

### **Further procedural issue – undertakings**

48. Another procedural issue that should be considered is amending the way undertakings are applied for an enterprise agreement.

49. The practical outcome of the current arrangements is that an enterprise agreement is approved in the terms filed but often with undertakings appearing at the beginning of the document.

50. This means defective clauses still appear in the agreement but are read with regard to the approved undertakings.

51. It would be simpler and easier if the Fair Work Commission was empowered to approve a “final” version of the agreement which has the defective clauses modified in accordance with the approved undertakings. This would merely reflect the intended legal effect in simpler terms.

### **BOOT**

52. We do not support any modification of the current Better Off Overall Test (BOOT).

53. Whilst we acknowledge a ‘line by line’ approach to assessing an enterprise agreement did initially occur to some extent following the commencement of the *Fair Work Act 2009*, our experience is that this practice has now been extinguished by Full Bench decisions which have confirmed the correct approach.

### **Greenfields agreements**

54. The Draft Report notes the use of greenfields agreements has expanded from comprising 6.4% of enterprise agreements in September 2011 to the current figure of 10%.<sup>23</sup>

55. The higher utilisation of greenfields agreements is seemingly an indication that the current system is acceptable for industrial parties and that changes are not necessary.

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<sup>22</sup> Productivity Commission Draft Report *Overview ‘Workplace Relations Framework’* at page 12

<sup>23</sup> *Ibid* at page 32]



## Content of enterprise agreements

56. We are strongly opposed to the Draft Report's recommendation that agreement terms, which limit or regulate the use of contractors and labour hire should not be permitted.<sup>24</sup>

57. These types of terms have a direct connection with job security for employees covered by the relevant agreement. This has been confirmed in a number of decisions including by a Full Court of the Federal Court in 2012.<sup>25</sup>

58. Further, a key object of the *Fair Work Act 2009* is:

*Achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.*<sup>26</sup>

59. In this context, it is not appropriate for the legislation to interfere with the right of employees and their unions to pursue terms at the enterprise level which will genuinely assist in securing their employment future.

60. We note a Full Court of the Federal Court in *AIG*<sup>27</sup> also rejected an argument that a clause effectively requiring contractors to pay the rates specified in an enterprise agreement conflicted with the *Competition and Consumer Act 2010*.

61. We welcome the Draft Report's finding that the mandatory inclusion of productivity clauses in enterprise agreements may ultimately be counterproductive.

62. We also support limitations on non-union bargaining representatives who represent only a small number of employees and have witnessed first-hand the inefficiency that can be created by their involvement in bargaining.

## 6. Individual arrangements

63. We are strongly opposed to the Draft Report's concept of an "enterprise contract".<sup>28</sup>

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<sup>24</sup> Productivity Commission Draft Report *Overview 'Workplace Relations Framework'* at page 34

<sup>25</sup> *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108

<sup>26</sup> s 3 (f) *Fair Work Act 2009*

<sup>27</sup> *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108

<sup>28</sup> Productivity Commission Draft Report *Overview 'Workplace Relations Framework'* at page 37

64. An immediate problem with the idea is that it necessarily involves conflating statute law and common law.
65. Statutory rights and responsibilities have been deliberately kept separate from common law rights and responsibilities in Australian industrial relations for over a century. In this historical context, any departure from the established system would need to be very carefully considered.
66. A further terminology issue arises in that the elements of a “contract” are reasonably well known in Australia society.
67. The “enterprise contract” would involve a dramatic departure from established contractual principles because it does not require the agreement of both parties.<sup>29</sup>
68. The proposal for retrospective testing by an external regulator following a complaint from an employee is also problematic on many levels. This has the potential to leave employers exposed to significant lump sum underpayment claims if terms of the “enterprise contract” are later found to be invalid.
69. Finally, the requirement for an employee to complain before any independent examination of the “enterprise contract” occurs is not a sufficient safeguard.
70. Many employees will have no idea that they have grounds to complain and others may be too concerned about ramifications if they make a complaint.

## **7. Industrial disputes and right of entry**

71. We agree with the Draft Report’s general finding that “industrial disputes do not appear to be a major problem in Australia’s WR framework”.<sup>30</sup>
72. This being the case, we don’t believe any of the proposed tinkering suggested in the Draft Report<sup>31</sup> is necessary and that the system would be better served by simply maintaining the status quo.
73. For example, varying the *Fair Work Act 2009* to allow employers to stand down employees if notified industrial action is cancelled may have the perverse effect of meaning more industrial action is taken in Australia.

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<sup>29</sup> Ibid at page 37

<sup>30</sup> Ibid at page 40

<sup>31</sup> Productivity Commission Draft Report *Overview ‘Workplace Relations Framework’* at page 40

74. Every action has a reaction and unnecessary changes that could have unforeseen consequences should not be recommended lightly.

75. We see no grounds to justify increased penalties for unprotected industrial action.

## **8. Sham contracting**

76. We agree with Draft Report's finding that the current sham arrangement provisions in the *Fair Work Act 2009* place too high a hurdle for legal action.

77. We reiterate our earlier submissions dated 13 March 2015 which contain proposed amendments to rectify these issues from [159] to [195].

## **9. Migrant workers in Australia**

78. We agree with the Draft Report's concerns about migrant workers in Australia and support the introduction of a fine commensurate to the amount that migrant workers have been underpaid.

79. Fines arising from successful prosecutions should then be paid to the affected migrant worker.

## **10. Terms of Reference and the exclusion of Workplace Health and Safety (WHS) and Employees' Compensation considerations.**

80. The potential impact of a number of recommendations within the draft report on employees' health and safety as well as compensation in the event of work-related illness has not been considered.

81. We believe that any analysis of the efficacy of the Workplace Relations System that excludes the WHS and Employees' Compensation implications is fundamentally flawed.

### **Employees' Compensation**

82. The recommendations in the report to remove certain public holiday pay entitlements, review apprenticeship and trainee pay progression and amend weekend penalty rates, fails to take into account the effect it would have on the compensable payments of injured and ill employees as well as the community.

83. Depending on the jurisdiction, ill or injured employees are compensated on pre-injury earnings including penalty rates.

For example, in Victoria, an injured employee unable to work is entitled to the following, which are inclusive of penalty rates and allowances:

- a. for at least 13 weeks 95% of their pre-injury earnings;
- b. afterwards 80% of their pre-injury earnings for up to 52 weeks; and
- c. beyond 52 weeks and up to 130 weeks, 80% of their pre-injury base rate.

84. Any reduction in penalty rates or paid entitlements would have a flow on effect on injured employees as well as the community. Due to the reduction of paid entitlements and penalty rates the amount of compensation that an injured employee receives will be reduced dramatically. A reduction in the amount of compensation will flow on to the community, most probably through family support, Centrelink or Medicare welfare payments.

85. Reduction of penalty rates or paid entitlements would have a devastating effect on injured employees and their families' capacity to maintain their existing living standards.

86. Furthermore, in 2012 Safe Work Australia<sup>32</sup> ascribed the \$60 billion (4.8% of GDP) economic cost of work-related incidents in the following way:

- a. Employer – 5%
- b. Workers – 74%
- c. Community – 21%

87. The economic cost of work-related incidents has doubled in the decade prior to 2009. Whilst the cost to employers has increased by 2% over that period the community burden has been reduced by 32%. Meanwhile, workers have endured a 168% increase in costs.

## **Work Health and Safety**

88. Any assessment of productivity enhancements and the recommendations that flow from such an assessment must include the effects on work health and safety.

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<sup>32</sup> The cost of work-related injury and illness for Australian employers, workers and the community: 2008-09, Safe Work Australia [2012] at page 5.

89. A number of recommendations contained within the Productivity Commission's draft report have the capacity to incentivise individual labour arrangements and precarious employment.
90. There is a strong link between precarious work and deterioration in occupational health and safety outcomes.<sup>33</sup> Precarious workers are less likely to be on company health and safety committees.<sup>34</sup> Consequently this reduces awareness of occupational health and safety risks, thereby increasing the isolation of the precariously employed worker; and the ability of employers to identify and deal with occupational health and safety risks that arise in the areas where only workers in precarious employment operate.
91. Additionally, our members report that precariously employed workers within the workplace are less likely to raise health and safety concerns; consequently their workplaces are subject to elevated risk environments.
92. Precarious employees who do raise WHS concerns are often threatened, derided or harassed whereby they eventually succumb to the employer's intimidation, not offered further work or leave that employment. This has a significant impact on productivity as it results in lower morale, absenteeism and high turnover rates in the workplace.
93. However, the net impact on employees' health and safety is a cost and productivity burden yet to be accurately realised.
94. Casual and contract employees are overrepresented in the transport, postal and warehousing; agriculture, forestry and fishing; Construction and the Mining sectors. According to Safe Work Australia these sectors account for 84 of the 108 Australian employees killed while at work as at 8 September 2015.
95. We submit that no comprehensive assessment of productivity in the context of the Australian Workplace Relations system could be considered in the absence of any consideration of the cost of diminished standards of WHS.

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<sup>33</sup> Quinlan M, 2012, The 'Pre-Invention' of Precarious Employment: The Changing World of Work in Context, The Economic and Labour Relations Review Vol. 23 No. 4, pp. 3–24