

Submission to The Productivity Commission

Inquiry into Australia's Workplace
Relations Framework

March, 2015

Queensland Nurses' Union
106 Victora St, West End Q 4101
GPO Box 1289, Brisbane Q 4001
P (07) 3840 1444
F (07) 3844 9387
E qnu@qnu.org.au
www.qnu.org.au

CONTENTS

INTRODUCTION	4
SUMMARY OF RECOMMENDATIONS.....	5
<i>The QNU recommends</i>	5
FEDERAL WORKPLACE RELATIONS IN CONTEXT	6
<i>The QNU recommends</i>	7
PRODUCTIVITY, FAIRNESS AND ENTERPRISE BARGAINING	8
WAGE JUSTICE.....	10
<i>The QNU recommends</i>	10
PRODUCTIVITY AND EFFICIENCY IN HEALTH CARE	11
<i>The QNU recommends</i>	12
PENALTY RATES	13
Penalty Rates and 'Unsociable Hours'	13
Penalty Rates in Nursing and Midwifery	14
<i>The QNU recommends</i>	15
SPECIFIC MATTERS BASED ON THE <i>FAIR WORK ACT 2009</i>	16
National Employment Standards - Chapter 2, Part 2-2	16
Personal/Carer's Leave - Part 2-2 Division 7, Subdivision A, 96	17
<i>The QNU recommends</i>	17
General Protections/Adverse Action - Chapter 3 Part 3-1	17
<i>The QNU recommends</i>	17
PUBLIC SECTOR WORKPLACE RELATIONS.....	18
<i>The QNU recommends</i>	19
CONCLUSION	20
REFERENCES	21

INTRODUCTION

The Queensland Nurses' Union (QNU) thanks the Productivity Commission (the Commission) for the opportunity to make a submission to the inquiry into Australia's Workplace Relations Framework.

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNU is the principal health union in Queensland covering all categories of workers that make up the nursing workforce including registered nurses (RN), registered midwives, enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 50,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU.

The QNU recognises there are many dimensions to this inquiry as outlined in the Issues Papers. As Issues Paper 1 (Productivity Commission, 2015a, p.8) notes, Australia's workplace relations laws and practices are unique to this country and have adapted over time. Our submission concentrates on matters of particular relevance to nursing and midwifery recognising that as a feminised, continuous shift workforce nurses and midwives have specific needs that must be taken into account in any review of the workplace relations framework. This is not an exhaustive approach. There are many matters that such a wide-ranging review could examine. Here, we begin by considering the history and purpose of Australian labour law and then draw the Commission's attention to some specific matters we seek to be considered in the review.

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

SUMMARY OF RECOMMENDATIONS

The QNU recommends

- The Productivity Commission is mindful that the purpose of workplace regulation is primarily to protect workers from the imbalance in power in the employment relationship. Labour is not a commodity that can be bought and sold like other goods and services;
- The Productivity Commission promotes an evidence-based, mutual gains approach to productivity in enterprise bargaining so that efficiencies are measurable and properly remunerated. Productivity measures must not become a mechanism for trading away workers' entitlements or increasing work intensification;
- The Productivity Commission endorses development of a mechanism to ensure nurses in the aged care sector achieve and maintain wage parity with their colleagues in the acute care sector through collaboration between the industrial parties, the regulator and the Commonwealth. This mechanism will respond to changes in wage rates and include an effective indexation system that provides employers with adequate funds when wage rises are negotiated within a transparent and accountable process/framework.
- The Productivity Commission supports Australian workers who work unsociable hours, particularly the nurses and midwives who keep the health system safe, by resisting any moves to scale back penalty rates;
- the National Employment Standards (Chapter 2, Part 2-2) of the *Fair Work Act 2009* should:
- Include a 'right' to request flexible work and should be extended to all workers with caring responsibilities including grandparents and made enforceable (Division 4);
- Include a formal dispute mechanism in the event that an employee's request for flexible working arrangements is rejected (Division 4);
- Expand the ability to access personal/carer's leave (and the quantum of 10 days per annum minimum to be increased to 12-15 days) to include the following situations:
 - ◆ Grandparents needing to provide care to grandchildren when grandchildren are unwell;
 - ◆ Employees needing to provide care to their elders when their elders are unwell;
 - ◆ Domestic violence situations (Division 7);
- Include surrogacy and foster parent leave in the current parental leave provisions which only appear to apply in traditional birthing arrangements and adoptions (Division 5);
- Expand Division 5 of Chapter 3 Part 3-1 of the *Fair Work Act 2009* to include protections for employees who must exercise their rights to comply with their professional obligations;
- There should be no weakening of state administrative law in the Public Sector. Workplace relations arrangements in state and public services (and any relevant state-owned enterprises) should be standardised across the entire public sector entity (i.e. no differences based on location).

FEDERAL WORKPLACE RELATIONS IN CONTEXT

Workplace relations legislation will always be contested space, because it is at the heart of the labour/capital divide. It is the ideological centre of politics and as such becomes a battleground with each change in government.

Central to the workplace relations framework is the employment relationship. The employment relationship is the fundamental mechanism that regulates work activities in industrial society. Employers and employees do not have the same motivations and capacity for control within the employment relationship, i.e. this is not a relationship between equals. There is inherent imbalance in the power of the two parties to bargain directly with each other and this leads to conflict. Institutional regulation of the employment relationship through collective labour law aims to protect employees from the possibility of employer exploitation (Keenoy & Kelly, 2001).

For most of last century, the *Conciliation and Arbitration Act 1904* (CA Act) was the principal piece of federal industrial relations legislation regulating the employment relationship. The CA Act remained in force until the late 1980s, by which time it had been amended more than 80 times. In the last 20 years, there have been a number of major changes to the legislation regulating federal industrial relations.¹ It appears the quest to continue the momentum for change to this legislation will continue well into the 21st century. However, it is not just the federal jurisdiction experiencing such instability.

Very recent Queensland history found public sector workers at the behest of a Liberal National Party (LNP) state government that within the space of just over two years significantly amended the *Industrial Relations Act Qld 1999* six times to withdraw workers' rights and make unions more 'accountable'.² Not one single amendment advanced workers' entitlements or rights. The new Labor government has signalled its intention to restore these entitlements. However, these ongoing amendments in both state and federal jurisdictions have had a destabilising effect on the nursing workforce, their employers and trade unions as they seek to keep pace with the level of change.

Until the introduction of the *Workchoices* legislation in 2005³, nurses and midwives working in QH, the state government employer, were employed under federal industrial instruments and the majority of private sector nurses and midwives were employed under state industrial instruments. This situation was largely reversed, with most nurses and midwives employed in the private sector moving to the federal jurisdiction and nurses employed by QH transferring back to the state jurisdiction. This arrangement has stayed in place under the *Fair Work Act 2009*. It is understandable that workers see any further moves to change the industrial relations framework will come at a cost to them.

Such scepticism arises from the recognition that the 'bargain' between an employer and an employee is inherently unequal, absent the intervention of the state in the form of legislation and the existence of trade unions. Otto Kahn-Freund (1972, p.8) who, in the post-WWII period, was so influential in shaping labour law scholarship around collective bargaining at the workplace level characterised labour law as

... a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation...and indeed most labour legislation altogether must be seen in this context.

However, the protective imperative of traditional labour law has increasingly assumed a wider purpose as regulator of the labour market as well as the employment relationship. Labour law seeks not only to address the inequity in bargaining power between employers and employees, it also encompasses the needs of the economy. Imbalance in power can occur

1 See the *Industrial Relations Reform Act 1993*, *Workplace Relations Act 1996*, *Workplace Relations Amendment (Workchoices) 2005* and the current *Fair Work Act 2009*.

2 The LNP government also introduced significant amendments to the *Workers Compensation and Rehabilitation Act 2003* and the *Public Service Act 2008*.

3 See the *Workplace Relations Amendment (Workchoices) Act 2005*.

across the labour market, often by reason of unemployment or underemployment, and this type of disparity can itself lead to widespread inequality and poverty.

Regulation of the employment relationship through labour law has been conducted for a range of purposes, including the advancement of micro-economic efficiency, national competitiveness and macro-economic regulation such as the pursuit of incomes and employment policies (Howe, 2010). Understood in primarily redistributive terms, classic labour law must now accommodate the rise of an alternative regulatory agenda that is overridingly economic (Conaghan, 2003).

This transition has caused difficulties for traditional labour law's express focus to distribute power between capital and labour, not to influence the economic outcome of the exchange in which the parties are engaged. Labour law has been concerned with the justice of the exchange, not its profitability (Conaghan, 2003). Here, the move away from the traditional protectionist approach has seen the continuing pressure for enterprise bargaining to deliver 'productivity enhancements'.

The move to 'the Corporations power' as the Constitutional head of power⁴ for framing industrial relations legislation heralded by Workchoices and the continual emphasis on 'productivity' as the prime motivation for enterprise bargaining has increased the momentum to treat labour as a commodity. According to this concept, labour markets operate as the transaction between buyers and sellers of labour.

This interaction is an essential aspect of the subject matter of industrial relations scholarship that sees the nature of the labour market as fundamentally different to that of other markets. Isaac (1992), Gahan and Harcourt (1999) and others have argued that labour is not a commodity. The nature of the object of exchange and the characteristics of the exchange itself distinguish the employment relationship from other market relationships. Despite orthodox economic approaches that suggest labour markets perform like any other market, the employment relationship does not operate in the same way as other economic exchange relationships. Human factors such as health and wellbeing, education, training and development are uniquely variable and implicit in the transaction. Increasingly, these factors are seen to be the responsibility of the individual with limited obligation on employers to provide any matters beyond statutory minima around anti-discrimination and health and safety.

The *Fair Work Act 2009* is also enacted under the Corporations head of power, reinforcing the notion that federal labour law is just a sub-set of corporations law where its utility does not turn on its ability to obtain fair wages and conditions, but rather on assisting corporations to maximise profits (McCallum, 2005). The protective capacity of labour law in which all parties could ask—'is it fair?', now rests on the ethically different question—is it legal?

The QNU recommends

The Productivity Commission is mindful that the purpose of labour law is primarily to protect workers from the imbalance in power in the employment relationship. Labour is not a commodity that can be bought and sold like other goods and services.

⁴ Workchoices was enacted pursuant to Section 51(xx) of the Australian Constitution of the [Australian Constitution](#) which gives the [Commonwealth Parliament](#) the power to legislate with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". This power has become known as "the corporations power". Prior to this, industrial relations legislation was enacted pursuant to Section 51 (xxxv) "the conciliation and arbitration" head of power.

PRODUCTIVITY, FAIRNESS AND ENTERPRISE BARGAINING

The QNU notes that a major focus of this inquiry is on productivity in the employment context. Although most will agree that Australians are better off in an economy with high productivity, high employment and low inflation, the debate on whether industrial relations policy can deliver these outcomes continues. Reflections on enterprise bargaining as the mechanism for productivity improvements increasingly indicate there is little empirical evidence to support this argument (Hancock, 2012; Peetz, 2012).

In April, 1991, the (then) Australian Industrial Relations Commission¹ declined to introduce a principle for enterprise bargaining as it was sceptical of claims this would be an effective mechanism for raising both the level and rate of growth in productivity.² Although the National Wage Case³ later that year gave conditional acceptance and established the basis for the legislative changes in 1993, there is still conjecture around enterprise bargaining as a vehicle for productivity improvements.

In an examination of productivity data for the years 1964-65 and 2009-2010 Hancock (2012) concludes there is little evidence of any boost to productivity that could be attributed to enterprise bargaining. Further, Hancock (2012) contends that there are good grounds for doubting enterprise bargaining has contributed anything to productivity and still less to ongoing productivity growth. These include:

- At most, there was four year boost in productivity whose timing does conceivably match the introduction and spread of enterprise bargaining but this has not endured;
- If the four year boost was policy-induced, there were other changes of policy in the late 1980s and early 1990s that may have been more important than the shift to enterprise bargaining;
- When the productivity data are dissected to the industry level, it is hard to identify any large movements in productivity that could reasonably be ascribed to enterprise bargaining with wholesale trade the possible exception. The records of some major industries, notably mining and electricity, gas and water suggest that much stronger influence have been at work (Hancock, 2012, p.301)

Eslake and Walsh (2011), writing for the Grattan Institute, an independent think-tank focused on Australian public policy, maintain that reversing the decline in Australia's productivity growth lies in 'a re-invigorated economic reform effort, improvements to education and training, improved governance of infrastructure investment, and a heightened innovation effort'. They acknowledge that regulatory reform extends well beyond the workplace relations framework and reconfiguring the taxation system could also improve Australia's productivity growth performance (Eslake & Walsh, 2011, p. 29).

The Fair Work Commission (FWC) has also recently conducted independent research into the link between productivity and enterprise bargaining (Preston, Katic, Farmakis-Gambone & Yuen, 2014). The following summary of findings from this study indicates there is limited evidence at this time to make a connection between the two:

Turning to the relationship between enterprise bargaining and productivity in particular, the review noted mixed research findings. While some research has found that firms that engage in bargaining are more productive than those that don't, other research has contended that enterprise bargaining has not contributed much, if at all, to productivity. The literature also highlighted the difficulty in finding a causal relationship. The focus of the literature in this area is on enterprise bargaining and enterprise agreements, rather than on particular clauses within agreements;

1 Now known as the Fair Work Commission.

2 See *National Wage Case April 1991*, Print J7400.

3 See *National Wage Case October, 1991*, Print K0300.

Further, an analysis of the available data on enterprise agreements that contain clauses to improve productivity, at an industry level, suggests that there is no directly observable association between enterprise agreements and ABS measures of productivity;

In light of these findings, it is clear that an analysis of Australian data provides limited insight into the use of enterprise agreement clauses to improve productivity at the workplace and the effect particular clauses have in regards to raising productivity (Preston, Katic, Farmakis-Gambone & Yuen, 2014, p.22).

An enduring feature of enterprise bargaining has been the permissible subject matter of agreements. Internationally, these matters are left to the parties to determine, however Australian law has never allowed this. The FWC's (and its predecessors') decisions around matters pertaining, decisions of the High Court and the legislation have historically determined the content of agreements.

Indeed, as Creighton (2012, p. 277) suggests, 'the permissible scope of collective regulation has bedevilled both federal and state systems of industrial regulation since their inception – most notoriously as reflected in the long line of cases which insisted that industrial awards and agreements could not trespass upon the sacred turf of managerial prerogative, or upon other matters that did not 'pertain' to the employer/employee relationship in the relevant sense'.⁴

In our view, any consideration of productivity should also occur within a context of fairness. Despite Minister Abetz's warning of a 'wages explosion' (Abetz cited in Woodley, 2014), wages have failed to keep up with inflation. To the June, 2014 quarter, the Wage Price Index grew by 2.6% while the Consumer Price Index (CPI) rose by 3% over the same period (ABS Cat No. 6345.0) The fall in wages growth has slowed in every industry including mining.⁵ The most recent ABS data (Cat no. 5260.0.55.002) indicates that on a quality adjusted hours worked basis, labour productivity grew 1.3% in 2013-14.

Labour productivity on this basis reflects a positive contribution from changes to labour composition, due to educational attainment and work experience. There is no mention that this is attributed to enterprise bargaining outcomes.

4 See for example *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181; *R v Kelly*; *Ex parte Victoria* (1950) 81 CLR 64; *R v Commonwealth Conciliation and Arbitration Commission: Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443.

5 Wages in mining rose by only 2.5% over the year to June, 2014 compared to an average of 4% over the past 10 years (ABS Cat no 6345.0).

WAGE JUSTICE

Pay is an important symbolic indicator of the value placed on work by employers and the community. Nowhere is the disparity in wage outcomes in nursing more evident than the difference between the aged and acute care sectors. Prior to 1996 when there was centralised wage fixation, there was general parity between nursing wages in the public acute hospital sector and residential care establishments.

Since 1996, the actual wages and conditions of employment for aged care nurses have declined in real terms and progressively fragmented those who were able to secure collective agreements and those who were not. Despite the notional obligation on industrial tribunals to establish and maintain a safety net of fair minimum wages and conditions of employment, for the nurses who continue to rely on awards, their entitlements have been in decline over the past two decades.

It is understandable that nurses in aged care feel undervalued when their colleagues in acute settings earn significantly more. Full time residential aged care nurses now earn on average up to \$340 per week less than their colleagues in other sectors resulting in increasing difficulties attracting and retaining adequate numbers of appropriately trained nursing staff (ANMF, 2015).

While the content of federal safety net awards covering nursing staff in both the acute and aged care sectors remains broadly comparable, enterprise bargaining has been unable to deliver similar outcomes across sectors. In aged care, this disparity is attributable to the difficulties of bargaining in a segmented sector with a large number of facilities spread across the nation.

As aged care is also largely dependent on the Commonwealth for funding it has been in the interests of successive governments to restrain wages in this sector, particularly in the context of the ageing demographic. Previous Labor government initiatives in this area such as the aged care supplement made only minimal difference in adjusting wages growth. The aged care wages gap relates not only to the nature of work performed in the sector (caring work where it is difficult to take industrial action to advance claims and therefore there is an inherent bargaining imbalance) but also the funding source.

This is how health and aged care are two fundamentally different ‘enterprises’ that require a new method of bargaining. In our view, the concept of productivity must take a longer term approach to the outputs of nursing and midwifery work—i.e. safe patient care and quality outcomes based on evidence.

Given the ageing of the population, wages and conditions in aged care must improve to attract nurses into the sector.

The QNU recommends

The Productivity Commission endorses development of a mechanism to ensure nurses in the aged care sector achieve and maintain wage parity with their colleagues in the acute care sector through collaboration between the industrial parties, the regulator and the Commonwealth. This mechanism will respond to changes in wage rates and include an effective indexation system that provides employers with adequate funds when wage rises are negotiated within a transparent and accountable process/framework.

PRODUCTIVITY AND EFFICIENCY IN HEALTH CARE

Broadly speaking, productivity is the measure of organisational inputs and outputs. Health care inputs usually include items such as labour, consumables products and services while outputs are often calculated using activity and unit cost data. The process of measuring productivity in health care is complex because variables such as costs weights and quality adjustments influence service outputs (National Audit Office, 2010). Comparative analysis and benchmarking of health care service productivity can prove difficult due to the variability of calculation methods used within organisations.

Productivity examples include:

- Organisational – dividing the volume of operations and treatments (adjusted for quality) by the resources used to carry out the care;
- Labour – ratio of outputs to the number of staff/hours used.

The term productivity is often confused with efficiency which is the degree to which a production process reflects ‘best practice’ either in a technical or allocative sense (Organisation for Economic Co-operation and Development, 2001).

- Technical efficiency – maximum output is achieved by a fixed set of inputs using a certain technology.
- Allocative efficiency – occurs when the input-output combination is cost-minimising and/or profit maximising.

Understanding the distinction between health care productivity and efficiency is essential when determining the best measures of service performance.

The QNU is not unfamiliar with the concept of productivity in nursing and midwifery. We are a party to the *Nurses and Midwives (Queensland Health) Certified Agreement (EB8) 2012* that contains a number of clauses related to reform and productivity enhancements. The QNU and QH negotiated this agreement within an Interest Based Bargaining Framework that recognises mutual interests and gains. The agreement also contains several clauses related to fairness in the employment relationship. However, soon after its election in 2012 the LNP government in Queensland set about withdrawing these entitlements including consultation, union encouragement, contracting out and job security. This occurred even though this same government entered into the agreement as one of its first actions after taking office.

In the process the LNP government also cut over 1800 nursing and midwifery jobs. These matters, negotiated in good faith with unions were rendered unenforceable, yet other matters where the employer stood to gain from the additional efforts of nurses and midwives—erstwhile ‘productivity’ measures - remained. If nursing and midwifery employers seek to introduce productivity measures, then they must also be prepared to discuss excessive workloads and inadequate skill mix, two issues that not only require proper resourcing of the workforce, but are also critical to patient safety.

The new Labor government in Queensland has committed to restoring rights and legislating minimum nurse/patient ratios. Minimum nurse-to-patient ratios and skill mix levels provide a safety net for patients, staff and organisations in relation to safety and quality of care standards. Mandated ratios guarantee that adequate nursing numbers and skill mix are available to meet patient demand. Ratios are an economically sound method to save lives and improve patient outcomes (Lankshear, Sheldon et al., 2005; McHugh, Beres & Small, 2013; Thungjaroenkul, Cummings & Embleton, 2007; Needleman, Buernaus, et al., 2011).

Health services with a higher proportion of Registered Nurses and increased nursing hours per patient will have lower mortality, reduced length of stay and less adverse events such as failure to rescue, pressure injuries and infections (Needleman, Buernaus, et al., 2011; Aiken, Sloane et al., 2014; You, Aiken et al., 2013; Queensland Health, 2013).

Ratios also contribute to organisational productivity, hospital efficiency and continuity of patient care by increasing staff satisfaction, decreasing attritions rates, reducing service variation and improving healthcare equality (Twigg, Geehoed et al., 2013; Twigg, Duffield & Evans, 2013; Australian Commission on Safety and Quality in Health Care, 2014).

The QNU recommends

The Productivity Commission promotes an evidence-based, mutual gains approach to productivity in enterprise bargaining so that efficiencies are measurable and properly remunerated. Productivity measures must not become a mechanism for trading away workers' entitlements or increasing work intensification.

PENALTY RATES

We emphasise here the critical role penalty rates play not only in retail and hospitality, the areas traditionally targeted by employers, but also in supporting the income for the nursing and midwifery workforce. The QNU believes that penalty rates adequately compensate workers for the effects of working unsocial, irregular hours and should not be altered in any way that undermines or undervalues the payment of these entitlements.

Penalty Rates and 'Unsociable Hours'

It has long been the catchcry of employers, their associations and occasionally academics¹ that penalty rate payments for work performed outside the traditional 'normal' hours no longer serve the original purpose in attracting labour to work during unattractive, unsocial hours. Over time, changes in the composition of the workforce, reductions in the length of the standard working week and working year, and more 'flexible' work patterns ostensibly provide grounds for removing penalty rates from industrial agreements and awards. Indeed, a common catchcry is that because we operate in a globalised 24/7 economy, the concept of penalty payments is 'now largely outdated'.

We note that hospitality and retail employers are now relying on expert evidence from an economist and academics in their bid to cut penalty rates in the Fair Work Commission's (FWC) four-yearly modern award review. In the past, the FWC has criticised employers for failing to support their claims with sound evidence.

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

Penalty rates are about equity in employment as well as labour supply regardless of the size of the employer's business. They have a social impact as well as an economic one (Deery & Mahony, 1995). Weekends and after hours are also the times when employers in retail and hospitality stand to gain the most because people are not at work and hence more available to buy goods and services. Most sections of the health sector must operate continuously or across extended hours to treat and care for the population.

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

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

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

¹ See for example Dawkins, P. (1985); Wooden, M. (1995); and evidence given by Professor Phil Lewis in *Restaurant and Catering Association of Victoria [2014] FWCFB 1996* that led to a partial cut in penalty rates for restaurant casuals in May 2014, although the FWC full bench majority did not accept his opinion that society's views about Sunday activity had changed markedly in the last 10 years.

Changes to penalty rates will greatly increase the ability of employers to exercise ‘flexibility’ in the workplace by requiring employees, many of whom are already vulnerable, to work at times and rates of pay that suit the business, not necessarily those that suit workers with caring responsibilities or those who prefer to work in some form of standard hours arrangement. ‘Flexibility’ for employers cannot be at the expense of the personal lives and incomes of the workforce.

Penalty Rates in Nursing and Midwifery

The QNU recognises that undermining wages and conditions in one or two strategic industries may invariably lead to similar moves in sectors such as health that also operate according to extended hours in predominantly continuous shift patterns. As the largest occupational profession within the health sector, nurses and midwives may become vulnerable to this type of proposal.

Nurses and midwives are the most geographically dispersed health professionals in Queensland and indeed Australia, working independently or collaboratively to provide professional and holistic care in a range of circumstances. Nurses and midwives advocate for the patient as a whole person within a complex health system. At every site and level of the nurse-patient relationship nurses and midwives facilitate and mediate the competing demands of patients, families, carers, the environment at points of immediate care, the system and society to achieve the best possible outcomes.

Nurses and midwives provide continuity of care for patients 24 hours a day, seven days a week according to a continuous shift roster. Of all employed clinical nurses and midwives, almost two-thirds (62.6%) worked in hospitals (AIHW, 2013). Nursing is also an ageing workforce. Between 2008 and 2012, the proportion of employed nurses aged 50 years and over increased from 35.1% to 39.1%. In 2012, the average age of nurses was 44.6 years (Australian Institute of Health and Welfare, 2013). The ageing process, the nature of the work and the continuous shift pattern combine to place nurses and midwives at a significant risk of workplace illness and injury (Cohen, 2006).

The provision of health services is an ongoing essential service. The majority of full-time, permanent nurses and midwives have no choice but to work the rotating shift system with its consequent negative effects on their health and family and social relationships. The payment of shift penalties is a justifiable compensation for the disruption to their personal life.

Every effort needs to be made to enhance the profession of nursing and midwifery so that more students enter universities and TAFEs to train. Any moves to compromise the ability of nurses and midwives to attract penalty rates for working shiftwork will detract from the profession, make it more difficult to recruit and retain a nursing and midwifery workforce and contribute to already heavy workloads.

The workplace health and safety of nurses is intrinsic to ensuring patient safety. Poor work environments that do not protect nurses from work stress, accidents and injury contribute substantially to nursing turnover, estimated to cost around \$150,000 per nurse (Chan et al., 2004). Each additional patient allocated to the nursing workload increases the likelihood of patient death (Aiken et al., 2002) patient falls, respiratory infections, and patient complaints (Yang, 2003). Nurses and midwives working shifts of 12.5 hours or more are three times more likely to make an error, and working more than 40 hours a week increases the risk of error (Rogers, 2004).

The consequences of shiftwork are well documented. Because nurses and midwives work extended, unpredictable hours with a lack of regular breaks they are more likely to experience elevated fatigue levels. Night duty rotations are common, particularly in specialist units where nurses must maintain careful and astute observations of their vulnerable patients. Fatigue can negatively affect nurses’ and midwives’ health, quality of performance and thus patient care. The effects of fatigue may be exacerbated for nurses and midwives over 40 years of age (Muecke, 2005).

Furthermore, extensive research indicates that increasing the number of nursing and midwifery hours and skill mix will lower other quality healthcare indicators such as mortality and readmission rates (McHugh, Beres & Small, 2013;

Aiken, Sloane et al., 2014; Thungjaroenkul, Cummings & Embleton, 2007; Twigg, Duffield & Evans, 2013; Australian Commission on Safety and Quality in Health Care, 2014; Twigg, Duffield et al., 2011; Tubbs-Cooley, Cimiotti et al., 2013; Twigg, Geehoed et al., 2013; ACT Department of Health, 2007).

The known benefits include:

- Every one patient added to a nurse's workload is associated with a 7% increase in deaths after common surgery (Aiken, Sloane et al., 2014);
- Every 10% increase in registered/bachelor- educated nurses is associated with a 7% lower mortality (Aiken, Sloane et al., 2014);
- Hospitals with higher nurse staffing had 25% lower odds of being penalised for excessive readmissions compared to otherwise similar hospitals with lower staffing (McHugh, Beres & Small, 2013);
- Every one patient added to a nurse's workload increased a medical child's odds of readmission within 15-30 day by 11% and a surgical child's likelihood of readmission by 48% (Tubbs-Cooley, Cimiotti et al. 2013);
- Increased nursing skill mix in aged care is associated with reductions in hospital admissions, readmission rates, presentations to emergency departments and improvement in management of end of life care.

In light of this strong evidence indicating the importance of proper staffing levels, the QNU and QH entered into an enterprise agreement that included amongst other matters an increase in the Sunday night/Monday morning shift penalty rate from 20% to 25%. This increase was supported by Directors of Nursing who have experienced ongoing difficulties in staffing these shifts. Clearly, there is sound evidence that many nurses and midwives are unwilling to work at these inopportune times because of the impact on their personal lives, health and wellbeing. It is critical that nurses and midwives receive penalty rate payments for keeping the health system operating continuously, efficiently and safely.

Therefore we strongly oppose any attempts to alter, restrict or withdraw current rights to penalty payments. Such a move in the health industry would not only act as a disincentive to staff working beyond standard hours, it would significantly reduce their take home pay and undermine their important contribution to the health of all Australians.

The QNU recommends

The Productivity Commission supports Australian workers who work unsociable hours, particularly the nurses and midwives who keep the health system safe, by resisting any moves to scale back penalty rates.

SPECIFIC MATTERS BASED ON THE FAIR WORK ACT 2009

We draw the Commission's attention to the following matters arising from specific provisions of the *Fair Work Act 2009* that we believe any review of workplace relations should address. This is not an exhaustive list. Our comments and recommendations are based on cases where the QNU has assisted nurses and midwives with representation, but may extend to other matters in any future submissions to this inquiry. This includes:

- National Employment Standards (NES) (Chapter 2, Part 2-2);
- General protections/adverse action (Part 3-1 – General Protections);
- Public Sector Regulation.

National Employment Standards - Chapter 2, Part 2-2

The National Employment Standards (NES) form part of the 'safety net' (minimum standards) for all workers covered by the *Fair Work Act 2009*. Awards and Agreements cannot exclude or provide a lower entitlement than the NES. Issues paper 2 (Productivity Commission, 2015, p. 9) states 'these standards have social and safety net goals similar to those that underpin the minimum wage'.

The *Fair Work Act 2009* aims to assist women workers by better protecting them from discrimination, guaranteeing equal pay, assisting with work/family balance and providing some protection from low pay and insecure work.

Part 2-2, Division 4 Section 65 provides the 'right to request' flexible working arrangements in the following circumstances for working parents:

- a. the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
- b. the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
- c. the employee has a disability;
- d. the employee is 55 or older;
- e. the employee is experiencing violence from a member of the employee's family;
- f. the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

Unfortunately, this provision does not allow all workers to balance work and family life, for two main reasons.

First, it excludes those who care for school-aged children, and/or adult dependents with a disability and/or elderly parents — despite these workers constituting a significant proportion of those with caring responsibilities. Secondly, the 'right' is not enforceable, as employers are not obliged to demonstrate that they have properly considered a request, and employees may only appeal an employer's unreasonable refusal to grant the request if the employee is covered by an enterprise agreement which provides such an appeal right.

The QNU maintains that all workers who care for or support (or expect to care for or support) a person who reasonably relies on them for care or support should have the right to request flexible work arrangements. The employer should have a duty to consider the request and reasonably accommodate the employee's needs.

We believe the *Fair Work Act 2009* would better meet its objectives if the right to request flexible work were made enforceable by including a formal dispute mechanism through the auspices of the FWC in the event that an employer rejects a worker's request.

Personal/Carer's Leave - Part 2-2 Division 7, Subdivision A, 96

We propose that the eligibility to access personal/carer's leave be expanded (and the quantum of 10 days per annum minimum to be increased to 12-15 days) to include the following situations under clause 97:

- Grandparents needing to provide care to grandchildren when grandchildren are unwell;
- Employees needing to provide care to their elders when their elders are unwell;
- Domestic violence situations.

We also propose that the current parental leave provisions at Division 5, Subdivision A (which currently only apply in traditional birthing arrangements and adoptions) are expanded to include other 'birth-related' leave such as surrogacy and foster parent leave.

The QNU is aware of nurses and midwives who have had kinship foster arrangements and have not been able to access any time off work at the time of placement in order to settle the child.

The QNU recommends the NES Chapter 2, Part 2-2 of the *Fair Work Act 2009* should:

- Include a 'right' to request flexible work and should be extended to all workers with caring responsibilities including grandparents and made enforceable (Division 4);
- Include a formal dispute mechanism in the event that an employee's request for flexible working arrangements is rejected (division 4);
- Expand the ability to access personal/carer's leave (and the quantum of 10 days per annum minimum to be increased to 12-15 days) to include the following situations:
 - ♦ Grandparents needing to provide care to grandchildren when grandchildren are unwell;
 - ♦ Employees needing to provide care to their elders when their elders are unwell;
 - ♦ Domestic violence situations (Division 7).
- Include surrogacy and foster parent leave in the current parental leave provisions which only appear to apply in traditional birthing arrangements and adoptions (Division 5).

General Protections/Adverse Action - Chapter 3 Part 3-1

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

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

Issues Paper 1 (Productivity Commission, 2015, p. 5) notes the skill mix of the workforce is shifting, with future projections of a large increase in the proportion of 'professionals' in Australian workplaces. Other professions that may experience similar issues include, but are not limited to, engineers and teachers.

The QNU recommends

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

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

PUBLIC SECTOR WORKPLACE RELATIONS

Workplace relations in the public and private sectors vary because as ‘enterprises’ their funding, motivations and purpose are in stark contrast. We do not accept the assertion that ‘management control in the public sector is less clear-cut than in the private sector’ (Productivity Commission, 2015c, p.8). The public sector has highly regulated classification and delegation structures that make clear the lines of control, who has the delegated authority to act and the circumstances in which they must do so.

In our experience it is management’s inconsistent interpretation and application of industrial instruments that calls for greater scrutiny.

Public sector industrial relations throughout Australia have been characterised by the existence of centralised management and standardised conditions of employment. Personnel administration in the public sector originally emerged as an extremely technical and regulation-bound ‘science’. A traditional focus on public accountability, equity, individual rights and social justice was implemented through bureaucratic means. Legislation (usually in the form of public service acts) established the terms and conditions of employment (Wanna, O’Faircheallaigh & Weller, 1992).

In Queensland, QH employs the majority of public sector nurses and midwives and until the advent of Hospital and Health Service (HHS) districts run by individual boards in 2012, there was centralised management and standardised conditions of employment. Although centralised industrial relations in public sector health have been hitherto complex, they have been reasonably consistent.

With the introduction of HHS, conditions of employment remained standardised, however staff management has been decentralised to the local HHS level. HHSs themselves fall into two categories, ‘prescribed’ and ‘non-prescribed’. At present, eight HHSs are ‘prescribed’ (which gives them greater decision making power in employment related matters), with the remainder being ‘non-prescribed’. It is expected that all remaining ‘non-prescribed’ HHSs will become ‘prescribed’ as at 1 July, 2015.

In our experience, the devolution of centralised management of QH employees to the HHS boards has produced inconsistent decision-making in respect to employment conditions, for example, each HHS has a different policy regarding Public Interest Disclosures. Our major concern however, is the increase in Public Service Commission Discipline Appeals. Issues Paper 5 (Productivity Commission, 2015c, p. 8) claims that ‘administrative law’ adds ‘another layer of regulatory requirements and scope for appeal’. The relevant administrative law in Queensland is the *Public Sector Act 2008*. This Act contains appeal provisions at s. 194, enabling an individual to challenge an unfavourable decision of the Public Service Commission via a Judicial Review (Supreme Court of Queensland).

The ability to appeal disciplinary decisions is an important entitlement as an unwarranted disciplinary finding and/or the imposition of a disproportionate form of disciplinary action can have long term detrimental impacts on an individual public sector employee. For example,

- if an employee is found to have engaged in ‘serious disciplinary action’ (see s. 179A of the *Public Service Act 2008*), they must disclose this fact when seeking secondment/appointment to any other entity covered by this piece of legislation,
- an employee who is subject to a reduction in classification level and a consequential change of duties (such as permanent demotion from Clinical Nurse to Registered Nurse) will suffer substantial financial detriment (loss of wages, lesser superannuation accruals), be unlikely to be considered for promotion in the future, and suffer significant reputational damage.

The devolution of centralised management is also currently resulting in inconsistent ‘interpretations’ of industrial entitlements between HHSs. Each HHS conducts performance improvement differently e.g. ‘Learning Contracts’ in

Metro North HHS; ‘Supported Practice Framework’ in Central Queensland and Sunshine Coast HHSs; and the use of ‘Performance Improvement Plans’ in other HHSs.

QH Human Resource Policies also differ in their application depending on whether the employee is a Department of Health Employee, ‘prescribed’ HHS employee or ‘non-prescribed’ HHS employee. In summary, the difficulties with decentralisation are:

- inconsistent decision making;
- inconsistent interpretations of industrial entitlements;
- inconsistent policy application.

The QNU believes workplace relations arrangements in state and public services (and any relevant state-owned enterprises) should be standardised across the entire public sector entity (i.e. no differences based on location).

The QNU recommends

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

CONCLUSION

The QNU is always willing to discuss genuine reform ideas. We are continually involved in negotiations for enterprise agreements and workplace initiatives aimed at improving the efficiency, productivity and efficacy of the health and aged care systems. However, we will oppose at every opportunity any attempts to refashion the workplace relations system to favour the interests of governments, corporations and big business at the expense of workers. We see any such a move as an attack on the Australian way of life, one which new and established governments enter into at their peril.

REFERENCES

- ABS Cat No. 6345.0 Wage Price Index Australia.
- ABS Cat No. 5260.0.55.002 Estimates of Industry Multifactor Productivity, 2013-14.
- Aiken, L., Sloane, D., Bruynell, L., Van den Heede, V., Griffiths, P., Busse, R., Diomidous, M., J. Kinnunen, J., Kozka, M., Lesaffre, E., McHugh, M., Moreno-Casbas, M., Rafferty, A., Scwendimann, R., Scott, P., Tishelman, C., Achterberg T. & Sermeus, W. (2014) 'Nurse Staffing and Education and Hospital Mortality in Nine European Countries: A Retrospective Observational Study', *Lancet*, 383 (9931), pp. 1824-1830.
- Aiken, L., Clarke, S., Sloane, D., Sochalski, J. & Silber, J. (2002) 'Hospital nurse staffing and patient mortality, nurse burnout and job dissatisfaction' *Journal of the American Medical Association*, 288 (16), pp. 1987-93.
- Australian Commission on Safety and Quality in Health Care and Australian Institute of Health and Welfare (2014) *Exploring healthcare variation in Australia: analysis resulting from an OECD*, Sydney.
- Australian Institute of Health and Welfare (2013) *Nursing and Midwifery Labour Force 2012*.
- Australian Nursing and Midwifery Federation (2015) *Nurses' Paycheck: Public Hospital and Private Age Care Comparative Wage Information*.
- Chan, C. et al. (2004) 'Nursing Crisis: Retention Strategies for Hospital Administrators', *Research and Practice in Human Resource Management*, 12 (2), pp. 31-56.
- Cohen, J. (2006) 'The Aging Nursing Workforce: How to Retain Experienced Nurses', *Journal of Healthcare management*, 51 (4), pp. 233-245.
- Conaghan, J. (2003) 'Labour Law and 'New Economy' Discourse', *Australian Journal of Labour Law*, 16 (1), pp. 9-27.
- Creighton, B. (2012) 'Impacts of Enterprise Bargaining on Unions and Employers: Discussants' Comments', *Labour and Industry*, 22 (3), pp. 275-288.
- Dawkins, P. (1985) *Penalty Rates and the Organisation of Working Time*, Report to the Business Council of Australia by National Institute of Labour Studies, Flinders University of South Australia, Adelaide.
- Deery, S. & Mahony, A. (1995) 'Penalty Rates and Labour Supply: A Reply', *Journal of Industrial Relations*, 37 (3), pp. 302-305.
- Dorrian, J., Tolley, D., Lamond, N., van den Heuvel, D., Pincombe, J., Rogers, A. & Dawson, D. (2008) 'Sleep and Errors in a Group of Australian Hospital Nurses at Work and During the Commute', *Applied Ergonomics*, 39 (5), pp. 605-613.
- Eslake, S. & Walsh, M. (2011) *Australia's Productivity Challenge*, Grattan Institute, Melbourne.
- Gahan, P., & Harcourt, T. (1999) 'Australian Labour Market Institutions, 'Deregulation' and the Open Economy', *Economic and Labour Relations Review*, 10 (2), pp. 296-318.
- Independent Inquiry into Insecure Work in Australia (2012) *Lives on Hold: Unlocking the Potential of Australia's Workforce*.
- Hancock, K. (2012) 'Enterprise Bargaining and Productivity', *Labour and Industry*, 22 (3) pp. 289-302.
- Howe, J. (2010) *The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work*, Working Paper No. 49, Centre for Employment and Labour Relations Law, University of Melbourne.
- Isaac, J. (1992). *Performance Related Pay: The Importance of Fairness*, Working Paper No. 64, Centre for Industrial Relations and Labour Studies, University of Melbourne.
- Kahn-Freund, O. (1972) *Labour and the Law*, Stevens, London.
- Keenoy, T., & Kelly, D. (2001) *The Employment Relationship in Australia* (2nd ed.), Southbank Victoria, Nelson Thomson Learning.
- Lankshear, A., Sheldon, R. & Maynard, A. (2005) 'Nurse staffing and Healthcare Outcomes: A Systematic Review of the International Research Evidence', *Advances in Nursing Science*, 25 (2), pp. 163-174.
- McCallum, R. (2005) 'Plunder Downunder: Transplanting the Anglo-American Labor Law Model to Australia', *Comparative Labor Law and Policy Journal*, 26 (3), pp. 381-400.
- McHugh, M. Beres, J. & Small, D. (2013) 'Hospitals with Higher Nurse Staffing had Lower Odds of Readmissions Penalties than Hospitals with Lower Staffing', *Health Affairs*, 32 (10), pp. 1740-1747.
- Needleman, J., Buerhaus, P., Pankratz, S., Leibson, C., Stevens, S. & Harris, M. (2011) 'Nurse Staffing and Inpatient Hospital Mortality', *The New England Journal of Medicine*, 364, pp. 1037-45.
- Independent Inquiry into Insecure Work in Australia (2012) *Lives on Hold: Unlocking the Potential of Australia's Workforce*.
- Muecke, S. (2005) 'Effects of Rotating Night Shifts: Literature Review', *Journal of Advanced Nursing*, 50 (4), pp. 433-439.

- National Occupational Health and Safety Council (2005) *Surveillance Alert OHS and the Ageing Workforce* retrieved from <http://www.deir.qld.gov.au/workplace/subjects/manualhandling/musculoskeletalfaq/index.htm>
- Peetz, D. (2012) 'Does Industrial Relations Policy Affect Productivity?' *Australian Bulletin of Labour*, 38 (4), pp. 268-292.
- Preston, M., Katic, M., Farmakis-Gamboni, S. & Yuen, K. (2014) *Productivity and Innovation in Enterprise Agreement Clauses: An Overview of Literature, Data and Case Studies at the Workplace Level*, Fair Work Commission.
- Productivity Commission (2015a) *Workplace Relations Framework: The Inquiry in Context Issues Paper 1*.
- Productivity Commission (2015b) *Workplace Relations Framework: The Inquiry in Context Issues Paper 2*.
- Productivity Commission (2015c) *Workplace Relations Framework: The Inquiry in Context Issues Paper 5*.
- Queensland Health, (2013) *Strengthening Health Services Through Optimising Nursing Strategy and Action Plan (2013-2016)*, Brisbane.
- Rogers, A. (2004) 'The Working Hours of Hospital Staff – Nurse and Patient Safety' *Health Affairs*, 23 (4), pp. 202-212.
- Tubbs-Coolley, H., Cimiotti, J., Silber, J., Sloane, D. & Aiken, L. (2013) 'An Observational Study of Nurse Staffing Ratios and Hospital Readmission Among Children Admitted for Common Conditions', *BMJ Quality and Safety*, 0, pp. 1-8.
- Twigg, D., Duffield, C., Bremner, A., Rapley, P. & Finn, J. (2011) 'The Impact of the Nursing Hours Per Patient Day (NHPPD) Staffing Method on Patient Outcomes: A Retrospective Analysis of Patient and Staffing Data', *International Journal of Nursing Studies*, 48 (5), pp. 540-548.
- Thungjaroenkul, P., Cummings, G. & Embleton, A. (2007) 'The Impact of Nurse Staffing on Hospital Costs and Patient Length of Stay: A Systematic Review', *Nursing Economics*, 25, (5) pp. 255-265.
- Twigg, D., Duffield, C. & Evans, G. (2013) 'The Critical Role of Nurses to the Successful Implementation of the National Safety and Quality Health Service Standards', *Australian Health Review*, 37, pp. 541-546.
- Twigg, D., Geehoed, E., Bremner, A., & Duffield, C. (2013) 'The Economic Benefits of Increased Levels of Nursing Care in the Hospital Setting', *Journal of Advanced Nursing*, 69 (10), pp. 2253-5561.
- Wanna, J., O'Faircheallaigh, C. & Weller, P. (1992) *Public Sector Management in Australia*, Centre for Australian Public Sector Management – Griffith University, Macmillan Education Australia Pty Ltd.
- Wooden, M. (1995) 'Penalty Rates and Labour Supply' *Journal of Industrial Relations*, 37, (3), pp. 287-301.
- Woodley, N., (2014) 'Eric Abetz warns of wages 'explosion' unless employers stop 'caving in' to unions', ABC AM 29 January, retrieved from <http://www.abc.net.au/news/2014-01-29/eric-abetz-warns-of-wages-breakout/5224382>
- Yang K. (2003) 'Relationships Between Nurse Staffing and Patient Outcomes' *Journal of Nursing Research*, 11 (3), pp. 149-158.
- You, L., Aiken, L., Sloane, D., Liu, K., He, G., Hu, Y., Jiang, X., Li, H., Liu, S., Shang, S., Kutney-Lee, A. & Sermeus, W. (2013) 'Hospital Nursing, Care Quality, and Patient Satisfaction: Cross-sectional Surveys of Nurses and Patients in Hospitals in China and Europe', *International Journal of Nursing Studies*, 50, pp. 154-161.