

Statement to Public Hearing of Productivity Commission Review of the Workplace Relations Framework

By: UnionsWA Secretary Meredith Hammat

Date: 23 September 2015

Thanks to the Productivity Commission for the opportunity to appear before you to outline our concerns regarding the Draft Report of its Review of the Workplace Relations Framework.

UnionsWA supports the contentions of the Australian Council of Trade Unions (ACTU) that the changes recommended by the Commission represent:

... a substantial diminution of workers' rights and a skewing of the Fair Work Commission's function more in favour of employers.

The Commission's advocacy of such changes is particularly perplexing, considering that the report's overall finding is that

Australia's workplace relations system is not systemically dysfunctional. It needs repair not replacement

The bias of the Commission's 'repairs' however, are against the interests of workers in WA and the rest of Australia.

UnionsWA will not address all the report's findings and recommendations; however we do wish to comment on the following areas:

- Minimum wages;
- Institutions;
- Enterprise Contracts;
- WA's experience of being an 'early adopter' of WorkChoices;
- Penalty Rates; and
- Right of Entry – proposed restrictions on 'frequent visits'.

Minimum wages

The Report's Draft Recommendation 8.1 says that

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

The wording of this recommendation 'stacks the deck' against the increasing the minimum wage by framing increases in terms of reducing employment, and wage limits as creating or retaining employment. This sets up a false opposition between the interests of the unemployed and the interests of the low paid.

The Recommendation also contradicts the bulk of the discussion within the body of the Draft Report, which finds that there is no clear evidence that minimum wage increases affect unemployment at all. *Restraining* minimum wage increases however, will entrench inequality and hurt the lowest paid.

UnionsWA argues that the gender pay gap is particularly significant for considerations of the minimum wage. Unfortunately the closest the report gets to a discussion of this matter is a short section about 'Earlier changes in gender wage relativities' on page 306.

There is ample research of the significance of minimum wages for the gender pay gap. For example, a report for the Australian Fair Pay Commission entitled 'Gender Pay Differentials in Low-Paid Employment', found that minimum wages decisions are an important determinant of women's involvement in paid work i.e. their participation in the labour market. They go on to argue that

It is reasonable to conjecture that, in the absence of adjustments of minimum wage rates over recent years, wage outcomes for low wage workers would be worse than they currently are and wage inequality would be greater. Given that women are over-represented in low-paid jobs, this implies that the gender pay gap would be greater than it currently is if the minimum wage adjustments had not occurred

The 2009 inquiry into *pay equity and associated issues related to increasing female participation in the workforce* by the House of Representatives Standing Committee on Employment and Workplace Relations reported that 'Women are more likely than men to be reliant on the minimum wage'.

The Committee's report *Making it Fair*, includes the following quote from the Working Women's Centre's submission:

As 60.3 percent of award dependent workers are women, changes to minimum wage setting and awards will disproportionately affect them.

Making it Fair's section on the minimum wage concludes with the following quote from the National Pay Equity Coalition and Women's Electoral Lobby regarding the AFPC's refusal to increase the national minimum wage in 2009:

The reasoning for the decision is flawed in arguing that an increase would worsen unemployment. Not only does the decision harm women and [the] low paid by not granting them an increase when other workers have received annual increases of 4.6% but is also a retrograde step in addressing the gender wage gap ...

In its suggested amendments to the Fair Work Act 'necessary to give explicit and effective recognition to the right to equal remuneration' *Making it Fair* included

upgrade equal remuneration from principle to be taken into account in minimum wage fixing in annual wage review and national wage orders to explicit obligation

In March 2015 a report by the UK's Low Pay Commission found that, since the introduction of their national minimum wage:

... the gender pay gap has generally been falling. Indeed ... it has more than halved at the lowest decile from 12.9 per cent in 1998 to 5.5 per cent in 2014. Similarly, the gender pay gap at the median has fallen from 15.9 per cent in 1998 to 8.5 per cent in 2014.¹

The gender pay gap is a significant matter in Western Australia, because WA continues to have the worst gender-pay gap in the country.

The most recent data for May 2015 has the WA gap at 26.1%, while the next highest is NSW with 19.1%. The national gap is 17.9%.

	Earnings; Males; Full Time; Adult; Ordinary time earnings ; \$	Earnings; Females; Full Time; Adult; Ordinary time earnings ; \$	Gender Gap
SA	1401.80	1246.70	11.1%
Tas	1345.20	1188.00	11.7%
ACT	1799.80	1589.30	11.7%
Vic	1471.30	1274.00	13.4%

¹

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413415/The_National_Minimum_Wage_Low_Pay_Commission_Report_2015.pdf

Aus	1591.60	1307.40	17.9%
QLD	1550.80	1269.90	18.1%
NT	1643.50	1344.30	18.2%
NSW	1635.90	1322.80	19.1%
WA	1857.20	1373.20	26.1%

On average women in WA get paid \$484 per week less than men in full time work, which is by itself unfair. However the gender pay gap also has broader, long term consequences. Women are more likely to be financially insecure, a situation becomes even worse when women have children and the pay gap persists for the rest of their lives including into retirement through less superannuation.

The Commission has asked for participant's input into the possibility of an Earned Income Tax Credit (EITC) in Australia as a 'complement' to the minimum wage.

In countries such as the USA, which has a substantially lower minimum wage than Australia's, the EITC are intended to counter the impact of those lower wages by acting as a kind of negative income tax. However, recent studies, such as that of Jesse Rothstein of Princeton University, have found that the EITC has been acting to transfer income to *employers* rather than to low income workers:

I show that targeted work subsidies produce unintended transfers to employers, coming not just from targeted workers but also from ineligible workers in the same labour markets. The transfer to employers is largest when the subsidy induces large increases in the labour supply and when demand is inelastic.

Professor Peter Whiteford of the Social Policy Research Centre argues that Australia has the lowest level of 'in-work poverty' among families with children in the OECD precisely *because* we have been willing to pay relatively high minimum wages.² These minimum wage rates *complement*, rather than compete with, the tax-transfer system. According to Professor Whiteford, his research found that:

The combination of Australia's relatively high minimum wages and targeted family benefits also reduces child poverty among working families by more than any other country ... We have a system which is both generous to families and in which it pays to work.

² Whiteford, Peter, 'Transfer Issues and Directions for Reform: Australian Transfer Policy in Comparative Perspective', *Melbourne Institute – Australia's Future Tax and Transfer Policy Conference* (June 2009) (p.57) http://taxreview.treasury.gov.au/content/html/conference/downloads/conference_report/03_afts_tax_and_transfer_policy_conference_chap_3.pdf

Professor Whiteford has examined the ability of lone parent family on the minimum wage to escape poverty in Australia (which he defines as going above 60% of the median income line). He finds that working full time at the minimum wage, combined with family benefits, should be enough to escape poverty in Australia. By contrast

...families at the minimum wage are well below the 50% poverty line in Spain, Greece, Portugal, Turkey and the USA.³

UnionsWA urges to Commission not to see a 'complement' to the minimum wage as a 'substitute' for maintaining a substantial minimum wage in real terms. The danger of measures such as an EITC is that they will be used as an argument against minimum wage rises.

In our submission to the Review, UnionsWA discussed the WA state minimum wage. We have consistently argued in state wage cases that WA's larger gender pay gap warrants a state minimum being higher. However UnionsWA also emphasises that the WA state system includes a state wage *case*. That is, an opportunity for unions and civil society groups to make their cases for increasing the minimum wage. The ability to advocate before an independent tribunal is a key aspect of the industrial relations system across Australia.

Therefore UnionsWA is concerned about the Commission's notion that there should be 'temporary variations ... in exceptional circumstances' in minimum wages. As it stands this would operate to undermine annual wage reviews, as there could be no true 'hearing' to determine if a 'temporary variation' is warranted. The proposal also raises the question of why low paid workers must carry the burden of 'exceptional circumstances' when they are the most likely to be victims in (say) a natural disaster and the least likely to be able to bear the costs.

Our concerns about how a minimum wage case could be conducted go to our broader concerns about how the Commission's recommendations concerning Australia's industrial relations institutions.

Institutions

In his analysis of the Commission's Draft Recommendations 3.1 to 3.4 covering the treatment of the Fair Work Commission, John Buchanan of the WRC describes these proposals as leading to the '*erosion of the independence of Australia's labour standards setting authority*'. He goes on to describe how:

³ Whiteford, Peter, Family Joblessness in Australia (January 2009) (pp.51-52)
http://www.socialinclusion.gov.au/sites/www.socialinclusion.gov.au/files/publications/pdf/family_joblessness_Jan2009.pdf

The Productivity Commission report claims “several major deficiencies” must be addressed, criticising the Fair Work Commission for being overly-legalistic in the way it determines awards and claiming the appointment process for FWC members leads to inconsistencies in its decisions.

In place of tenure, Fair Work Commissioners are to have five year contracts, be subject to performance management and be appointed by the relevant Federal minister alone. Labour standards are to be set by people with research and analytical expertise alone.

Those with practical experience of the operation of labour standards are to be excluded from shaping them in any way. Any notion of a quasi-judicial process to determine labour standards would be completely eradicated if these recommendations are implemented. It would mark the complete severance with Australia’s distinctive - and well respected – regime of labour standards determination.

UnionsWA has argued strongly against the WA state Liberal government’s regular attempts to undermine the independence of the state Industrial Relations system. If accepted, the Commission’s recommendations would be a transfer of power to the industrial relations Minister of the day which would give the appearance of, or allow for the reality, for there to be erosion of independence.

Enterprise Contracts

UnionsWA shares the ACTU’s concerns about Enterprise Contracts, which are that they will effectively amount to a ‘collective’ Australian Workplace Agreement (AWA). Like AWAs they would be offered on ‘take it or leave it’ basis as a condition of employment, why would an employer choose to bargain? Enterprise Contracts would simply be a repeat of the negative experiences of the AWAs of the WorkChoices era, with so-called ‘safeguards’ nothing but an illusion.

In WA we were unfortunate enough to experience the worst aspects of WorkChoices in advance of the rest of Australia, through the Court state government’s three ‘Waves’ of industrial legislation between 1993 and 2003. Instead of AWAs, in WA we had Workplace Agreements (WPAs) as our individualised employment arrangements. While there was much rhetoric about the benefits of ‘choice’ for employers and employees to take up WPAs, subsequent research found that:

- WPAs were not equally distributed across industries, but were concentrated in casualised work and semi-skilled occupations in the supermarket and grocery stores sector, the accommodation, cafes and restaurants sector, and the business services sector - not areas where employees had a great deal of bargaining power.

- 25 per cent of WPAs reduced wages below the award.
- More than half of WPAs reduced or eliminated significant conditions such as overtime premia, penalty rates and annual leave loading, with a number of employees clearly losing two or more significant conditions.
- Women workers were 50% more likely than men to have their wages reduced below relevant award rates when they signed a WPA⁴.

The last point is particularly pertinent given our concerns about WA's gender pay gap. Any 'reforms' to Industrial Relations that reintroduce non-negotiable employment arrangements that allow for any erosion in the safety net will make an already bad situation on gender pay much worse.

It is worth noting that 'take it or leave it' contracts, whether they cover a single worker or a group of workers, simply do not offer the same protections for pay and conditions as a union negotiated collective agreement. In a unionised workplace employees can band together to both defend existing conditions and negotiate better ones in the future. There may be times when negotiations don't produce a good deal – the point; however is that workers and employers can go back to the table after a reasonable time to negotiate a better one. A 'no disadvantage test' simply does not offer the same protection.

Research conducted by David Peetz in the early 2000s proved that under AWAs, workers lost valuable conditions of work – even if they were offered a higher wage in the first instance. Lost conditions stayed lost under AWAs even before WorkChoices removed the inadequate 'no disadvantage test'. In his 2004 paper *'Are Employees on AWAs Really Better Off Than the Rest of Us? Reanalysing the OEA's employee survey'* Peetz found that:

Individual contracts such as AWAs represent a weakening of the bargaining power of employees. For ordinary employees – those below the managerial and professional ranks – this is translated into increasing hours and work intensity, a poorer work-family balance and lower satisfaction with pay and conditions.⁵

A statutory 'no disadvantage' or 'Fairness' Test cannot protect workers from losses of conditions and the inevitable race to the bottom that will be encouraged by 'Enterprise Contracts'.

⁴ Janis Baily and Bob Horstman *'Life is Full of Choices': Industrial Relations 'Reform' in Western Australia since 1993*

<http://www.mngt.waikato.ac.nz/departments/Strategy%20and%20Human%20Resource%20Management/Air%20aanz/old/conference/newscastle2000/Vol1/bailey.pdf>

⁵ http://www.pc.gov.au/data/assets/pdf_file/0007/187945/sub0133-workplace-relations.pdf

Penalty Rates

UnionsWA rejects the notion that a so-called 24/7 society warrants a reduction in take home pay, which would be caused by a reduction in penalty rates.

The industries targeted for penalty rate reductions are some of the lowest paid. Many in these industries rely on penalty rates to make ends meet. This reduction will further increase inequality.

UnionsWA rejects the Commission's judgements about the relative values of Saturdays versus Sundays. The Commission's argument has no concern with community wellbeing, otherwise it would have argued that Saturday rates should be increased to the level of Sunday rates, rather than reduced. This is especially the case given that they accept the argument that both Saturday and Sunday should have penalty rates.

The Draft report provides no assessment of what a reduction in wages at weekends would do for labour supply or aggregate labour demand at weekends, or wider macroeconomic impacts. There is no evidence that penalty rates have lowered the rates of employment or economic activity at weekends. This is a baseless assertion. Instead employers are paying higher wages to ensure labour is supplied on weekends. The Commission is recommending setting one standard for the wellbeing of skilled workers and another for unskilled. It is just another exploitation of what are already lower paid workers on an increasingly lower minimum wage relative to the median, and a mechanism to widen income distribution.

A reduction in penalty rates runs into a national impact of billions of dollars less of expenditure on penalties, and the spin offs for national income. These effects are even stronger because many of those on penalty rates at awards spend all their income. This would have downward effect on consumption expenditure on goods and services, employment and profits.

The Commission thinks long working hours, night shifts and rotating shifts should be compensated because of health consequences for workers and lack of bargaining power but it doesn't consider other social consequences. It sees these payments akin to danger pay rather than pay for inconvenience and ignores the role of OH&S law. If OH&S law is doing its job, the payment isn't danger money. It's the remaining price of social dislocation for working these hours safely.

If the Commission accepts that the quantum of penalty rates in health, emergency services and manufacturing (e.g. +50% on Saturdays, +100% on Sundays) are a fair match between inconvenience to the worker and the expectations of consumers, it's difficult to argue otherwise in other industries.

Right of Entry – proposed restrictions on ‘frequent visits’

UnionsWA is concerned that the Productivity Commission sees Right of Entry (RoE) primarily as an inconvenience to business, rather than recognise it as a right of workers. There is no acknowledgement that employers will always regard visits by union organisers as ‘too frequent’ – particularly if those employers are doing the wrong thing.

In WA RoE is a particularly important issue given that many workplaces are in remote locations which are generally difficult to access. Right of Entry is about the right of workers to join their union and meet with their representatives in the most convenient location. For workplaces in remote locations it can be challenging to find such locations. Often unscrupulous employers will take advantage of remote locations to restrict union access to worker accommodation villages on the grounds that they are ‘private residences’, even though the employer has control over who can access these accommodation sites.

Far from finding further excuses to restrict RoE, the Commission should be looking at ways to make access more efficient and less administratively burdensome. It could do this by recommending provisions to ensure:

- That where a union representative wishes to enter a worker accommodation village to consult with members or potential members, that union representative is permitted to do so as of right as though the worker accommodation village were a workplace proper.
- That where an entire workplace is in a remote and difficult to access location, employers should proactively facilitate workers access to their union. E.g. allow reasonable time on site for worker to talk to union organisers (not just the designated breaks) if the workplace can only be reached after hours or days of travel.

More broadly, Industrial Relations Legislation needs to have far more detailed provision about what constitutes a reasonable meeting place e.g. four walls, a roof, access to water. Remote site meetings are often forced to take place outside in searing heat. Access should preferably be at the crib rooms or lunch facility or similar. It should also recognise that employers often hope that, by requiring employees to walk past or through the main office areas to go to designated rooms, those employees will feel intimidated because management will know where they are going. These are the issues around Right of Entry that the Productivity Commission should take up, rather than accepting uncritically employer complaints.

In Western Australia, RoE is regulated by the WA *Industrial Relations Act 1979* (Part II, Division 2G). WA’s RoE provisions are considerably less rigid and bureaucratic than those of the Fair Work Act, and no evidence has been provided of any problems with their operation – even when the WA state government has proposed amendments.

For example, the current section 49H of the WA Act relating to 'Entry for discussions with employees' states that Unions can access "...any premises where relevant employees work, for the purpose of holding discussions at the premises...". This starkly contrasts with the sections 492 and 492A of the Federal Act which contain pettifogging restrictions such as 'The permit holder must comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area of the premises' (section 492A(1)). There have been no situations in WA where problems have arisen in the state system from the lack of regulation about 'particular routes' to reach rooms.

Conclusions

UnionsWA has the following concerns with the Productivity Commission's Draft Report:

- **Minimum wages:** The report does not address the significance of minimum wages in addressing the gender pay gap. We also reject the concept of 'temporary variations' in 'exceptional circumstances'.
- **Institutions:** UnionsWA supports the independence of the Industrial Relations system at both a state and national level. The Commission's proposals will undermine that independence.
- **Enterprise Contracts:** these will be 'collective' AWAs with the same problems as previous attempts to legislate such arrangements. They should be rejected.
- **Penalty Rates:** UnionsWA rejects the premise of the attack on penalty rates i.e. that weekends are no longer significant. The Commission's proposals are simply an attack on the low paid.
- **Right of Entry:** – proposed restrictions on 'frequent visits': rather than making Right of Entry more difficult, the Commission should be looking to remove the current burdensome difficulties on RoE – particularly regarding remote locations.