



Submission in Response to the
Productivity Commission's Draft Report
on the Workplace Relations Framework

ELECTRICAL TRADES UNION OF AUSTRALIA

SEPTEMBER 2015

Introduction

The Electrical Trades Union (ETU) is the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). Our members work in a number of industries such as the electrical power, mining, construction, steel production and manufacturing to list a few.

The ETU represents over 70,000 electrical and electronics workers around the country and the CEPU as a whole represents approximately 100,000 workers nationally, making us one of the largest trade unions in Australia.

The ETU is committed to advancing and protecting the wages, conditions, rights and entitlements of members through campaigning and workplace activism. The ETU utilises its collective strength to continually support, train and educate our members to the highest standard of industrial, political and social awareness.

The ETU welcomes the opportunity to make a response submission to the Productivity Commission's draft report (draft report) into Australia's workplace relations framework.

The ETU endorses and supports the submissions of the Australian Council of Trade Unions (ACTU) in relation to this review, particularly in reference to enunciated key principles and a cooperative industrial relations framework in order to promote economic prosperity and the welfare of Australian workers.

The ETU supports continuing productivity growth and economic prosperity, workplace collective bargaining should be promoted and supported and be underpinned by a fair and equitable industrial relations framework.

We are pleased that the draft report acknowledges that the fundamentals that underpin the current industrial relations framework are working well, namely:

- That the workplace relations system "is not systemically dysfunctional."¹
- That minimum wages are a justified element of the workplace relations system and the current rate of the wage is not inappropriate.²

¹ Workplace Relations Framework Draft Report, Productivity Commission, August 2015, p9.

² Ibid.

- Acknowledgement of the power imbalances between employers and employees in workplace relations.³

Despite these findings however, the vast majority of recommendations in the draft report, that are ostensibly aimed at framework “repair”, will be damaging and retrograde to Australia’s workplace regulatory environment if implemented by government. The draft report seeks to:

- Be a deliberate and explicit prescription for more inequality;
- Hold down minimum wages;
- Cut penalty rates;
- Reduce the effectiveness of a safety net as a bargaining floor;
- Threaten weekend rates in the retail and hospitality sectors;
- Expand the scope and operation for individual agreements;
- Introduce pattern bargaining through the introduction “Enterprise Contracts”;
- restrictions on right of entry and protected industrial action are proposed;
- Undermine the independence and functions on the Fair Work Commission.

There are several alarming aspects of the draft report such as recommendations to introduce of a two-tiered penalty rates system along with the removal of provisions that prevent employers engaging labour hire companies, leading to a race to the bottom in terms of wages and conditions. It also seeks to gut the Fair Work Commission of its core functions, increases fines for unions, and prevents union officials from accessing workplaces.

One of the most concerning aspects of the draft report is the recommendation to introduce non-negotiable employer-written ‘enterprise contracts’ that override awards and enterprise agreements. These are unfair ‘like it or lump it’ deals rob workers of any bargaining power or ability to improve their conditions at work.

Some of the suggestions are simply outrageous, such as the recommendation that companies be able to dock workers’ pay and stand them down for an unspecified period if they decide not to take industrial action. The idea that the boss can fine you for refusing to strike is just

³ “...employees are likely to have much less bargaining power than employers, with adverse outcomes for their wages and conditions” Page 3 PC Draft Report.

absurd. Indeed, the Freedom of Association Convention (ILO 87) is offended by limits placed around the right to strike, the capacity for the FWC to restrict strike action on economic grounds and further limiting workers access to union advice and support in their workplace.

Lack of Balance to Inquiry Scope

The Terms of Reference

The terms of reference that was released for this Inquiry mainly focused on issues impacting employers, as opposed to taking a more balanced approach. This leads to a potential perception that the inquiry scope is quite biased, providing minimal attention to employee protections.

Issue Papers

The perception of bias gains more weight when considering that the Productivity Commission chose to examine issues like minimum wage and penalty rates, despite not being expressly mentioned in the terms of reference. The way questions are framed in the issue papers were quite leading. For example, questioning the basis for a minimum wage. Questions such as “to what extent should an earned income tax credit or some other in-work payment serve as a complement or substitute for minimum wages?” and “what is the rationale for the minimum wage in contemporary Australia?” suggests that the Productivity Commission has already drawn conclusions on various matters in this Inquiry.

Insufficient Time for Consultation

The issue paper provided over 130 questions for stakeholders to respond in seven weeks. This is a very limited amount of time for stakeholders to collate and provide an evidence based submission on such a broad range of issues. The ETU is concerned that providing such limited time for submissions seriously compromises the consultation process and therefore potentially compromises the results of the Inquiry overall.

Institutional Issues

We acknowledge the importance of the appointment process and tenure of Commissioners in the Fair Work Commission to ensure independence and confidence in the tribunal system prevails.

However, the prescriptive recommendations 3.1, 3.2, 3.3 and 3.4 provided in the draft report seems impractical. For instance, ‘merit-based performance review’ has been suggested yet there is no discussion about what the specific criteria would be. It has been suggested in this report to limit the time period for appointments, however the productivity commission should also consider mechanisms dealing with independence and experience.

We are concerned about the draft report recommendations to exclude people involved in industrial representation or advocacy. Having a diverse, representative panel of people is paramount to ensuring just and equitable outcomes, as well as ensuring there is no public perception of bias. Suggestions such as requirements “that panel members should have experience in board or senior executive selection”⁴ would seem to bias the panel towards either the public or corporate sector.

We reject the formation of the Minimum Standards Division because to have a panel without industrial experience would, in the longer term, lead to a more fiscally conservative approach to the setting of wages and conditions. This is an inappropriate recommendation by the Productivity Commission.

We submit that appointed Commissioners should have sufficient standing, be knowledgeable and have experience with the areas of industrial relations, economics and human resources.

Regarding recommendation 3.5, conciliation should remain confidential and off the public record.

National Employment Standards (NES) & Penalty Rates

We reject the recommendation for the Australian Government to amend the NES so that employers are not required to pay for leave or any additional penalty rates for any new public holidays along with the cash out option for additional leave and allowing casual workers exchanging part of their loading for additional entitlements. Additionally, we reject altering Sunday penalty rates to Saturday penalty rates for the suggested listed industries.

⁴ p154

Unless the Australian Government can provide a thorough and comprehensive report on the employee, social and economic impacts that such recommendations suggested will have upon various industries and employees, these recommendation is unjustified.

The draft report eludes that the casual loading of 25 per cent as a 'penalty'.⁵ This is highly deceptive, inappropriate and disappointing from the Productivity Commission. We remind the productivity commission that the casual loading is not a penalty but it is to compensate casual employees who do not have access to certain conditions such as leave entitlements.

We suggest that the Productivity Commission should be seeking information about the viability of casuals converting into permanent secure jobs than just offering them to convert some of their loading for entitlements. The lack of job security and causal workers exploitation is more important to be assessing than accessing leave entitlements. There needs to be more research and surveying of the causal workforce in all industries and on how employers can also assist with addressing job security amongst the casual workforce.

Penalty rates are important for not only our members but the wider community, in compensating those who work "at inconvenient times" and also to act as a deterrent against "long or abnormal hours being used by employers".⁶ Former Prime Minister Tony Abbott also concurs stating that "If you're a low-paid worker one of the things you often love to do is work late nights, weekends, because it does substantially increase your income."⁷

There are number of points to draw from the draft report which questions the report's validity of the rationale to change penalty rates. Firstly, there is no substantive justification for the proposal to simply reduce the Sunday penalty rate, rather than looking at what may be an appropriate weekend penalty rate. Essentially the proposal appears to be capricious rather than considered. There is no reliable evidence regarding the impact altering weekend penalties "upon employment patterns, operational decisions and business performance."⁸

⁵ in Figure 7 on page 26 of draft report

⁶ Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd (1909) Justice Higgins

⁷ <http://www.news.com.au/national/breaking-news/abbott-attacking-penalty-rates-labor/story-e6frku9-1226818212691>

⁸ Modern Awards Review 2012 – Penalty Rates[2013] FWCFB 1635.

Secondly, the focus on some limited sectors of the economy is not justified. The draft report explains that there is a trend to a seven day consumer economy- why did the draft report not take a wider approach? It would appear that the productivity commission is responding and making recommendations based on a particular industry rather than looking a national approach to address this matter.

Unfair Dismissal

The draft report conveys an intention to discharge dismissal applications based “on the papers” without a hearing/submissions or a more “merit focused” conciliation, however we reject this recommendation. It must be highlighted that the unfair dismissal process already has a greater focus on protecting employers from unfair dismissal claims at the cost of the employees.

For instance, the limitation period for unfair dismissal claims is 21 days from the date of dismissal. The Fair Work Commission does have the capacity to look at ‘exceptional circumstances’, yet it is common for individuals to miss the 21 days limitation period and ‘exceptional circumstances’ is narrowly defined. It also must be stated that only 63 out of 243 out of time applications were accepted during the 2013-14 financial year.⁹

It is important to keep in mind that there are vulnerable members of society who have been too emotionally distressed about being dismissed that they only seek redress after a few weeks to a couple of months. Non-English speaking individuals, or those who are disabled or have literacy issues or even those who live out in regional and rural areas are restricted by this limitation. It is obvious that even some employees would have to prioritise looking for a new job because of financial pressures and/ or tend to family needs.

We recommend a longer limitation period to address the quality of the initial dismissal application and adopt similar policies such as those in the UK¹⁰ and NZ¹¹ - who have a much longer limitation period. This may improve the quality and reduce “incomplete or illegible application” as mentioned in the draft report. This may also remove the need to add more bureaucratic measures such as conducting a more detailed merit focused conciliation.

⁹ FWC, Annual Report 2013 – 14, p126

¹⁰ 3 months

¹¹ 90 days

Recommendation 5.2

It has been recommended by the draft report to make various changes regarding the penalty regime for unfair dismissal matters. We submit that employees should be entitled to compensation and reinstatement, if appropriate.

Additionally, we recommend that the Fair Work Commission should have the discretion to award penalties (financial, counselling and education) in respect of unfair dismissal claims in appropriate circumstances. Under the FW Act, penalties can be awarded in respect of general protections claims and other breaches of the FW Act, but they cannot generally be awarded in respect of unfair dismissal claims.¹²

Obviously, a pecuniary penalty would not be appropriate in every unfair dismissal case. However, some unfair dismissal cases involve deplorable conduct or procedural errors on the part of the employer. Deputy President Sams described, in a particular case where an individual with no record of unsatisfactory performance, was dismissed with no reason and via a text message, that it was “one of the worst unfair dismissals on record”.¹³ Deputy President Sams could not even award a penalty against the employer who was at fault.

A case mentioned in the draft report, *Sheng He v Peacock Brothers & Wilson Lac v Peacock Brothers*, is a very poor example. In that case the employees clearly behaved inappropriately, however, the employer in this matter also failed to offer the employee an opportunity to have a support person present during the meetings. The employer failed to take account that both employees needed language assistance to understand what was put to them to provide an adequate response. The Commissioner highlighted given the size of this employer, the employer lacked “sophistication with human resource” which impacted the investigation of the allegation. Additionally, the Commissioner took inconsideration of the long continuous service and employment history of the employees, yet also applied misconduct penalties appropriately. The draft report failed to explain the case appropriately within context. Yes the

¹² The only penalties that can be awarded in respect of unfair dismissal claims are where a person contravenes a costs order –see FW Act s 539 item 13

¹³ *Kaye v Fahd and Others* [2013] FWC 1059, [132]

employees in this instance received compensation given the facts of the case and applying the principles set out in *Sprigg*¹⁴ and *Ellawala*¹⁵

It is interesting to see that the Productivity Commission is suggesting that procedural errors such as denying an employee their right to have a support person present in a meeting or assistance to understand what the employer puts to the employee to be overlooked. Depending on the facts of the case, some procedural errors can deny the employee natural justice. Remember that the FWA provides the criteria that the Fair Work Commission must take into account when determining harshness etc. of a person's dismissal. Failure to take account of each of the criteria is a significant error in law and may be sufficient to provide a basis for an appeal. Denying the right of a person their entitlement of possible reinstatement and compensation due to procedural errors by employers is oppressive.

Case Study MUA v Hutchison Ports

The recently reported case of nearly 100 employees of Hutchison Ports in Sydney and Brisbane being sacked by via a text message or email is an example of where recommendation 5.2 will have a destructive impact on employees.

Only last month Hutchinson Ports informed workers by late-night text messages and emails that their last day of employment would be Friday 14 August. The representing union, the Maritime Union of Australia argued that Hutchison Ports breached its enterprise agreement by failing to adequately consult workers and ignoring a dispute resolution clause before announcing the forced redundancies.

Recommendation 5.2 suggests that in this circumstance the procedural error exercised by Hutchinson Ports would not provide an opportunity for the employees to be reinstated or a right to compensation. ETU agrees that the employer should be penalised, however, employees are placed in a very vulnerable financial position and should be at least be compensated.

Reinstatement should remain as a “primary goal”

Recommendation 5.3

We reject the recommendation suggesting the Australian Government to “remove the emphasis on reinstatement as the primary goal”- within the realms of unfair dismissal provisions. Just because there is a small number of individuals being reinstated and a conjecture that employment relationships are “irremediably destroyed” in majority of unfair

¹⁴ *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21.

¹⁵ *Ellawala v Australian Postal Corporation*, AIRCFB (2000), Print S5109, at [33]

dismissal matters, this does not mean that the FWC cannot already make an assessment to include a broader range of factors. Such factors are already considered whether there has been a loss of trust and confidence between the employee and the employer.¹⁶

The FWC is obligated to ensure that a “fair go all round” is accorded both the employer and the employee in working out remedies.¹⁷ It has been emphasised that the “fair go object does not constitute a basis for ignoring, or for rolling into one amorphous act judgement, the procedures or conditions associated with the powers and discretions to determine remedies”.¹⁸

Before the Productivity Commission provide such a recommendation to remove reinstatement as a primary goal, we ask the Productivity Commission what is the purpose of removing it? If there is no evidence to support the proposition that most reinstatements are not appropriate in any possible circumstance, therefore it must remain as a remedy.

However, in the case of *Brooks v Australian Dried Fruit Sales Pty Ltd*¹⁹, the Commission found the termination of two employees on the grounds of redundancy was harsh, unjust or unreasonable. Only one was reinstated. In deciding that reinstatement was no appropriate for the other employee, Commission Simmonds took into account the low score that the employee has achieved on a competency test, which was 17% below the lowest person retained by the company during the redundancy process. He considered that in these circumstances “there are insufficient grounds [for me] to conclude that reinstatement is appropriate as it would not provide the company with a “fair go all round”.

The Productivity Commission also failed to take in consideration of the greater impact on vulnerable employees. For instance, many vulnerable employees work in low-skilled roles which do not require a specific qualifications.²⁰ If they are dismissed, it is often much harder for them in to get another job. According to the Department of Employment’s Vacancy

¹⁶ *Australia Meat Holdings Pty Ltd v McLaughlan* (1998) 84 IR 1, 17; *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186; *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201

¹⁷ S381(2) FWA

¹⁸ *Sprigg v Paul’s Licensed Festival Supermarket* (1998) 88 IR 21, 31.

¹⁹ (1998) 84 IR 33, 50

²⁰ Natalie James, Fair Work Ombudsman, ‘Risk, Reputation and Responsibility’ (Speech delivered at the ALERA 2014 National Conference on 29 August 2014).

Report, the lowest number of job vacancies is among sales workers, machinery operators and drivers and labourers.²¹

Similarly, employees in a rural, regional or remote area will likely have significantly fewer alternative job opportunities if they are dismissed, due to the lack of available work in these areas. The dismissal may also be more likely to have magnified impacts on these employees' social and family lives because the termination of their employment is likely to be publically known in their local community.

Matured aged employees are also disproportionately affected by unfair dismissals. Such employees are likely to have greater difficulties in finding alternative employment. People of mature age often face significant barriers when seeking new employment, such as discrimination by potential employers and a perception that such persons are more difficult to train and retain.²² The average duration of unemployment for a person above the age of 55 years is twice that of a person between the ages 15 and 54.²³

The financial impacts of unfair dismissal on low income employees are likely to be amplified for example if such employees are less likely to have substantial savings to draw from in any subsequent period of unemployment.

²¹ Department of Employment, Vacancy Report January 2015 (2015) 2.

²² Labour Market Research & Analysis Branch, Labour Market Strategy Group, Australian Government, Workforce Aging (June 2012) 10, 15.

²³ Ibid.

Case Study - Importance of Reinstatement (ETU QLD)

An ETU member, 55 years of age and an electrical worker, moved to Moranbah with his wife and started a family nearly 30 years ago. He worked for an employer for nearly 28 years with an unblemished record.

One evening, whilst on his 12 hour shift he encountered a severe electrical storm and was delayed arriving to work and had forgotten to do his fitness for work test. Additionally, given the circumstances he had forgotten to finalise a vehicle check. This member had no pattern of not doing his fitness test and there was no suggestion that he was not fit for work. Additionally, there was no suggestion that he had a pattern for not completing the vehicle log book.

In the early hours of the morning he lost control of the vehicle because of a large patch of bulldust. The employer said that the “expert” report says that the member took a sharp turn before entering into the bulldust and therefore the member was at fault. The member was sacked.

In this instance the member did not want anything but to be reinstated. This example highlights that even though the PC to elude that reinstatement is not important just because there are a small number of cases, it is necessary to maintain reinstatement as a primary goal to ensure individuals also have the chance to retain a secure job.

Remedies and Uncapped Compensation

If employees is eligible to be paid compensation in lieu of reinstatement, section 392(4) of the Fair Work Act expressly prohibits consideration of shock, distress, humiliation or analogous hurt caused by the dismissal when calculating compensation.

At common law, it is possible to award damages for mental distress, shock and humiliation resulting from the breach of an employment contract or from a harsh, unjust or unreasonable termination of employment.²⁴ Even under the FW Act regime, compensation has been awarded for distress and humiliation in an adverse action claim.²⁵

There is no reason why compensation for shock, distress and humiliation should not be awarded in unfair dismissal claims where appropriate. Many ETU members experience shock and distress in connection with unfair dismissal. This is a form of loss which should be

²⁴ *Emmerson v Housing Industry Association Ltd* [1999] FCA 500 (Ryan JR); *Burazin v Blackstown City Guardian Pty Ltd* (1996) 142 ALR 144, 157; *Liu and Ors v Coms 21 Limited Print S3571* Guidice P, Duncan DP and Larkin C (25 February 2000) 6.

²⁵ *Australia Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333.

compensable. By way of comparison, New Zealand workplace laws expressly state that a compensation order may take into account any humiliation, loss of dignity and injury to the feelings of the employee.²⁶

We recommend that there be no cap on the amount of compensation that may be awarded in unfair dismissal matters. The current compensation cap is the lesser of 26 weeks' remuneration and half of the high income threshold.²⁷ The high income threshold is currently \$136,700²⁸ - i.e. the maximum compensation that can be awarded in any unfair dismissal matter is therefore \$68,350.

However, in other OECD countries, there is either no cap on compensation or the amount of compensation that can be awarded in unfair dismissal claims is greater than in Australia. There is no statutory cap on compensation ordered in Canada²⁹ or New Zealand.³⁰ In Sweden, employees are entitled to both economic and punitive damages. Damages are capped at 6 months' pay for less than 6 months employment; 16 months' pay for less than five years of employment; 24 months' pay for at least five years but less than ten years employment; and 32 months' pay for ten or more years of employment.³¹

It is unreasonable to limit the amount of damages that an employee can receive for unfair dismissal to 6 month wages or \$68,350, particularly where an employee has worked for an employer for a long period of time, has been dismissed harshly and the employee has been unable to obtain other work since the dismissal- despite making an effort. This should not expose employers to excessive liability because the onus will still be on the employee to prove what their loss has been as a result of the dismissal. Additionally, the Fair Work Commission has the discretion to determine what amount of compensation to award in the circumstances.

²⁶ Employment Relations Act 2000 (NZ) s 123(1)(c).

²⁷ FW Act ss 392(5) and 392(6).

²⁸ As of 1 July 2015

²⁹ Canada Labour Code, RSC 1985, c L-2, s242(4).

³⁰ Employment Relations Act 2000 (NZ) s123.

³¹ Employment Protection Act (1982:80) s39

General Protections

Recommendation 6.1

The general protection provisions in the FWA have scope for improvements such as forms and parts of the provisions to be revised and possibly simplified. Other areas for improvement include:

- Increase the limitation period for general protections claims involving dismissal (as like suggested in the unfair dismissal claims);
- Reducing the high threshold for applications submitted out of the 21 day limitation period.

However, maintaining the reverse onus of proof provision in the general protections claims should remain.

Recommendations 6.2 and 6.3

We agree that complaints should be made in good faith and to ensure that they are not frivolous and vexatious however we do not believe this recommendation provides a workable solution. However to suggest a preliminary interview with the complainant without a describe framework as to how this would unfold means that the ETU needs further details to consider. Yet one could assume the application lodged itself provides as an indication whether the matter seems “frivolous and vexatious” in nature. Also the Commission may order costs to those who make an application or response to an application vexatiously or without reasonable cause.³²

Recommendation 6.4

There should be no cap on compensation for claims lodged under the general protections provisions of the FWA. By maintaining the uncapped compensation, within the general protection jurisdictions, it will enable eligible dismissed employees to claim compensation for damages for hurt and humiliation as well as lost remuneration and other economic loss.

³² S611, FWA

Minimum Wage

It must be highlighted that in the draft report it has been suggested “that the FWC should give significant weight to employment impacts of when determining the level of the minimum wage”.³³ This implies that the current Commission is failing to do this however, it is arguable to say that the Commission already takes this criterion seriously as seen in the 2014 Annual Wage Review³⁴ and as emphasised in the 20091- Review decision.³⁵

The draft report also provided a recommendation that the FWC ‘should broaden its analytical framework to systematically consider the risks of unexpected variation in economic circumstances on employment and the living standards of the low paid’.³⁶ Such suggestion means that the FWC should be disproportionate in its reasoning and decisions to minimise risks it may have for the minimum wage to grow. The Draft report seemed to cover major concerns of theoretical than highlighting weaknesses in current arrangements. Risks illustrated in the report based on the Bank of England report seems to disregard that the report suggest that the spread of possibilities shown in the chart are not a realistic set of forecasts.³⁷ It must also be highlighted that the Treasury and/or the Reserve Bank have the capacity within the existing frameworks of the Annual Wage Reviews to provide material covering aspects of risks and economic circumstances to the FWC to use in its considerations.

Variations in Uniform Minimum Wages

It seems quite obscure to recommend (Recommendation 9.1) that the FWC have the power to make temporary variations in the awards in “exceptional circumstances”. The report suggested an example of exceptional circumstances like natural disasters. It is strange to retrospectively address the wages system as a means of compensation in the context of a natural disaster without properly reflecting how this will impact employees. It seems illogically to penalise those who are dependent on award wages to carry the burden of

³³ P331

³⁴ Eg: <https://www.fwc.gov.au/documents/decisionssigned/html/2014FWCFB3500.htm> “Economic Considerations” Para [22]-[31].

³⁵ ‘Our view is that the low paid need the highest level of wages that is consistent with all other objectives including low unemployment, low inflation and the viability of business enterprises.’ (FWC 2014, p17–18)

³⁶ P334 PC draft report

³⁷ Page 7

employer's problems. Furthermore, it can become quite complex by locality and industry. We reject recommendation 9.1.

Junior Rates

In determining junior pay rates (eg for apprenticeships) and the application of models, a combination of criteria's such as general demographics, competency, experience, industry demand and historical skills shortage should be taken into account.

It is vital for employers and industries to recruit and retain apprentices to manage future skill base of Australia's economy and met the demand of consumer demand for on-going supply of highly skilled tradespeople.

Case Study – Apprentice Electrician Wage Rates

In 2013, ETU was successful to vary the *Electrical, Electronic and Communications Contracting Award 2010* (MA000025) which provided a substantial pay rise and modernised trade training. The pay rises transitioned over two years as follows:

- a 1st year apprentice electrician who has completed year 12 - from \$289 to \$398 a week;
- a 2nd year apprentice electrician who has completed year 12 - from \$376 to \$470 a week;
- a 1st year adult apprentice electrician, aged over 21 when commencing their trade, doubling from \$289 to \$579 a week;
- a 2nd year adult apprentice electrician, aged over 21 when commencing their trade, leaping from \$376 to \$622 a week; and
- 3rd and 4th year adult apprentice electricians, aged over 21 when commencing their trade, moving to the higher of the minimum wage or the junior apprentice rates.

In handing down their joint decision, the Fair Work Commission emphasised that increased apprentice wages were a benefit for both apprentices and employees, finding that the rises were "appropriate in setting a fair and relevant minimum safety net for apprentices and would recognise the benefits of having better educated and potentially more productive young people entering apprenticeships."

A major factor, which was reflected in an independent research¹ that the ETU commissioned, emphasised also the shifting demographics. At the time it showed that more than a quarter of modern apprentices were over the age of 25 when they entered into the electrical trade. Even more startling was the revealing statistics that many of these trade apprentices were living below the poverty line with current junior rates at the time.¹

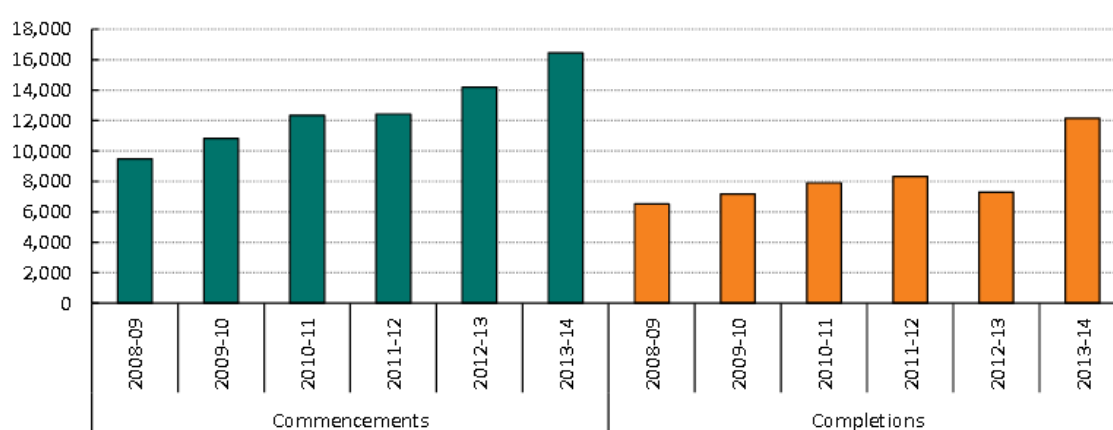
In principle we support a comprehensive review into Australia's apprenticeship and traineeship arrangements. It is important to highlight significance spaces as per suggested in this recommendation to modernise, encourage and retain apprentices in various trade industries.

The National Centre for Vocational Education Research (NCVER) data for electrotechnology and telecommunications trades workers apprenticeships and traineeships show that the number of commencement and completion has increased strongly over the past six years (see Fig below).³⁸ And those who have completed, nearly half were trained as an electrician.

Even though this reflects a strong growth of electrical apprentices since the wages win in 2013; nationally, statistics illustrate a different story. 2.7% of Australian workers were employed as an apprentice or trainee as of December 2014, compared with 3.3% in 2013. Specifically to trades, 10.6% of workers were employed as an apprentice or trainee as of December 2014, compared with 12.3% in 2013.³⁹

Additionally, productivity in the construction and electricity industry have increased, both ranging in the top ten industries with high productivity (figure...)⁴⁰

**Figure 1 -Apprentices and trainees, Commencements and completions (no.),
Electrotechnology and Telecommunications Trades Workers, 2008-09 to 2013-14**



Source: NCVER, *Apprentices and Trainees, September 2014, estimates, Certificate III or higher qualification*

³⁸ <http://docs.employment.gov.au/system/files/doc/other/electrotechtelecommtradesaus.pdf>

³⁹ National Centre for Vocational Education Research , *Apprentices and trainees 2014*

⁴⁰ <http://www.tai.org.au/content/productivity-construction-industry> page 6

The scope of the proposed review would substantially alter both how training arrangements operate within various industries and the role of awards in providing pay and entitlements for employees covered by training arrangements. Currently different industries are at different stages of progressing towards competency based progression. Future movement to competency based progression should be determined by the industry participants.

Other areas of review should include:

- Ensuring quality training is provided by private providers of apprenticeships and skills training: and
- Addressing stigmas associated with apprenticeships such being “second best” compared to university education and its’ genderisation.

Figure 2 - Labour productivity in selected industries

	Labour productivity: Value added per worker (\$)	Share of total employment (%)
Mining	602,331	1.79
Electricity, gas, water and waste services	366,414	1.09
Information Media and Telecommunications	209,375	1.58
Rental, hiring and real estate services	155,296	3.72
Transport, postal and warehousing	117,188	5.32
Manufacturing	109,358	8.45
Professional, scientific and technical services	108,060	9.09
Wholesale trade	107,687	5.36
Construction	96,838	9.87
Health care and social assistance (private)	64,522	9.44
Public administration and safety (private)	63,444	0.76
Other services	63,426	4.12
Education and training (private)	60,264	3.42
Arts and recreation services	55,960	1.88
Administrative and support services	54,918	8.27
Retail trade	54,868	12.38
Agriculture, forestry and fishing	52,132	4.70
Accommodation and food services	39,298	8.75
Total selected industries	94052	100.00

Source: ABS (2013) *Australian System of national accounts, 2012-13*, Cat no 5204.0, 1 November.

Repairing Awards

We currently involved in the 4 yearly review of modern awards. We acknowledge that this is an important process that all awards are reviewed and current. However, it does become quite resource intensive for both the employer and the employee organisations. Our direct interests are in a number of awards:

- The Electrical, Electronic and Communications Contracting Award 2010
- Electrical Power Industry Award 2010
- Manufacturing and Associated Industries and Occupations Award 2010
- Building and Construction General On-site Award 2010
- Business Equipment Award 2010
- Mining Industry Award 2010
- Black Coal Mining Industry Award 2010

The concept of having a division solely dedicated to review the modern award could potentially address the strain that this process has on parties and the fair work commission resources. However, the suggested Minimum Standard Division to exclude law expertise is problematic. Empirical evidence is an important objective but so is also the need for industrial and legal knowledge is vital.

As previous mentioned in this submission, the we reject the formation of the Minimum Standards Division because to have a panel without industrial experience would, in the longer term, will lead to a more fiscally conservative approach to the setting of wages, conditions and reviewing awards. This is an inappropriate recommendation by the Productivity Commission. We submit that appointed Commissioners should have sufficient standing, be knowledgeable and have experience with the areas of industrial relations, economics and human resources.

ETU rejects recommendation 12.1 and 12.2 particularly due to the suggested structure of the Minimum standard division.

Enterprise Bargaining

We reject the draft report recommendations to:

- reduce procedural protections in relation to employee rights and approval;
- prohibition on collective agreements restricting the use of individual flexibility agreements; 5 year terms for agreements (up from 4) of the life of a greenfield project even if it is more than 5 years;
- replacement of the “better off overall test” with a lower “no disadvantage test”;
- greater employer powers in relation to Greenfield agreement;
- make it unlawful to bargain about job security questions such as the engagement of casual, temporary and contract labour.

No Disadvantage Test (NDT)

Employees may be ‘disadvantaged’ in all sorts of ways through the alteration or removal of non-pecuniary conditions and benefits. For example, even if an employee is no ‘worse-off’ financially as the result of a certified agreement, he or she may be worse-off in personal enjoyment terms measured as job satisfaction or enjoyable family life. The scope for disagreement over meaning and interpretation is boundless. The whole assessment of the NDT by academics and other labour market commentators has been fairly condemnatory. A prominent argument is the fact the NDT does not prohibit the negotiation of reductions in the terms and conditions of employment by employees in any strict sense.

Individual Arrangements / Enterprise Contracts

The Commission proposes a new form of agreement that can adjust or replace the relevant Modern Award or reduce its terms, the content being determined unilaterally by the employer and not subjected to negotiation, a vote of employees or approval of the Fair Work Commission. It would be compulsory to new employees and “opt in” for existing employees, with a 1 year notice to revert to the Award. This is a contract dictated by one party.

We reject recommendation 16.2 to replace BOOT with the no disadvantage test. The draft report has already acknowledged that employees already are disadvantaged when it comes to negotiating an agreement with the employer.

The Enterprise Contract would not be subject to the existing “better off overall test” that currently applies to enterprise agreements and individual flexibility arrangements. Instead, it would be tested against a weaker “no disadvantage” test.

If therefore has the key features of two previously abandoned instruments. One is “employer greenfield agreements”, which only existed under Work Choices. These enabled an employer to agree with itself the conditions that would apply to new employees – but only in a new establishment, whereas enterprise contracts would apply in any establishment of any size. These greenfield agreements led to frequent cuts in penalty rates and other conditions.

Australian Workplace Agreements, which even when they were subject to a no disadvantage test (before WorkChoices), were shown to lead to lower pay and conditions (and/or to be used for union avoidance), and which under WorkChoices could be offered as a condition of employment.

Industrial Disputes and Right of Entry

Although the draft report notes that strikes are at a very low level it proposes extensive further restrictions on the right to strike. Remove access to protected industrial action (such as a strike) unless the employer has agreed to bargain or the union has secured a Majority Support Determination. This would result in the introduction of a US style “union recognition” system widely abused by anti-union forms (and overturns the way access to protected industrial action has worked under all version of the law since it was first introduced in 1993). Greater scope for employers to seek orders ending or suspending lawful strikes and greater powers for employers to stand down workers who take legal strike action. Higher penalties for unlawful strikes, and additional restrictions on the rights of workers to meet with their union in the workplace.

Breach of International Labour Convention

The Productivity Commission recommendations, regarding the aspects of restricting industrial disputes and limiting right of entry, clearly offends international conventions ratified by the Australian Government. It offends some of the most fundamental international conventions, such as the *Right to Organise and Collective Bargaining*

*Convention*⁴¹- a convention that was entered into by our Federal Government in 1949. The convention states in Article 2:

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this article.

The draft report has recommended policy changes that clearly breaches the Commissions legislated guideline to ensure that Australia meets its international obligations and commitments.⁴² The draft report merely provided three pages of dribble on how Australia is "not obligated", yet provided recommendations that clearly restricts rights to industrial action and right of entry.

Competition Policy

ETU highlights that the current labour exemptions from the Competition and Consumer Act 2010 (Cth) exist because of the recognised inequality of bargaining power that exists between employers and workers. The role and design of competition law is to deal with market distortions and inefficient resource allocation through regulating aggregations of capital. It is not appropriate to use competition law to regulate aggregations of labour. While some argue that competition law and labour law are analogous, and therefore should be subject to the same regulation, such arguments fail to properly understand the nature of labour and the purpose of labour regulation.

⁴¹ C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312243

⁴² Section 8(j) Productivity Commission Act 1998

It is well established and recognised internationally that labour is exempt from most aspects of competition law for two reasons. Firstly, the nature of capital is different to the nature of labour. Secondly, there is important societal value in labour being able to collectively bargain to improve wages and conditions of employment. The second reason is also reinforced by Australia's international human rights obligations, in particular ILO Convention 98.⁴³ The right of a worker to join with other workers and freely associate in a union is recognised internationally as a fundamental human right. The right to collectively bargain is a fundamental right which should not be encroached on by competition law principles which seek to ignore the inequality of the bargaining relationship and the ethical and social imperatives of a fair and equitable labour 'market'.

A workplace is not the same as the marketplace and should not be subjected to 'anti-competitive' regulation. Labour should not and cannot be characterised as a mere 'resource' or 'commodity' that can be treated like an economic unit of production. Labour, in any civilised society, must be treated as a vital part of the social framework which respects the rights of an individual to earn a living and the rights of workers to collective bargain to improve their pay and working conditions.

Conclusion

As it stands the draft report represents the beginning of a renewed attack on the working conditions of all Australians and is the beginning of a process that will leave working Australians worse off.

In our view there is a clear need for the Productivity Commission to comprehensively review the draft report in its entirety, and the Commission will need to reconsider its position on the fundamental principles that underpin the review to provide any possibility of developing sound and balanced recommendations in the final report.

⁴³ "The Right to Organise and Collective Bargain", ratified by Australia in 1973.