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Introduction

The Queensland Council of Unions (QCU) is the peak union body in Queensland. The QCU made a submission to the Productivity Commission's original enquiry and is happy to follow up with a response to the interim report.

The spectre of WorkChoices looms large in the minds of industrial organisations within the Australian workplace relations framework. Some policy makers have learnt from the mistakes made by the Howard Government in WorkChoices and some have not. Thankfully one mistake made in WorkChoices is not being repeated and that is having law firms draft the legislation with no reference to anyone. At least in this case the Productivity Commission is seeking the views of the parties in some but not all cases.

A number of the problems of the WorkChoices legislation are being repeated however, including interference with institutions, the better off overall test (BOOT) or no disadvantage test (NDT), increasing bargaining power of employers at the expense of employees and looking to remove genuine and legitimate industrial strategies available to employees and their unions. Similar to WorkChoices, a number of Productivity Commission recommendations seek to solve problems that do not exist. Reduction in conditions of employment, in particular penalty rates, are vehemently opposed by the union movement and will not be removed without a struggle.

This submission replies to every section of the interim report that seeks a response, and several that do not. It is a problem in itself that some of the recommendations are presented as a *fait accompli*. The QCU has not felt restrained from making comment with respect to those matters that are contained in a draft recommendation with which we disagree, and in particular where there is no justification for the changes sought. The submission provides a response in relation to the Chapter headings as they appear in Draft Recommendations, findings and information requests of the Productivity Commission draft report.

Chapter 3 Institutions

The Productivity Commission did not invite comment with respect to one of the most concerning and potentially dangerous set of recommendations. The Queensland Council of Unions is opposed to any measures that might undermine the independence of the Fair Work Commission. Careful consideration would need to be given to any measure that would interfere with the tenure of tribunal members. Moreover, public confidence in an institution could be damaged by any perception of interference in its operation. There appears to be little justification for the recommendation concerning appointments of tribunal members. If one was to examine the appointments made by governments in recent years, the bias would not be towards representatives of employer organisations or unions, but rather lawyers. It is important to understand that a primary skill that

should be considered for appointment to the Fair Work Commission is the capacity to resolve industrial disputes and this skill is best gained from experience in industrial organisations.

The Productivity Commission Report also considers the development of separate divisions within the Fair Work system. This approach is reminiscent of the Office of the Employment Advocate (OEA) that was introduced in the *Workplace Relations Act 1996* (Balnave et al 2007; Bray et al 2006; Sappey et al 2006) and Australian Fair Pay Commission (AFPC) that was introduced by WorkChoices (Bray and Stewart 2013; Bray et al 2005; Hall 2008; Waring et al 2006). Both of these new institutions were intended to dilute the influence of the Australian Industrial Relations Commission (AIRC), by taking away some aspects of agreement ratification (Balnave et al 2007; Watson et al 2003) and the determination of minimum wage rates in its entirety (Balnave et al 2007; Waring et al 2006). The AIRC and its predecessors had considerable experience at both functions and had not demonstrated any abrogation of its responsibilities (Bray et al 2005; Sappey et al 2006; Waring et al 2006).

As is noted elsewhere, the OEA oversaw a significant diminution of the NDT (Balnave et al 2007; Mitchell et al 2005; Rowse 2004; Sappey et al 2006; Sutherland 2007; Waring and Lewer 2001). AWAs that were approved by the OEA often reduced significant minimum standards and included “quantifiable consideration” to offset the removal of standard conditions and this trade off amounted to truck¹ (Mitchell et al 2005; Waring and Lewer 2001). Conversely the conditions traded away in AWAs, that were not monetary, were never taken into consideration for the assessment of the NDT (Mitchell et al 2005). “The OEA operated entirely in private and issued no reasons for the decisions made by its ‘faceless staff’” (Stewart 2011:565). The secretive operation of the OEA contrasted to the open hearings within the AIRC that were able to shed light on its decisions, and those decision were subject to appeal (Mitchell et al 2005). We are also aware that of the 1,748 AWAs lodged between April and October 2006, 89% removed a protected award condition (Parliament of Australia 2008). This shocking statistic demonstrated that without adequate transparency even the substandard safety net of WorkChoices was not met when agreements were approved in private.

There was no obvious reason, other than the ideology of the government of the day, to remove such basic functions from an established institution. The AIRC decisions regarding minimum wages were subject to scrutiny and rigorous evidentiary procedures whereas the AFPC, like the OEA lacked transparency (Waring et al 2006) Apparently one of the purposes of creating the AFPC was to remove tribunal members with a union background from appointment (Waring et al 2006) and this reasoning appears to be adopted in relation to new institutions being advocated by the Productivity Commission. The diminution of the powers of the AIRC, the independent umpire, was not well received by the public and, as is previously discussed, the approval of AWAs by the OEA lacked transparency. The creation of new bodies, for no apparent reason, adds to an unnecessary level of complexity associated with the workplace relations framework (Stewart 2006) and should be resisted.

¹ Truck meaning payment in kind (Yerbury and Karlsson 1992)

Chapter 4 National Employment Standards

There appears to be little justification for the recommendation concerning the recommendation to prohibit any provision for new public holidays declared by state or territory governments (recommendation 4.2). This recommendation would appear to be an intrusion into the capacity of state governments to regulate public holidays and perhaps act in accordance with a mandate. There would be little point in a state or territory government introducing a new public holiday, for whatever reason without it being able to be enforced as an industrial right through an industrial instrument. In November 2014 the Newman Government declared a once off public holiday to coincide with the G20 meeting Brisbane. This public holiday was to alleviate traffic and assist with security measures deemed necessary for the safe operation of the G20 summit (Queensland Parliament 2013). Presumably, if legislation reflecting recommendation 4.2 had been in place, the ability of the Newman Government to introduce measures that it saw fit for public safety would have been thwarted. As such recommendation 4.2 is contrary to the democratic structures that operate in Australia.

Recommendation 4.3 advocates the further cashing out of annual leave. It is understood that this recommendation seeks to extend the amount of annual leave that can be cashed out beyond the minimum balance of accrued leave. Annual leave of four weeks is a basic minimum condition that has been a feature of the Australian workplace relations framework for over four decades. It has a specific purpose and should not be the subject of bargaining below which this minimum standard should be allowed to drop. Again this was an aspect of the WorkChoices legislation that, whilst adopting the rhetoric of choice, provided a means by which existing conditions can be eroded. There is little doubt that the bargaining power in the employment relationship in almost all cases will favour the employer (Stewart 2006). This combined with the proposed enterprise contract, and its apparent lack of transparency, would enable employers to reduce this basic condition of employment to the detriment of workers who may well be given little option but to accept the reduced condition of employment.

The Productivity Commission seeks information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carer's leave) if they so wish, and whether such a mechanism would be worthwhile.

The better question for the Productivity Commission to be asking is why employees would need personal or carers leave? If the nature of the engagement was truly casual, the employee would simply not attend work when it was necessary to take such leave. The fact that this suggestion is being contemplated demonstrates that the employees in question have a need to take paid leave from their employment. The need for paid leave from employment would indicate that such employees are reliant on their income on a weekly basis and the employment relationship is on-going (Belnavé et al 2007). If viewed objectively, the relationship between employees who would wish to avail themselves of these forms of paid leave is not truly casual but demonstrative of the broader over-use or even misuse of casual employment.

Employers in a number of industries, such as the hospitality industry, use casual employment to provide flexibility (Barnes and Fields 2000; Buultjens and Cairncross 2001). Employees in these

industries are denied access to all forms of paid leave and have little or no employment security. It is precisely for these reasons that casual employment is so popular with employers (Sappey et al 2006). The discipline that casual employment holds over a workforce further tips the balance of power in favour of the employer (Belnavé et al 2007). Many employers and employer organisations will publically suggest that casual employment is necessary as it suits the needs of both the employer and the employee (Bray et al 2005). That there is sufficient interest in this proposition would tend to belie this supposed mutual benefit of casual employment.

It is extraordinary that the Productivity Commission would ask this question in part of its interim report whilst in another recommend restriction on the matters that can be bargained about at a workplace, including a restriction on the terms of engagement for casual employees (see recommendation 20.1). One of the reasonable matters that employers and employees might agree is conversion of casual employment to permanent employment that would satisfy employees in the category being contemplated by this question. If an employee is in need of paid leave and has an on-going employment relationship with the employer, then chances are they are not really casual and certainly not enjoying their status as a casual employee

Chapter 5 Unfair dismissal

The Productivity Commission seeks further views on possible changes to lodgment (sic) fees for unfair dismissal claims.

Unfair dismissal is a perennial source of complaint from employers. Whenever an enquiry of this nature is made, employers will provide stories of being compelled to pay “go away” money to applicants in unfair dismissal cases (Balnavé et al 2007). For every employer that claims to have settled an application without merit for commercial reasons, there is an employee who has been vindicated by payment of an amount of money from their former employer. Settlement is likely to be in the order of a few weeks’ pay that goes nowhere near compensating the employee for hurt, humiliation, loss of reputation, loss of projected earnings and loss of future accrual of entitlements that can occur from being unfairly dismissed.

The primary matter that is taken into consideration for compensation for unfair dismissal is a loss of income up to a maximum of six months’ pay (Sappey et al 2006). Termination of employment can have a devastating impact on employees (Bray et al 2006; Pocock et al 2008). By comparison to compensation that is awarded to applicants in other jurisdictions the amount either awarded or negotiated in relation to unfair dismissal is woefully inadequate. We would urge the Productivity Commission to consider the importance of an effective unfair dismissal regime to providing fairness in the workplace and that also promotes good human resource practices and punishes lazy and/or vindictive management.

The information sought, as well as the recommendations made by the Productivity Commission appear to be in the context of the skewed interpretation of payment being made to the employees in order to settle unfair dismissal claims. An alternative explanation is that the compensation awarded

or negotiated in this jurisdiction is so low that employers, particularly large and wealthy employers, can easily frustrate the intention of the unfair dismissal legislation by paying a relatively minor sum of money and terminate employment with impunity.

It is for these reasons that the QCU submits there is no justification for any deterrent to employees making application for relief from unfair dismissal as appears to be suggested by the information sort. Moreover, a number of the recommendations in the interim report are opposed for similar reasons.

The removal of the emphasis on reinstatement (recommendation 5.3) would further enable employers to wrongly terminate employment with impunity. In the case of large employers there is no reason why an employee cannot be reinstated if they are wrongly dismissed. This is predominantly the case for employees who have developed specific skills particular to an employer and that employee would struggle to find suitable alternative employment. Perhaps a better line of enquiry might be why there is such a low level of reinstatement, when it is meant to be the primary objective. The trade union movement maintains that the best remedy for unfair dismissal is to ensure the employee wrongly dismissed remains in or returns to employment.

It would also appear that the recommendations have been made on the basis that there is insufficient consideration to the merits of a case by the tribunal and/or the parties (e.g. recommendation 5.1). This preconception again has its source in employer "war stories" rather than any hard evidence. The Fair Work Commission deals with a large number of unfair dismissals and tribunal members will provide guidance to applicants that assist with settling an application, where there is a genuine desire for the matter to be settled. Merits of the application are fundamental to the conciliation process as it currently stands and this has been the practice for as long as the unfair dismissal jurisdiction has existed. Applications being dealt with on the papers could well deny the tribunal member important information that would assist in the resolution of the application. Under such a system, there could be a tendency for applications to be determined on how well they are written, as opposed to their merits.

The other recommendation that warrants comment is recommendation 5.2. It is currently the case that an unfair dismissal case could be unsuccessful even when an employer has not followed procedural fairness as well as they might. It is however a matter of judgement for a tribunal to exercise in the determination of whether a dismissal is unfair. A leading authority in the way in which the Fair Work Commission considers unfair dismissal application is *Byrne v Australian Airlines Ltd [1995] HCA 24*. In this matter the High Court describes the intersection between procedural fairness and the substantive matters of a termination of employment in considering the meaning of harsh, unjust and unfair:

"A dismissal with notice may be harsh, unjust or unreasonable because it is based on a ground defined as such by cl 11(b). This refers to such matters as termination "on the ground of" race, colour, sex and marital status. It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be

unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”

Recommendation 5.2 would appear to advocate the removal of discretion on the part of the tribunal so that even the most flawed and objectionable exercises undertaken by an employer do not result in reinstatement or compensation. Again this recommendation is made on the mistaken belief that employers’ interests are not protected in relation to unfair dismissal.

Poor procedures, for example terminating an employee’s employment via text message, should be discouraged. There is no doubt, that the means by which such sensitive information is provided to the employee can have a detrimental impact, if conducted poorly. The legislative framework needs to act as a deterrent against employers acting callously towards their workforce.

Chapter 6 The General Protections

Recommendation 6.4 advocates placing a cap on compensation and this recommendation is opposed by the QCU for similar reasons as are set out in relation to unfair dismissal. That is, if compensation is inadequate it will not provide any disincentive for wealthy employers to mistreat employees. We are unaware of any evidence that would suggest that compensation awarded to individual applicants is excessive. Anecdotally it has been suggested that compensation arising out of the general protections has been quite modest.

Chapter 8 Minimum wages

Recommendation 8.1 is concerned with the low paid and unexpected variations in economic circumstances. Existing annual wage reviews encapsulate a broad range of economic data, indicia and projections. The FWC already considers the circumstances of the low paid at length in its decisions.

Chapter 9 Variations in uniform minimum wages

The FWC can already make temporary variations to its annual decisions as is suggested by recommendation 9.1. The problem is that all such applications have to date been so lacking merit that they have been unsuccessful. It is very easy for an employer or group of employers to say that they have an incapacity to pay for a wage increase but it is quite another to be able to prove incapacity to pay.

The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria.

Age based rates of pay are discriminatory. As such the trade union movement supports their removal. The structural efficiency principle that was introduced in the late 1980s should have provided a skill-based career path that would reward employees on the basis of the acquisition of skills through accredited training. A return to payment on the acquisition of skills would be preferable to an age-based pay structure.

Recommendation 9.2 deals with training and skill acquisition which is something that can actually contribute to levels of productivity on a national, industry and enterprise level. Vocational education and training alone is likely to have the greatest impact on productivity of all of the matters that have been considered in this interim report. We would remain very concerned about any review intended to roll back advances made through the Modern Award Review with respect to apprentice wages and competency based progression for a number of key trades.

Chapter 10 Measures to complement minimum wages

The Productivity Commission invites participants' further input on the feasibility, merits and optimum design on an earned income tax credit in Australia, what its introduction might mean for future minimum wage determinations and employment outcomes, and in what conditions it would be appropriate to implement such a scheme.

The QCU is unable to assist with the particulars of such a scheme. It does however raise concerns that consideration is being given to a means by which a lower minimum wages could be justified. The QCU remains steadfastly opposed to any reduction in, or avoidance of the minimum wage by any employer. This would be particularly the case if the taxpayer is expected to subsidise an employer that cannot comply with minimum employment standards.

Chapter 12 Repairing awards

The Productivity Commission should take care not to provide an apprehension of bias with respect to headings of this nature. Modern awards within the Fair Work system are not in need of repair and have been the subject of continual review. This heading presupposes a problem that quite simply does not exist.

There appears to be universal consensus for the discontinuance of quadrennial reviews of awards (Workplace Express 2015). Such a system tends to promote change being sought for changes' sake, in that parties feel the need to raise matters in a review because it is occurring. The alternative would be for application to be made by an interested party for amendment of the modern award on a needs basis.

The QCU opposes the creation of any separate divisions within the tribunal as is recommended by the interim report (Draft recommendation 12.2). As is discussed throughout this report the Productivity Commission should learn from the many mistakes made by the Howard Government with the

introduction of its WorkChoices legislation. Aside from its unfairness, WorkChoices included a raft of new concepts which undoubtedly contributed to its failure as public policy (Stewart 2006).

The creation of the Australian Fair Pay Commission (AFPC) to replace an existing tribunal charged with the same responsibility for a century defied logic. The creation of the AFPC was on top of the Office of the Employment Advocate (OEA) that had been created to take approval of AWAs away from the existing tribunal that had experience with approving agreements. As will be discussed at length in relation to the no-disadvantage test, the OEA was bureaucracy under ministerial control that clearly had the charter of approving documents outside of public scrutiny.

The QCU would caution the Productivity Commission against the creation of new divisions or tribunals where there is no need for change. The Fair Work Commission currently enjoys a high degree of public confidence in terms of its independence and integrity. That public confidence could easily be dissolved in the event of new bodies being created that have a perception of being wedded to particular ideology or disposition. The creation of a new Minimum Standards Division is unnecessary and can only lead to the perception of it being created to do the Government's bidding.

Chapter 14 Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurants and cafe industries

The Productivity Commission has determined that Sunday penalty rates should be reduced for specific occupations (recommendation 14.1). In the event that the impact of this recommendation on this group of low paid workers is not understood, the Productivity Commission may find the following table instructive:

Table 1
Productivity Commission Penalty Rate Reduction
Modern Awards

Based on age 21 rate as at 1 July 2015

Award	Permanent	Casual
Amusement, Events and Recreation Award 2010		
Saturday Penalty	Nil	
Sunday Penalty	0.5	0.5
Reduction	0.5	0.5
Hourly Rate (Ticket seller)	18.47	23.09
Sunday Reduction/hour	9.24	11.54
8 hours shift loss	73.88	92.35
Fast Food Industry Award 2010 (weekend rates include casual loading)		
Saturday Penalty	0.25	0.5
Sunday Penalty	0.5	0.75
Reduction	0.25	0.25
Hourly Rate (Level 1 Sales)	18.98	18.98
Sunday Reduction/hour	4.74	4.74
8 hours shift loss	37.97	37.97
General Retail Industry Award 2010 (weekend rates include casual loading)		
Saturday Penalty	0.25	0.35
Sunday Penalty	1.0	1.0
Reduction	0.75	0.65
Hourly Rate (Shop Assistant)	18.98	18.98
Sunday Reduction/hour	14.24	12.34
8 hours shift loss	113.92	98.70
Hospitality Industry (General) Award 2010 (weekend rates include casual loading)		
Saturday Penalty	0.25	0.5
Sunday Penalty	0.75	0.75
Reduction	0.5	0.25
Hourly Rate (Level 2 Bar Attendant)	18.47	18.47
Sunday Reduction/hour	9.24	4.62
8 hours shift loss	73.88	36.94
Registered and Licensed Clubs Award 2010 (weekend rates include casual loading)		
Saturday Penalty	0.5	0.5
Sunday Penalty	0.75	0.75
Reduction	0.25	0.25
Hourly Rate (Level 2 Bar Attendant)	18.47	18.47
Sunday Reduction/hour	4.62	4.62
8 hours shift loss	36.94	36.94
Restaurant Industry Award 2010 Intro & Level 2 (weekend rates include casual loading)		
Saturday Penalty	0.25	0.5
Sunday Penalty	0.5	0.5
Reduction	0.25	Nil
Hourly Rate (Level 2 Waiter)	18.47	18.47
Sunday Reduction/hour	4.62	Nil
8 hours shift loss	36.94	Nil
Restaurant Industry Award 2010 Level 3+ (weekend rates include casual loading)		
Saturday Penalty	0.25	0.5
Sunday Penalty	0.5	0.75
Reduction	0.25	0.25
Hourly Rate (Level 3 Cook)	19.10	19.10
Sunday Reduction/hour	4.78	4.78
8 hours shift loss	38.20	38.20

The table sets out the relevant modern award, the Saturday and Sunday penalty, reduction that would occur per hour and then the computed result of that hourly reduction for an eight hour shift. The left hand column applies this computation to a permanent employee and the right column to a casual employee.

As can be seen from the proposed reduction to income for an eight hour shift, this reduction will mean that already low income earners will be placed under severe economic pressure. Such a reduction in income for the low paid jeopardises providing the basics of life such as food, clothing and shelter. The reduction of penalties, with what we believe will be an ultimate goal of their removal, is the recipe for a working poor in the style of the United States where holding a job is no safeguard against homelessness. The union movement rejects this approach.

The cases that have been chosen by the Productivity Commission are curious. It is noted that highly unionised areas of employment that are associated with penalty rates, such as nurses, paramedics, fire fighters and police officers are excluded from the current recommendation. This in itself smacks of a political compromise in order to avoid maximum public animosity to the recommendation. The decision to pick on the most defenceless, to remove their penalty rates, has rightly been criticised as creating industrial apartheid. Moreover, any suggestion that the removal of penalty rates is in anyway relevant to skill levels defies logic. The base rate upon which the penalties are applied, varies according to skill, whereas the disadvantage to the employee of working unsociable hours is the same, regardless of skill levels.

In addition, it is noted that the Productivity Commission suggest that the Fair Work Commission should undertake a review of other occupations' penalty rates in light of this interim report. This suggestion should be of concern to those employees who are currently in receipt of penalty rates but not listed by the Productivity Commission at this stage.

The Productivity Commission seeks views on whether there is scope to include preferred hours clauses in awards beyond the current narrow arrangements, including the scope for an arrangement where an employer would be obliged to pay penalty rates when it requested an employee to work at an employee's non preferred time in the employment contract.

What would the risks of any such 'penalty rate' agreements be and how could these be mitigated?

Preferred hours clauses are intended to undermine the safety net. In particular, preferred hours clauses have been used by employers to reduce labour costs by the removal of penalty rates and overtime payments (Cameron 2012). The concept of preferred hours is currently being played out in relation to the Capalaba Sports Club. Capalaba Sports Club will be mentioned later in this submission in relation to the no-disadvantage test. We oppose the concept of preferred hours on the grounds it undermines well established minimum standards that exist for working unsociable hours. Over a long period of time, it has been established that the weekend is the time at which communities and families have shared time. Preferred hours undermine this long standing concept.

Chapter 15 Enterprise bargaining

The Productivity Commission seeks feedback on whether there is a mechanism that would only restrain pattern bargaining:

where it is imposed through excessive leverage or is likely to be anticompetitive

while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to.

The case for the exclusion of pattern bargaining has never been made out. Enterprise Bargaining, as is discussed later under this heading, has failed to sustain productivity improvements at an aggregate level. Enterprise Bargaining has certainly not provided the 25% increase to productivity that was promised by the Business Council of Australia in the late 1980s. Employer organisations consistently oppose pattern bargaining but the reasoning for their opposition is absent. It is as if pattern bargaining is by definition a bad thing to be avoided despite enterprise bargaining not producing the results that were promised. Similarly the absence of project agreements for the building and construction industry defies logic. Much of the disputation that occurs in building and construction is as a result of contractors or sub-contractors attempting to avoid prevailing conditions.

The trade union movement would welcome the capacity of industrial parties to enter into agreements that extend beyond the current restrictions of being enterprise-based. It may well be the case that the current arrangements are satisfactory to employers and unions in some industries. It is equally possible that industry level negotiations or site level negotiations are more appropriate for specific industry sectors.

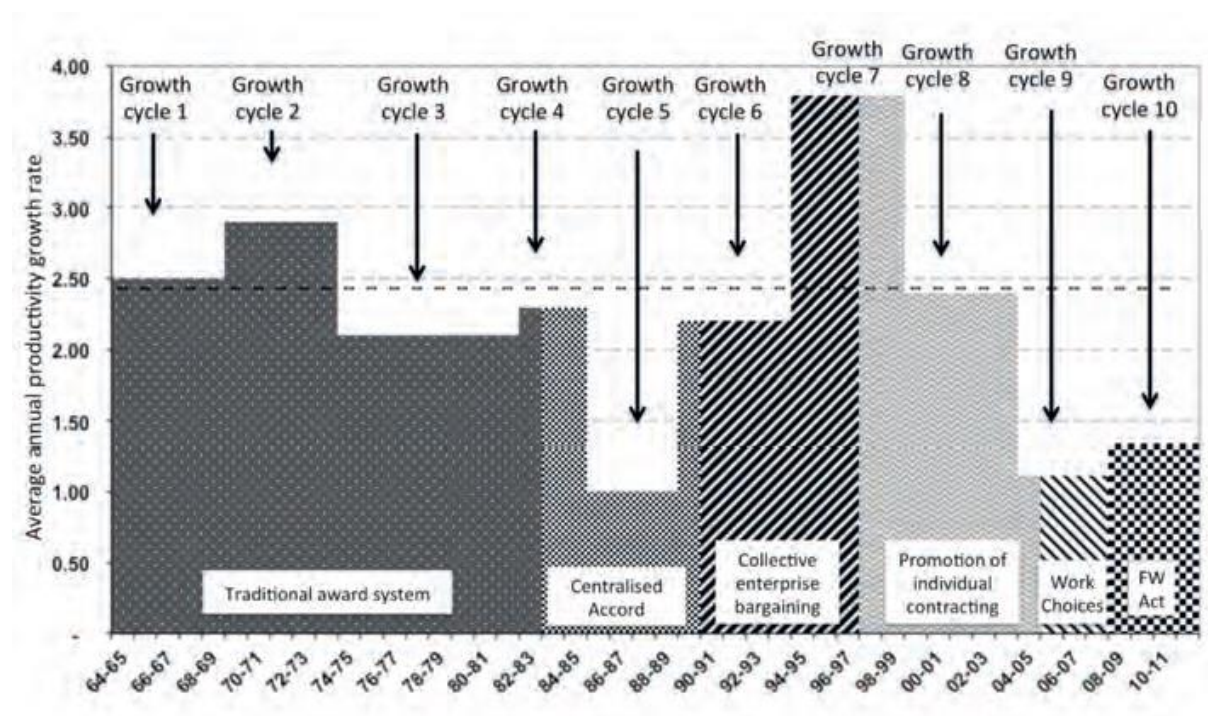
The case for imposing statutory requirements for employers and employees to discuss productivity improvements as part of the bargaining process, or for the mandatory inclusion of productivity clauses in agreements, is not strong. Voluntary agreements that promote productivity are highly desirable, but such agreements, and the gains they deliver, should arise from better management, not from a regulated requirement, which is likely to have perverse effects.

As is stated in the interim report, the case for “imposing statutory requirements for employers and employees to discuss productivity improvements is not strong”. An early examination of agreements that included productivity clauses found them to be fairly meaningless (Rimmer and Watts 1994). Moreover, the capacity of enterprise bargaining to deliver productivity improvements is in itself subject to serious doubt when considered objectively.

There is doubt as to whether an industrial relations system impacts upon labour productivity at all. Claims that a particular industrial relations policy positively impacts upon the economy should be treated sceptically “as there is a reasonable probability that the effects may be small, even non-existent, or perhaps the opposite of what is claimed” (Peetz 2012:269).

Longitudinal, industry and international comparisons demonstrate that there is no macro-level relationship between an industrial relations system and productivity performance. At the international level, Peetz (2012) adopts the Varieties of Capitalism (Hall and Soskice 2001) approach to differentiate between co-ordinated and liberal market economies and establish that neither approach is associated with an absolute advantage in terms of productivity. Conversely and perhaps unsurprisingly on the other hand, co-ordinated market economies outperform their liberal counterparts on unemployment and poverty levels. The longitudinal comparison undertaken by Peetz (2012) of average annual productivity growth rates is made for the various phases that have been earlier described in this paper. It is worth including a graphic that demonstrates the results of labour productivity growth for the relevant periods of time.

Figure 1 Labour Productivity Growth over Productivity Cycles
12 Market-sector industries, 1964-65 to 2010-11 (as contained in Peetz 2012:276)



The extraordinary result is that the traditional award system that was supposedly such a drain on productivity demonstrates the longest, sustained period of productivity growth. The Accord and WorkChoices phases demonstrate the lowest levels of productivity growth. Whilst the period immediately following the introduction of enterprise bargaining demonstrates the most marked increase in labour productivity, there are explanations other than enterprise bargaining for this phenomenon. The other possible explanation is that the surge in productivity that occurred in the 1990s was as a result of an unsustainable increase in work intensification that happened to coincide with that era (Belnavé et al 2007; Quiggin 2006; Townsend et al 2013).

Evidence from specific industries also casts considerable doubt on the proposition that enterprise bargaining was responsible for the surge in productivity that occurred in the 1990s (Townsend et al 2013). One would have expected manufacturing to be where the boost would occur and no such boost occurred (Hancock 2012). Mining enjoyed an increase to productivity but that commenced well before the introduction of enterprise bargaining and fell off soon after. Construction, similarly, suffered a decline following enterprise bargaining's introduction (Hancock 2012). Hancock (2012:298) summarises the relationship between enterprise bargaining and productivity as follows:

“The supposition that it was due to enterprise bargaining is hard to sustain. Insofar as there was a surge, it seems either to have occurred in the wrong industries or, if it was in the right industries, to have been a continuation of a process that pre-dated enterprise bargaining.”

At the time of WorkChoices, Peetz (2005) compares productivity growth between Australia and New Zealand as well as the same longitudinal comparison within Australia. Prophetically Peetz (2005) predicts that WorkChoices would not provide for any improvement in productivity levels

In short, rates of productivity growth since the introduction of the Workplace Relations Act have been, if anything, inferior to the rates that were achieved under the traditional award system in the 1960s and 1970s. The New Zealand experience suggests that further moves to reduce the safety net under individual contracts are likely to lead to reductions in the rate of growth or productivity.

What should be the basis for the revised form of the no-disadvantage test, including whether, and to what extent past forms of the no-disadvantage test provide a suitable model and would be workable within the current legislative framework?

The report makes recommendations to change the existing Better Off Over-all Test and this is of considerable concern to the union movement. It was the removal of the no-disadvantage test (NDT) that resulted in the unfairness of WorkChoices being highlighted to the community. Despite the Howard Government back-peddling on the NDT, the damage had already been done. Policy makers would need to be extremely cautious about any negative (from an employee perspective) change to the BOOT in light of this recent history.

A proposal to change the BOOT in combination with the proposed enterprise contracts provides the potential for clandestine avoidance of minimum standards. The comparison to the take it or leave way in which AWAs were provided by employers appears to be replicated in the concept of the enterprise contract. In addition, it is not intended to apply the BOOT before the application of the enterprise contract to the employee in question. AWAs were notorious for the dubious application of the NDT, even before WorkChoices (Mitchel et al 2005; Sutherland 2007; Waring and Lewer 2001). The lack of transparency combined with the attitude adopted by the Office of the Employment Advocate made for a diminution of the protection available to workers (Mitchel et al 2005; Stewart 2011). As is stated elsewhere, there is no justification for yet another form of industrial instrument and/or any new divisions within the Fair Work Commission. The lessons of WorkChoices demonstrate

that this combination of lessening transparency of the application of the NDT and providing employees with take it or leave it agreements can only lead to reducing minimum employment standards.

The existing Better Off Over-all Test has some obvious difficulties. It is not so much with the test itself but with the way in which an employer can apply the test to one set of circumstances for the purpose of passing the test and then apply the resulting agreement to a completely different set of circumstances. This problem with the application of an agreement that was developed and agreed to in another jurisdiction and then misapplied to another group of workers, has been illustrated at the Capalaba Sports Club south-east of Brisbane. The Club has contracted out its hospitality function to a labour hire company that is using its own non-union agreement that was made with employees in another state. The net result of the agreement would have been a loss of in the order of \$200 per week for at least one of the employees who has had the courage to expose this travesty. This employee then had her employment terminated for refusing to accept the agreement that would provide such an obvious disadvantage. Rather than looking for ways to reduce protections to workers, we would urge the Productivity Commission to consider ways in which this obvious abuse of process by employers can be eradicated.

There is absolutely no justification for the removal of any of the existing safeguards that are in place. Again the spectre of WorkChoices looms large with respect to the question of no-disadvantage in relation to approval of agreements. It is now history that the removal of the no-disadvantage test in WorkChoices was one of its most significant reasons for failure.

The QCU remains to be convinced that there is any need to depart from the existing provisions for greenfield agreements (recommendation 15.7). The question that arises is whether there is any evidence of a need for change in this aspect of the existing framework or whether it is a problem that is perceived.

Chapter 16 Individual arrangements

Previous comments have been made in this submission with respect to the no-disadvantage test. There also appears to be an implication that the number of employees that remain reliant on the award is a problem (recommendation 16.3). The number of employees considered as award only understates award reliance as a number of employment arrangements that are described as individual arrangements would include some reliance on the award (Macdonald et al 2001). The fact that employers of such a large number of employees do not seek to enter into agreements could demonstrate a number of matters but we are unaware of any definitive research on this topic. Logical explanations would include that the existing award is sufficiently flexible (Buultjens and Cairncross 2001).

Chapter 17 The enterprise contract

The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:

- *additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements*
- *the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised*
- *clauses that could be included in the template arrangement*
- *possible periods of operation and termination*
- *the advantages and disadvantages of the proposed opt in and opt out arrangements.*

In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies.

The QCU opposes the introduction of the new concept of the enterprise award. From the outset there is no need for any such an arrangement.

If after more than twenty years of enterprise bargaining being available, employers and employees are continuing with the award as the primary source of employment conditions, then they are likely to remain in those circumstance whether policy makers are happy with that fact or not. It is evident that awards provide sufficient flexibility for employers and that employees either lack the industrial muscle to shift the employer to enterprise bargaining or are themselves satisfied with the award. Although it is unlikely that employees are overly satisfied with the award, given the relationship between AWOTE and the minimum wage over the last decade (Fair Work Commission 2015).

Not only does the Workplace Relations framework not need another form of industrial instrument, the complexity that it would cause is not desirable. A consistent theme of this submission has been to urge the Productivity Commission not to replicate the errors of WorkChoices. As has previously been stated, the introduction of new and unnecessary concepts in WorkChoices undoubtedly went a long way to securing its failure in public opinion.

Enterprise Contracts appear to replicate many of the concerns that became apparent with the introduction of AWA's.

They are documents drawn up unilaterally by the employer without consultation and without a right for the involvement of employee's representatives. The opt in/opt out arrangement for existing

employees is fraught with danger. The draft Report recognises the inherent power imbalance in the workplace which would inevitably raise questions about how genuine any opt in or opt out arrangement would be. The ability to offer an Enterprise Contract to new employees as a condition of employment also raises concerns about the pressure placed upon any existing employee who does not accept the Contract.

The absence of scrutiny of an Enterprise Contract is a significant concern. An examination of AWA's, which were also not subject to scrutiny, highlighted that the great majority removed so called protected conditions of employment.

A promotion of Collective Bargaining is one of the current objects of the Act. Enterprise Contracts undermine that object as they would be unilaterally drafted and offered by the employer with no rights to bargain. Enterprise Bargaining itself would be undermined as employers could simply opt out of arrangements struck with workers and their unions by offering Enterprise Contracts on different terms. They would completely undermine the notion of 'settled rights' upon which enterprise bargaining was established.

Chapter 19 Industrial disputes and right of entry

The Productivity Commission seeks further input from stakeholders on how protected action ballot procedures may be simplified to reduce compliance costs, while retaining the benefits of secret ballots. Potential simplifications include:

- *removing the requirement that a protected action ballot specify the types of actions to be voted on by employees, and instead simply requiring a vote in favour of any forms of protected industrial action*
- *amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared*
- *granting the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot*

The simplest solution would be to remove any requirement for protected action ballot orders (PABOs). Up until the WorkChoices amendments there no necessity for PABOs and the case was never made for their necessity. The Act otherwise requires an employer to be given three days' notice of protected industrial action which is more than sufficient. The requirement for PABO is a further and unnecessary step for a group of workers to take in relation to exercising their rights. In the absence of the removal of the requirements for PABOs, the next best course of action would be the broader approval suggested that a PABOs "simply requiring a vote in favour of any forms of protected industrial action".

The Productivity Commission seeks further input from stakeholders on how 'significant harm' should be defined when the Fair Work Commission is deciding whether to exercise its powers under s. 423 and s. 426 of the Fair Work Act 2009 (Cth).

The union movement would oppose any suggestion that threshold upon which industrial action be terminated as a result of harm to a third party be reduced. This question was dealt with in a full bench if the Fair Work Commission in *CFMEU v Woodside Burrup Pty Ltd* [2010] FWAFB 6021 where it was rightly established that the threshold for termination of protected industrial action is quite high. Any reduction of this standard is an unnecessarily restriction the ability of employees to take protected industrial action.

The Productivity Commission seeks further input from inquiry participants on whether s. 424 of the Fair Work Act 2009 (Cth) should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low.

We are unaware of any need to amend the existing provisions in relation to this issue.

While the Productivity Commission sees a prima facie case for allowing employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban that impacts on the performance of normal duties, the Commission requests feedback from stakeholders about the risks that such a change may entail.

This would appear to be a softer option for employers to take retaliatory industrial action in a dispute situation. It would be difficult to ascertain how to calculate such a deduction. A typical ban used in lieu of a complete cessation of work is an overtime ban. In this case the employees undertaking the overtime ban are already accepting a loss through the earnings forgone by not working overtime. To further take up to 25% of the employees' income would appear to be excessive..

It appears that this recommendation would aggravate disputation rather than attempt to resolve it. Retaliatory protected industrial action falls into this category of making a dispute worse rather than bringing about a speedy resolution.

The Productivity Commission seeks further feedback from inquiry participants on what forms of more graduated employer industrial action should be permitted, and how these should be defined in statute.

Recommendations 19.7 and 19.8 seek to place further restrictions on right of entry for union officials. There appears to be no particular justification for these recommendations. The frequency of visits to a workplace is an irrelevance to the exercising of these rights and is also relative the size of the workforce. As per other discussions concerning right of entry, these recommendations, if enacted, would provide yet another unnecessary and unreasonable restriction on the work performed by union officials. In industries such as building and construction itinerant workforces and various phases of the construction project mean that continual visits to such a work place are necessary. Technical breaches of unnecessarily complex right of entry provisions has serious consequences for union officials and is inconsistent with freedom of association. The necessity to demonstrate membership at a particular workplace will itself be the source of argument. Where union members fear reprisal, demonstrating

union membership in a workplace could involve application to the Fair Work Commission and be burdensome for all parties involved.

Chapter 20 Alternative forms of employment

There is no case for the removal of matters that can form part of the discussions between an employer and group of employees, as is contemplated by recommendation 20.1. By removing discussions about forms of engagement, the agenda is restricted and belies any suggestion of collective bargaining. Recommendation 20.1 is not about fairness or productivity but rather increasing the power of employers in the workplace to the detriment of employees.

The inability of a group of employees to discuss and reach agreement with their employer about casual employment is an unfair restriction that denies employees the ability to have some input into their terms of engagement. The incidence of insecure employment has been an on-going concern to the union movement and the broader community. It is important to provide a means by which insecure employment can be bargained about and regulated.

Yet again the Productivity Commission has provided recommendation 20.1 as a *fait accompli* and does not seek any input into this aspect of the workplace relations framework. Policy makers would do well to consider that the perverse interference in what matters could be discussed between employers and employees was also one of the hallmarks of the WorkChoices legislation. It was also a feature of the legislative amendments made by the one-term Newman Government in Queensland.

The Productivity Commission seeks feedback on the extent to which unpaid internships have become more commonplace across the economy, whether any growth in such arrangements has led to problems rather than opportunities, as well as the potential remedies to any specific issues.

The QCU is unable to assist with any evidence in relation to this issue. Unpaid employment is obviously a problem if misused. A significant potential remedy is the payment of waiting time where an employee works and is not paid. One example of such a provision was in the former federal hotels award, the *Federal Hotels, Resorts and Hospitality Industry Award*.

The previous award contained a provision that could become a significant disincentive to the practice that was said to exist in hotels of “trialling” bar staff. This practice of “trialling” involved illegally engaging a bar attendant, ostensibly to see if they were capable of the job, then working the bar staff for an entire shift to come the conclusion that they were not the employee for which the hotel was looking. The hotel would get a free shift from the bar attendant who was not offered any further work. The waiting time provision would mean that an employee who had been trialled by unpaid work would not only be entitled to payment for that shift but also payment for the time until wages were paid. This provision did not survive the various restructures and simplifications of the award that is now the *Hospitality Industry (General) Award 2010*. The removal of this former provision has had adverse consequences for Award compliance.

Chapter 21 Migrant workers

The QCU welcomes the recognition of the problems associated with the exploitation of migrant workers. We would however point out that the enterprise contract, with its associated lack of transparency and capacity for being made a condition of employment, would provide unscrupulous employers with the mechanism to avoid the law.

Chapter 22 Transfer of business

There is no justification for recommendation 22.1. This is yet another example of the removal of safeguards for employees for no apparent reason. The Productivity Commission might also like to consider the practical implications of this recommendation to circumstances where an employer can provide adequate alternative employment to an employee in a redundancy situation.

Chapter 24 Competition policy

The Productivity Commission seeks further input from inquiry participants on whether the secondary boycott prohibitions in the Competition and Consumer Act 2010 (Cth) should be amended to:

- *amend or remove s. 45DD(1) and s. 45DD(2)*
- *grant Fair Work Building and Construction a shared jurisdiction to investigate and enforce the secondary boycott prohibitions in the building and construction industry.*

Yet again the Productivity Commission is enquiring as to whether it necessary or desirable to further tip the balance of bargaining power in favour of employers. Industrial disputation continues to be at record lows under the fair work system (ABS 2015). There is no justification for the removal of defences against secondary boycott legislation other than a deliberate attempt to place individual workers at risk for exercising their industrial rights. It would be an outrageous use of taxpayers' money to have a bureaucracy pursuing employees over potential or even spurious secondary boycott matters.

Chapter 25 Compliance costs

The Productivity Commission seeks data or other information on the extent to which the workplace relations system imposes unnecessary ongoing costs on unions, and how these costs are likely to be affected by draft recommendations proposed in this inquiry.

The right of entry provisions are the most striking case of red tape that were only ever intended to make it more difficult for unions to recruit new members and for employees to have access to their union. Right of entry provisions have provided yet another matter for employers and unions to litigate. The need to give an employer 24 hours' notice of the intention to enter a workplace has never been made out.

The PABOs as previously mentioned are an unnecessary step in the process of taking protected industrial action. PABOs did not exist before the WorkChoices amendments and there was no apparent need for them under the previously existing *Workplace Relations Act 1996*.

Enterprise bargaining requires significant effort on the part of unions and employers and unnecessarily duplicates a process that could logically take place at an industry level. A significant part of this submission is devoted to the indisputable fact that decades of enterprise bargaining have failed to produce the necessary results. Given that enterprise bargaining has failed to deliver on its promised productivity improvements, there would appear to be no justification for the examination of an alternative.

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