



Australian Education Union

Submission

to the

**Productivity Commission Draft Report on
Australia's Workplace Relations Framework**

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The AEU provides these submissions in response to the Commission's invitation for any interested person to examine and comment on its draft Report.

The AEU relies upon but does not intend to repeat the arguments and evidence it advanced in its original submissions on the various Issues Papers produced by the Commission for its Enquiry.

The AEU will confine its submissions to brief additional commentary on those particular draft Recommendations, Findings or Requests for Information produced by the Commission on which the AEU has not previously commented and with which the AEU takes issue due to their impact on its membership and the students and communities they serve.

In doing so it will follow the same structure or sequence to those draft Recommendations etc as provided by the Commission in its draft Report.

Chapter 3, 'Institutions', & Draft Recommendations 3.1 – 3.5

These recommendations concern the proposed introduction of fixed-term appointments for members of the Fair Work Commission (the FWC) and a re-structuring of that body into a Tribunal and a Minimum Standards Division (MSD) with different eligibility criteria for appointment to each. Members of the FWC would become fixed-term appointments through a process involving consultation with state and territory governments and others and the use of an expert 'appointments' panel. Renewal of appointment would become subject to 'success' in a performance review.

The AEU views these recommendations as a dramatic and un-necessary intervention. They would dramatically curtail the independence of the FWC and risk increase to the politicisation of that body. It would create reputational damage and reduce its standing in the community.

The recommendations ignore the function the FWC has, in the performance of its statutory role, to act judicially and afford natural justice or procedural fairness as a substantive right of participants in its deliberations. They appear to ignore the current capacity of government to appoint members with relevant expertise, e.g. for the existing Annual Wage Review Panel and other Expert Panels and, while acknowledging their development, does not give due regard to the current innovative practices within the FWC concerning the introduction of performance standards or timeliness benchmarks and the production of various 'bench books' which encourage greater knowledge and consistency in decision-making.

Rather than allow the above-mentioned, innovative developments to evolve, the Commission's approach appears to be the result of listening more to the concerns of some enquiry participants and ignoring the role the appellate jurisdiction of the FWC and the Courts have in achieving greater consistency in decision-making.

Changes of the magnitude proposed are unwarranted. It is simply unthinkable that award and annual wage determinations would be made by a panel of experts from economics, social science or commerce rather than one, as occurs currently, comprised of additional personnel with expertise in law and industrial relations.

Chapter 4, 'National Employment Standards', & Draft Recommendations 4.1 – 4.3, Information Request 1

The Commission notes that the NES has been largely uncontroversial. However, it remains somewhat 'risk averse' when considering either increases in regulatory measures such as an appeals mechanism where workers are denied access to flexible work arrangements or extension to parental leave or any need for a nationally consistent scheme for paid Long Service Leave. In the case of the former, it rejects calls for change and, in the case of the latter, it suggests the removal from the FW Act of the current 'transitional' provision in the NES¹ with the result that only state or territory LSL laws would apply.

The Commission does however make some precise recommendations about Public Holidays. The recommendation that the NES provide for substitution days is unexceptional. Most Modern Awards already make provision for this and the Commission's proposal would simply extend this to all awards.

The further recommendation that any additional public holidays gazetted by state or territory governments NOT result in employers having to pay for that Leave or any additional penalty rates where work is required on such a day would effectively render the public holiday largely illusory for the majority of workers other than for public sector workers outside the national system.

Suggestions for additional annual leave are effectively put off on the 'never-never' with an indication that all governments might periodically review the current 20 day cap. Any additional days, it is suggested, could be accommodated through increased cash-out provisions.

The Commission also asks for information on the practicability of enabling casual workers to exchange part of their casual loading for additional entitlements.

In this regard, the AEU notes the FW Act contains no definition of casual employment and this remains a continuing problem. The problem at the Award level is that the typical definition, namely that a casual employee is one employed as such and paid on an hourly basis, is simply circular in reasoning. It describes no substantive criteria to use in identifying whether particular work is casual or not.

¹ Fair Work Act, Part 2-2, Division 9.

The further problem in public sector education where the AEU has coverage is that casual employment is, largely, not really casual at all but a ‘permanent’ feature of the mode of engagement of many thousands of employees, especially in the TAFE sector, i.e. employees are engaged regularly and systematically for extended periods of time, even over many years but remain engaged as casuels. The casual rate of pay, also, in this sector, is generally not calculated on the basis of an ordinary hourly rate of pay plus a casual loading but as an ‘all-in’ rate derived from a previous ‘paid rates’ award environment.

Information Request 1

The AEU, as a general principle, does not advocate for the notion of exchanging salary for additional Leave entitlements. Leave of Absence should be a feature of the employment arrangement rather than a matter for any individual’s capacity to pay through forgone salary.

As an example of this, the AEU brings to the attention of the Commission that in NSW, part-time casual TAFE teachers have had access to paid Sick Leave and certain other entitlements. This entitlement is currently found in a federal enterprise agreement² but originated in arbitral and related proceedings in the NSWIRC initiated by the then NSW Teachers Federation that resulted in June 2005 in a variation to relevant award entitlements.

Chapter 5, ‘Unfair Dismissal’ & Draft Recommendations 5.1 – 5.4, Information Request 2

These recommendations propose the removal of reinstatement as the primary remedy for unfair dismissals, restrict access to compensation remedies to situations where there is no evidence of underperformance or misconduct, remove compensation for procedural unfairness in employer termination procedures – with employers being counselled or fined instead - and enable more cases to be processed ‘on the papers’, i.e. without a hearing.

While the Commission claims there is no need for fundamental reform and that its proposed changes are merely incremental in nature, the AEU views such proposed changes as inimical to the concept of a ‘fair go all round’ which the Commission itself acknowledges as one of several foundational elements of the FW Act unfair dismissal regime.

Under the proposals, it would become easier for an employer to ignore its own dismissal procedures, terminate the employment for alleged misconduct which falls short of serious misconduct and the dismissed worker would be denied a return to their job and receive only minimal compensation.

Denial of access to a reinstatement remedy cannot be justified on grounds of it being a significant burden for employers as the Commission’s own data shows a marked decline in reinstatements despite a significant increase in applications or lodgements.³

The proposed changes would constitute a significant compounding unfairness to an already unfairly dismissed worker.

² TAFE Commission of NSW Teachers and Related Employees Enterprise Agreement 2013, [2013] FWCA 8282 at cl 37

³ Draft Report, p839, Appendix B, Tables B.2

Chapter 6, 'General Protections', & Draft Recommendations 6.1 – 6.5

These protections generally serve to highlight that the legislative purpose was remedial. The Commission acknowledges this in stating, 'The broad scope of the protections was intended' and that the Australian Government intended this to be so⁴.

Despite this the High Court has held that the subjective intention of the alleged perpetrator of adverse action is centrally determinative in the absence of concrete evidence to the contrary – even where employee actions complained of were legal and carried out for legitimate union purposes.⁵ It would now also appear that despite the legislature affording employees certain workplace rights, e.g. that an industrial instrument provides a right to be absent on Sick Leave, should the exercise of that right cause difficulties to the employer, action including alteration of hours and time of work (rosters) can be taken against the employee with impunity. Such a development robs the legislative protection of any effective use to the 'victim'.⁶

The AEU is disappointed the Commission has not seen fit to adopt the AEU recommendation that the subjective intention of the 'perpetrator' not be determinative as a defence to a general protections claim.

The Commission's recommendations, e.g. to more narrowly define 'workplace rights', to introduce more preliminary steps in the litigation process, and to cap compensation would only operate to further restrict access to effective remedies. Such recommendations were an important 'cost' objective for business interests given the significant increase in general protections claims. This can only be interpreted as swinging the balance further in favour of employers who are the principal class of defendants in general protections claims.

Chapters 8-10 – Minimum Wages, Recommendations 8.1, 9.1-9.2 & Information Requests 3 & 4.

The Commission notes that the subject of minimum wages has long been a controversy and that the validity of the views held depends upon a range of empirical matters and the value judgments made. It further notes that empirical evidence to date hasn't been able to pinpoint the impacts of the minimum wage on matters such as employment⁷. It does however suggest that modest wage increases are unlikely to affect employment rates but that any marked increase in the ratio of the minimum wage to the average median wage (the minimum wage bite) is likely to affect employment levels.

⁴ Draft Report, p251.

⁵ *Board of Bendigo Regional Institute of TAFE v Barclay* [2012] HCA 32; *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41.

⁶ *CFMEU v Endeavour Coal Pty Ltd* [2015] FCAFC 76.

⁷ Draft Report, pp285-286. Only some 9 empirical 'quantitative' studies of minimum wage/employment effects in the Australian context are listed by the Commission (Draft Report, p300-301).

It thus paves the way for an approach which is designed to significantly limit wage increases. This is in an era when the Wage–Price Index is very low and trending downwards and even the Average Annualised Wage Increases provided in Enterprise Agreements are trending downwards.⁸

The AEU is concerned that such an approach risks exacerbating income inequality.⁹ The AEU values a more egalitarian society generally and advocates for a high-wage/high skilled economy. The AEU considers the Commission’s recommendations are more likely to enhance the prospects of the opposite result.

The recommendations would require the FWC, presumably restructured as earlier described, to consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid, to vary wage rates in awards more frequently downwards if circumstances required it, even after the completion of the annual wage review and for the Australian government to review (yet again) the apprenticeship and traineeship system.

The recommendations would continue the downward pressure on award wage fixation, especially the minimum wage bite, and a further review would do little to improve the current apprenticeship & traineeship system.¹⁰

The increased frequency with which award rates of pay could be varied outside an annual wage review indicates that awards would no longer carry the broad social function of a safety net but become increasingly a device for engineering the commercial objectives of business.

Chapter 12, ‘Repairing Awards’ & Recommendations 12.1-12.2

The recommendations propose the abolition of the current statutory requirement for the FWC to conduct a review of Modern Awards every 4 years, formalise the proposal that a new Minimum Standards Division of the FWC would be empowered to review and vary awards ‘as necessary’ including minimum wage rates, and that this MSD have a greater ‘evidence-gathering’, analytical and public consultative role than it is said the FWC has at present.

⁸ While initially indicating the evidence of impact of minimum wages on employment levels is unclear (Draft Report, pp285, 296), the Commission nonetheless proceeds on an assumption of a direct, inverse relationship and advocates for restraint in wages growth in order to decrease both un- and under-employment (Draft Report, pp331-333). A lower wage outcome is therefore generally seen as averting the ‘dis-employment risk’ associated with higher minimum wages and its adverse impacts would continue to be mitigated through the tax transfer and social security systems (Draft Report, pp 327-328). In other words, the Commission appears to support the transfer of the risks of employment from the employer to the Australian tax-payer.

⁹ Indeed the Commission itself has found that Australia has generally seen a continuing rise in the Gini Co-efficient, one generally accepted measure of income inequality, since 1988-89 (Draft Report, p124.) The closer the co-efficient is to 1, the more unequal is the income distribution. The OECD, in 2014, gave a Gini Co-efficient for Australia of 0.334 compared to an OECD average of 0.313. OECD, *Society at a Glance Highlights - Australia*, <http://www.oecd.org/australia/OECD-SocietyAtaGlance2014-Highlights-Australia.pdf> [accessed 21 September, 2015]. In 2005, Australia’s Gini Coefficient was 0.303 – see *HILDA Survey: Selected Findings from Waves 1-12*, 2015, p25.

¹⁰ The recommendations of the last Australian Government ‘apprenticeship review’, ‘*A Shared Responsibility-Apprenticeships for the 21st Century*’, *Final Report of the Expert Panel*, January 2011 still await implementation.

The analysis and recommendations the Commission sets out in this and the preceding chapter shows that it accepts that the conditions for maintaining regulated award wages exist in Australia.¹¹ It therefore has rejected calls from business for the wholesale replacement of the system. However, its recommendations for ‘repair’ create some serious concerns.

While it is accepted that the current method of periodic review of wage levels and modern awards is cumbersome and should be replaced as it meets none of the needs of participants, the AEU rejects a mechanism that could see the already low level of minimum award rates of pay decreased or the rate of growth in increases severely constrained. It would appear the Commission’s motivation is to explore ‘... *what might need to change in order to reduce the costs that awards impose.*’¹²

It is difficult to see how the proposed Minimum Standards Division and its envisaged processes for adjusting minimum wages and reviewing awards would yield ‘a more targeted and evidence-based approach’ than the current processes of the FWC which provide and even encourage any interested person - an individual member of the public, an organisation of employers or employees, various experts or expert bodies or any social advocacy group- with the right and opportunity to provide evidence and suggestions in virtually all proceedings whether in-person or through ‘on-line’ submission or commentary.

The bias of the Commission towards a peculiarly econometric perspective is evident. It castigates the FWC for its legalistic framework, its arbitral function and its emphasis on fairness which it claims are ill-suited to determining predominantly economic issues. It wants the new MSD to investigate matters using an economic methodology which it claims is more scientific, ie, that having identified likely problems, the MSD would set about collecting the evidence for alternative solutions or of the potential effects of alternative decisions.¹³

That economics is not a science can be easily accepted, e.g. economists have no or very little access to use of randomised, double-blind experiments on human subjects to test the efficacy of any particular course of proposed action. But to claim that the proposed methodology is scientific is misplaced. The suggestions for collecting or choosing the evidence to support or reject particular courses of action indicate neither rigour nor robustness but risk selection decisions being based upon idiosyncratic notions of efficiency or perhaps cost-effectiveness. What is rigorous and robust, is determining matters based on ‘equity, good conscience and the substantial merits’ of the particular matter in consideration – a current statutory obligation upon the FWC.¹⁴

¹¹ These conditions are: (a) where there is disproportionate employer bargaining power leading to inefficient, ie, too low, wages, (b) where wage setting for the low-paid is a better mechanism for income distribution than the tax-transfer system, (c) where award wages assist overcoming some of the biases against skill acquisition, (d) where awards assist addressing social biases against particular groups, eg, women. (Draft Report, pp419-420)

¹² Draft Report, p426.

¹³ Draft Report, pp428-429.

¹⁴ Fair Work Act, s578

Chapter 13, ‘Penalty Rates for long hours & night work’, and Chapter 14, ‘Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurants & cafe industries’

The Commission accepts that regulated wage premiums for long hours and night work are justified. This is because the costs of health risks associated with working long hours are unlikely to be factored into freely bargained wage outcomes due to the imbalance in market power between employers & employees, and also because the established premiums for night work are relatively low.¹⁵ Consequently no change is recommended other than for the FWC to produce some guidelines with simple examples.

The same is said not to be true for week-end work in certain specified industries (hospitality, entertainment, restaurants, retail & cafes) in the services sector. While not advocating the abolition of penalty rates per se, the Commission argues for a re-setting of the level of the Sunday penalty to that of the Saturday rate.¹⁶

This is said to be justified largely because greater loss of amenity justifies greater compensation and on the basis of improved employment opportunities for entry level jobs for relatively unskilled casual employees and young people needing flexible working arrangements.

The AEU notes that while penalty rates are generally not a feature of the occupations and industries in which its members work, they very well can be and are for the students with whom they work, and for the partners of AEU members and their children.

The Commission suggests close to 33% of secondary students are in paid employment.¹⁷ The majority of these are most likely to be engaged in those industries where the Commission considers the Sunday penalty is excessive, ie, hospitality, entertainment, retail, restaurants & cafes.

It is also noteworthy that such students fit the characteristics of those found by the Commission to be most likely to be minimum wage reliant. These characteristics are: workers in the accommodation, food, retail & other services sectors, labourers & sales workers, females and those working less than 15 hours per week, casual workers and the young.¹⁸

In other words, secondary school students are among those workers with probably the least bargaining power, are the lowest paid and the most vulnerable.

Social equity reasons would indicate further lowering such workers take-home pay is not justified.

¹⁵ Draft Report, p482. In the view of the AEU, these ‘findings’ by the Commission are somewhat problematic. They suggest that Work Health & Safety legislation is not effective in reducing these work health risks with the solution being for industrial legislation or the economic system to provide monetary compensation.

¹⁶ Draft Report, pp483-484

¹⁷ Draft Report, p89

¹⁸ Draft Report, pp313-315.

Should the recommendations proceed further the likely results would be: more students working or existing students working more hours or, if the Commission's predictions about employment increasing prove true, more students working more often.

While the reasons for households moving from single to double and to multiple wage income streams are complex, more time spent in paid employment by students means less time available to be spent in education studies – and in family and community life. None of these possibilities are socially desirable outcomes.

Chapter 15, 'Enterprise Bargaining', Chapter 16, 'Individual Arrangements' & Chapter 17, 'The Enterprise Contract'

The discussion in all three chapters displays a marked inclination of the Commission, despite some of its assertions to the contrary, to view a safety net of statutory (the NES) & award minima on top of which parties can bargain for improvements as largely 'anachronistic' or perhaps overly 'rigid'. Its preference is to support greater capacity for employers and employees to 'opt –out' of collective arrangements such as awards and enterprise agreements through increased use of more comprehensive Individual Flexibility Arrangements (IFAs) and it explores the use of a proposed new statutory employment instrument, the 'enterprise contract', which employers and their workforces could utilise to vary otherwise applicable award & enterprise agreement terms.

These new individualistic workplace arrangements – although the proposed 'enterprise contract' is conceived of as a 'collective IFA' - would nonetheless, it is argued, provide protections for employees through measurement against a No Disadvantage Test rather than the current Better Off Overall Test.

These arrangements are not envisaged as negotiated outcomes between interested parties (employer & employee/s) with or without the assistance or supervision of third parties (unions or the FWC). Rather they are really an offer by the employer, maybe utilising 'template terms' that have previously proved immune to challenge. Acceptance of an enterprise contract, for example, might be offered as a pre-condition of employment, to an employee or groups of employees.

The AEU views these proposals as undermining the enterprise bargaining system in fundamental ways:

- the abolition of the BOOT would see a test of comparative disadvantage, largely administered by the employer, substituted for a test of overall improvement. Bargaining would therefore be reduced to a process of seeking simple variation in employment conditions with the result that it risks productivity improvement further stalling.
- the removal, or reduced role, of third party assistance or supervision increases the lack of transparency in the labour market; and
- the increased capacity to opt-out of collective arrangements introduces a species of 'moral hazard' problem into the bargaining context as employers could negotiate collective agreements knowing full well their capacity to over-ride those arrangements at a later date.

Chapter 20, 'Alternative Forms of Employment'

In conceptualising a workplace relations system or framework, it is important that it include or deal with all elements or participants. Otherwise you provide incentives for 'players' to opt out and the system is reduced to covering residual participants, eg, employees rather than workers. The result is a system that deals purely with employment relations. The labour market would become further beset with transparency and informational asymmetry problems as there is no scrutiny of or public access to these 'opted-out' arrangements.¹⁹

The Commission suggests that approximately 40% of the workforce is engaged as independent contractors, labour-hire and casual workers.²⁰ The former two categories are largely excluded from coverage in the current WR system other than for a prohibition on sham contracting arrangements and for enterprise agreements being able to provide that such workers could be engaged on terms and conditions of 'employment' no less favourable than existing employees – the so-called 'jump-up' clause.

Yet the Commission recommendations would result in a significant contraction in the scope of the WR system by excluding casual workers and rendering unlawful any terms concerning contractors, labour-hire and casual worker which restrict their use or regulate their terms of engagement.

The proposal concerning casual workers is particularly ill-conceived as it would remove from both modern award, enterprise agreement and, to a lesser extent, NES coverage many thousands of employees who currently have at least their wages regulated by these industrial instruments. For example, the pre-dominant form of engagement of teachers in the NSW and Victorian TAFE systems is as regular casuales who are covered by a modern award and enterprise agreements. This fact alone suggests that the current system of industrial instrument coverage does not, to use the language favoured by the Commission, restrict the flexibilities employers and employees desire.²¹

¹⁹ Other than for the Fair Work Ombudsman to be empowered to investigate a complaint about whether the arrangement contravenes a No Disadvantage Test.

²⁰ Draft Report, p711

²¹ Draft Report, p733.