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Introduction

The Australian Services Union (ASU) is one of Australia's largest Unions, representing approximately 120,000 members.

The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

- Local government (both blue and white collar employment)
- Social and community services
- Transport, including passenger air and rail transport, road, rail and air freight transport
- Clerical and administrative employees in commerce and industry generally
- Call centres
- Electricity generation, transmission and distribution
- Water industry
- Higher education (Queensland and SA)

The ASU has members in every State and Territory of Australia, as well as in most regional centres as well.

The ASU made an initial submission to the Productivity Commission's Inquiry into Australian's Workplace Relations Framework on 13 March 2015. The Union now makes a further submission in response to the draft report released by the Productivity Commission on 4 August 2015.

The draft report is full of assurances that the current industrial relations system is not dysfunctional however it needs 'repair not replacement'¹ to deal with today's 21st Century economy. Yet the report is brimming with proposed benefits for employers, whilst attacking the rights and entitlements of workers.

The draft report contains numerous recommendations that are likely to increase inequality and reduce the living standards of the lowest paid workers. These include changes to: the minimum wage; changes to the National Employment Standards including a new "no disadvantage test"; the reduction of penalty rates; changes to the way union members can take industrial action; and the introduction of the "enterprise contract".

These recommendations are yet another step to restrict and eliminate the collective interests of workers from the current industrial relations system. Many of the Commission's recommendations are bad for workers as a whole, and in particular women workers². These issues are addressed throughout this submission.

¹ Productivity Commission Draft Report, Workplace Relations Framework, p.3

² ABC News (2015) *Productivity Commission report has 'overwhelmingly negative impact' on women* [online] Accessed at: <http://www.abc.net.au/news/2015-08-18/productivity-commission-report-has-overwhelmingly/6706920>

Summary of key ASU issues and recommendations

1. Minimum wage - We oppose any attempt to reduce or freeze the minimum wage. Minimum wages should remain set by an Expert Panel of the Fair Work Commission as per the current *Fair Work Act*.
2. Penalty rates – We oppose any attempt to reduce or deregulate penalty rates. In particular, we reject penalty rate cuts that will have a negative effect on women’s earnings.
3. The enterprise contract - The concept of the Enterprise Contract should be scrapped. We oppose the introduction of a new “no disadvantage test” and believe the current “better off overall test” should remain as per the current *Fair Work Act*.
4. Unfair dismissal - Unfair dismissal arrangements should remain unchanged as per the current *Fair Work Act*. Further an unfair dismissal applicant should have access to a face-to-face conciliation where the applicant believes that this will result in a greater likelihood of the matter being resolved at the conciliation stage.
5. National Employment Standards - The *Fair Work Act* should be amended to allow employees to access dispute settling procedures about the refusal of flexible work arrangements on “reasonable business grounds”.
6. Enterprise bargaining - The current “better off overall test” should remain as per the current *Fair Work Act*.
7. Enterprise bargaining - The current *Fair Work Act* establishes a clear set of rules and obligations in regards to enterprise bargaining. This should remain unchanged.
8. Industrial disputes & right of entry - Employers should be required to give three working days’ notice to bargaining representatives and employees of any proposed employer response action.
9. Alternative forms of employment - Unions should be able to bargain about job security through the utilisation of terms that restrict the engagement of independent contractors, labour hire and casual workers
10. Sham contracting - The *Fair Work Act* should be amended to strengthen the sham contracting clause and provide a clearer definition of a genuine independent contracting arrangement.
11. Domestic & family violence - Domestic and family violence leave should form part of all modern awards.
12. Equal pay - Consideration should be given to a non-adversarial scheme for correcting the undervaluation of women’s work. The recommendations in the “Making it Fair” report should be implemented in full.

ASU submission in response to the Productivity Commission's Draft Report into Australia's Workplace Relations Framework

Minimum wages

[DRAFT RECOMMENDATION 8.1]

The ASU is concerned for the 1.86 million Australians³ who rely on minimum wage increases each year. The Productivity Commission's draft report is proposing measures that would likely lead to lower increases in the minimum wage and also provides additional scope for temporary reductions or delays to increases in the minimum wage in particular industries or sectors⁴.

The gap between the minimum wage and average wages is currently the widest on record yet the draft report recommends using this as the starting point for future minimum wage increases, linking those increases to productivity and cutting this modest increase even further during high unemployment.

This means the gap between workers on average and minimum wages will never close and inequality in Australia will increase.

The draft report asks whether the setting of a minimum wages actually targets poverty and inequality or increases them by lowering employment in low income households. We believe the submission of the Australian Institute of Employment Rights⁵ (AIER) addresses this issue. Firstly, minimum wage continues to play a vital role in protecting vulnerable categories of workers, including women, youth and those in precarious forms of employment, thus targeting poverty and inequality. Secondly, the AIER asks the Commission to take into account first hand experiences of those living on a minimum wage, especially those in a part-time or casual basis to determine the efficacy of the minimum wage⁶.

The ASU's initial submission highlighted the fact that women workers are overrepresented in low-wage work, and therefore, we argued, minimum wage increases are an important tool in ensuring the gender wage gap doesn't increase any further.

Minimum wage adjustments awarded between 1995 and 2005 were estimated to contribute to a reduction of the gender pay gap in Australia over this period by approximately 1.2 percentage points⁷. This demonstrates there is an important gender equity component to the minimum wage.

The existence of a minimum wage is fundamental to the objective of a fair and reasonable safety net of employment conditions. We believe the current industrial framework of the Fair Work Commission taking submissions and evidence from a wide range of stakeholders and taking into account a broad range of social and economic factors is vital to protecting Australia's lowest paid workers.

Recommendation 1: We oppose any attempt to reduce or freeze the minimum wage. Minimum wages should remain set by an Expert Panel of the Fair Work Commission as per the current *Fair Work Act*.

³ Australian Unions (2015) *Increase the Minimum Wage* [online] Accessed at: <http://www.australianunions.org.au/minimumwage>

⁴ Productivity Commission Draft Report, Workplace Relations Framework - Draft recommendations 8.1 & 9.1

⁵ Australian Institute of Employment Rights submission, p. 27 [online] Accessed at: http://www.pc.gov.au/__data/assets/pdf_file/0010/187957/sub0140-workplace-relations.pdf

⁶ Ibid, p. 27

⁷ Australian Council of Social Service submission [online] Accessed at: http://www.acoss.org.au/wp-content/uploads/2015/07/ACOSS-minimum-wage-submission-2015_final.pdf

Penalty rates

[DRAFT RECOMMENDATIONS 14.1 & 14.2]

The draft report calls for a two-tiered workplace system with Sunday penalty rates to be cut for workers in hospitality, entertainment and retail but remain the same for “emergency service workers”. The Commission characterises penalty rates at two extreme points. On one hand it says penalty rates should be preserved for “emergency workers” - like police, nurses, firefighters – but that they should be reduced for already vulnerable workers in the hospitality, entertainment, retail, restaurant, and café industries (HERRC).

This means there are millions of workers in between these two extremes, many of them ASU members, who we are not sure whether now or in the future will they have their penalty rates targeted. For example, in local government we can identify librarians, parking inspectors and waste transfer workers; we have call centre workers in energy, water, and airlines who regularly work weekends and public holidays.

Furthermore, while the HERRC industries are targeted now in the draft report the Commission also says on penalty rates the following “Between these two poles lie a range of industries where the case may, or may not, be equivalent to that in the HERRC industries. Based on the improved practices and experience with conducting the award assessments recommended in chapter 12, **the FWC should undertake research and seek proposals from other industries in the medium term, and assess whether a similar case can be made for equalisation between Saturday and Sunday penalty rates**⁸”. Therefore, no one is safe.

It is worth noting that in proposing a two tiered approach to penalty rates, the Productivity Commission is effectively saying that some people's weekends are more important than someone else's.

As outlined in the draft report there is no evidence to show that cutting penalty rates increases employment or productivity – it is simply a raid on people's wages that will create an underclass of working poor.

With less money in their pockets to spend, cuts to low paid workers take home wages will result in businesses taking the second round of hits, usually small businesses in regional and rural areas who can least afford it.

A recent analysis by the McKell Institute⁹ supports this notion, finding “that retail and hospitality workers in rural Australia would lose between \$370 million and \$1.55 billion each year, depending on the extent of the cut to penalty rates and the level of local ownership of the retail stores¹⁰”.

The McKell analysis found that “any reduction in penalty rates was likely to result in a substantial negative impact on both the emotional wellbeing and financial security of workers¹¹”.

An employer commissioned study prepared by Deloitte Access Economics found “a large proportion of workers who choose to work on weekends do so for extra pay, undercutting industry claims that lifestyle choices and not penalty rates motivate weekend work¹²”. This study supports the view that workers see penalty rates as part of their overall remuneration and rely on them to pay their bills and their mortgages. They are not viewed as spare cash to splash around.

As around 50% of the ASU's membership are women, many of whom are employed in the social and community service sector and clerical and administrative sector, the ASU is concerned that any reduction or elimination of penalty rates will have a detrimental impact on women.

⁸ Productivity Commission Draft Report, Workplace Relations Framework, p.528

⁹ The McKell Institute (2015) Who loses when penalty rates are cut? [online] Accessed at: http://mckellinstitute.org.au/wp-content/uploads/pdf/McKell_Penalty_Rates.pdf

¹⁰ Ibid, p.8

¹¹ Ibid, p. 8

¹² Workforce Issue 19735, “Weekend work motivated by extra pay: employer studies”, dated 7 August 2015

Barbara Pocock believes the elimination of penalty rates will in fact widen the current gender pay gap, rather than narrowing it¹³. As it is, more women than men in Australia continue to work in jobs that provide less security and stability. The Australian Bureau of Statistics publication *Gender Indicators, Australia (August 2015)* shows that 43.8% of women work in a part-time capacity with a further 22% working on a casual basis¹⁴.

Furthermore Pocock warns that as a disproportionate number of women work on Sundays the taking away of penalty rates will have particularly negative effects on women's earnings¹⁵.

Recommendation 2: We oppose any attempt to reduce or deregulate penalty rates. In particular, we reject penalty rate cuts that will have a negative effect on women's earnings.

The enterprise contract

[CHAPTER 17]

In the draft report the Commission proposes a new form of agreement, the "Enterprise Contract". This is described by the Commission as a "collective individual flexibility arrangement, but with some further flexibility"¹⁶. It would allow employers to vary an award for a class or group of employees without having to negotiate individually or to put in place an enterprise agreement.

The ASU is very concerned these Enterprise Contracts will be the same, if not worse, than the Australian Workplace Agreements that were put in place under the former coalition Government's WorkChoices laws and saw workers given no choice but to sign unfair agreements that removed their rights and conditions.

Employers will be able to cut penalty rates, hours of work, overtime and rosters with absolutely no oversight from the Commission as the enterprise contract is to act as an independent statutory instrument that would "not be carved out from the protections applying to other agreements under the Fair Work Act 2009"¹⁷. To add further to this the Enterprise Contract will not be subject to the current "better off overall test" (BOOT), instead it would be tested against the proposed new "no disadvantage test" (NDT) which is currently undefined. Alarming it is up to the employee to complain that an enterprise contract may not meet the NDT!

The Enterprise Contract is just another recommendation by the Productivity Commission to weaken workers' rights and entitlements. The Commission even notes the Enterprise Contract will "go a long way in allowing enterprises to negotiate with individuals without union representation if that is their wish"¹⁸. This is just another attempt to erode union bargaining power.

The Commission's findings and recommendations are in stark contrast to the recent International Monetary Fund (IMF) report¹⁹ which found the rise of inequality in advanced economies is linked to the decline in unionisation and highlighted the importance of collective bargaining and union representation in addressing the growing wage inequality²⁰.

¹³ ABC News (2015) *Productivity Commission report has 'overwhelmingly negative impact' on women* [online] Accessed at: <http://www.abc.net.au/news/2015-08-18/productivity-commission-report-has-overwhelmingly/6706920>

¹⁴ Australian Bureau of Statistics, Issue: 4125.0 – *Gender Indicators, Australia*, August 2015 [online] Accessed at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4125.0Aug%202015?OpenDocument>

¹⁵ ABC News (2015) *Productivity Commission report has 'overwhelmingly negative impact' on women* [online] Accessed at: <http://www.abc.net.au/news/2015-08-18/productivity-commission-report-has-overwhelmingly/6706920>

¹⁶ Productivity Commission Draft Report, Workplace Relations Framework, p. 37

¹⁷ Ibid, p. 623

¹⁸ Ibid, p. 578

¹⁹ International Monetary Fund (2015) *Inequality and Labor Market Institutions* [online] Accessed at: <http://www.imf.org/external/pubs/cat/longres.aspx?sk=42987>

²⁰ Australian Institute of Employment Rights submission, p. 27 [online] Accessed at: http://www.pc.gov.au/__data/assets/pdf_file/0010/187957/sub0140-workplace-relations.pdf

An attack on trade unions means less bargaining power for workers and this in turn negatively affects workers capacity to fight for better wages and conditions. The social effects are growing inequality and a workforce with less spending power which will detrimentally affect the economy.

Recommendation 3: The concept of the Enterprise Contract should be scrapped. We oppose the introduction of a new “no disadvantage test” and believe the current “better off overall test” should remain as per the current *Fair Work Act*.

Unfair dismissal

[DRAFT RECOMMENDATIONS 5.1 - 5.3]

The suggested changes and recommendations to the current unfair dismissal procedures proposed by the Commission appear to favour only employers. Most concerning is the recommendation that “the Australian Government should remove the emphasis on reinstatement as the *primary* goal of the unfair dismissal provisions”²¹.

The percentage of reinstatements at the Fair Work Commission from July 2013-July 2014 was less than 1%²². To downgrade this procedure any further is absurd.

Further recommendations include: a proposal that allows unfair dismissal applications to be dismissed “on the papers” without the need for a hearing or any submissions; and that workers can only receive compensation for unfair dismissal if it was found they have been dismissed “without reasonable evidence of persistent underperformance or serious misconduct”²³.

Furthermore we oppose the second limb of recommendation 5.2 which states:

*procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties*²⁴.

Procedural requirements for a dismissal are there to ensure the overall fairness of the decision to dismiss, and by removing this protection employees are exposed to a greater level of unfairness than they otherwise would be exposed to. Procedural fairness is an integral part of every aspect of our judicial and tribunal system, affording employees the right and opportunity to answer the allegations against them, and take steps to rectify their behaviour or receiving the appropriate training.

The Commission’s attempt to separate substantive unfairness, which the Commission recommends should remain, and procedural unfairness, which the Commission recommends should be restricted to a mere discretionary power misunderstands the nature of the unfair dismissal regime.

A decision to dismiss which is effected by procedural error on the part of the employer is *inherently* unfair in and of itself, and should not require a further substantive element of unfairness for the unfair dismissal regime to be activated.

The ASU is opposed to all of these recommendations. Any changes that make it easier to dismiss a worker or to avoid reinstatement will only further undermine the current industrial relations system.

²¹ Productivity Commission Draft Report, Workplace Relations Framework, p.235

²² Fair Work Commission, *Resolving issues, disputes and dismissals* [online] Accessed at: <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

²³ Productivity Commission Draft Report, Workplace Relations Framework, p. 48

²⁴ *Ibid*, p. 233

In our original submission dated 13 March 2015 the ASU reported on mixed experiences of success in relation to unfair dismissal telephone conciliations. While these are at times an efficient manner in dealing with applicants and cases in remote and regional locations, ASU Branches have reported difficulty in achieving effective conciliation outcomes via telephone conciliations in a significant number of instances.

Our members feel frustrated that they cannot see the conciliator and the other party face-to-face and thus allow more effective communication. It is common knowledge that humans communicate 70% of their information through body language. Important cues are missed on the phone.

Also members feel 'cheated' in the sense that they are not getting their 'day in court'. They feel not enough respect is paid to their issues in telephone conferencing as opposed to being in a live tribunal setting. It is our view that cases may be more likely to settle in circumstances where the applicant feels that they have at least had an opportunity to be heard.

Recommendation 4: Unfair dismissal arrangements should remain unchanged as per the current *Fair Work Act*. Further an unfair dismissal applicant should have access to a face-to-face conciliation where the applicant believes that this will result in a greater likelihood of the matter being resolved at the conciliation stage.

National Employment Standards

[DRAFT RECOMMENDATIONS 4.1 & 4.2]

The most notable recommendation with regard to the National Employment Standards (NES) is that modern awards should include a provision for employers to substitute a public holiday for an alternative day by agreement with employees.

It has also suggested that the NES be amended to remove the requirement to pay for leave or any additional penalty rates in the case of a newly designated public holiday. These recommendations effectively deny state or territory governments from introducing new celebrations or commemorative events.

Should a state or territory government declare a new public holiday, workers have very little or no control over them doing so or their rostering arrangements.

Public holiday penalty rates exist to compensate workers for missing out on spending time with their family and friends. We do not support a proposal that will devalue working on a public holiday.

The NES provides employees with a legal right to request flexible working arrangements. The ASU refers to its original submission dated 13 March 2015 and wishes to reiterate that whilst we support flexible working arrangements, we are concerned employers can refuse a request on 'reasonable business grounds'.

Currently there is no definition of 'reasonable business grounds' in the Explanatory Memorandum to the *Fair Work Act* which just provides examples of what may contribute to 'reasonable business grounds'.

Furthermore employees are limited by the fact that there is no available dispute settling mechanism to determine whether the employer has in fact reasonable business grounds for refusing the request unless the employer has agreed to one in writing.

The effect of these provisions is to prevent any employee challenging any decision of an employer to refuse a request under the relevant provision of the NES if that employer nominates 'reasonable business grounds' as the reason for refusal. This means that employees are left with no way to challenge an employer's refusal of their request for flexibility, or to test the validity of the employer's purported "reasonable business grounds".

Our experience is that employers invoke “reasonable business grounds” because of the inability to challenge the assertion. This serves to limit the ability of women to work when they might otherwise be able to do so and has resultant productivity implications.

Recommendation 5: The *Fair Work Act* should be amended to allow employees to access dispute settling procedures about the refusal of flexible work arrangements on “reasonable business grounds”.

Enterprise bargaining

[DRAFT RECOMMENDATIONS 15.1-15.7 & 16.2]

The draft report found enterprise bargaining “generally works well²⁵”. The ASU believes as a matter of principle that parties should be free to bargain on any matter they choose. Both parties should have access to the FWC to resolve bargaining issues and enhance bargaining and any barriers that limit good faith bargaining should be removed as much as is reasonably possible.

Several of the Commission’s recommendations are of concern to the ASU, these include the suggestion to replace the current “better off overall test” (BOOT) to a no-disadvantage test (NDT) to supposedly encourage win-win options.

As witnessed under the Howard era the NDT sought to ensure that employees were not disadvantaged as against the applicable industrial instrument, whereas the BOOT requires the employees are in fact **better off overall**.

The draft report states the NDT will be applied across a like class (or series of classes) of employees for an enterprise agreement²⁶. This method is fraught with danger and it can be presumed the replacement of the BOOT with a new NDT will negatively affect employees wage outcomes.

Recommendation 6: The current “better off overall test” should remain as per the current *Fair Work Act*.

The Commission also recommends that enterprise agreements should be entitled to specify a nominal expiry date of up to 5 years. The ASU believes the current 4 year maximum term for all agreements is sufficient and should remain as is.

The ASU disagrees with the draft report’s recommendation to “allow the FWC wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement²⁷”.

Our experience when certifying agreements is that quite often the FWC requires a commitment or undertaking from the employer (and sometimes the union) in order to clarify the meaning of a particular clause or to ensure the clause(s) are not disadvantageous to employees.

This review of the agreement by the FWC and forcing the parties to comply with statutory obligations is one of the good things about the system and the ASU is strongly in favour of retaining it. Our fear is that the Commission’s recommendation may dilute the current system which in our view works fairly well.

²⁵ Productivity Commission Draft Report, Workplace Relations Framework, p.4

²⁶ Ibid, p. 54

²⁷ Ibid, p.53

Further we completely disagree that “Enterprise agreements should not be able to restrict terms of individual flexibility arrangements”²⁸. Individual flexibility arrangements (IFAs) are meant to live within the context of an agreement, not act as a ‘white ant’ to undermine the agreement.

The parties should be free to strike a balance between the needs of an individual employer or employee, but no to the extent that it dilutes the collective agreement. The ASU’s concern is that the unfettered use of IFAs would over time hobble the efficacy of the collective agreement.

The draft report discusses some of the difficulties that arise with greenfields agreements. The Commission proposes if a negotiated outcome for a greenfields agreement with the union is not reached after 3 months the employer may “request that the FWC undertake ‘last offer’ arbitration of an outcome by choosing between the last offers made by the employer and the union²⁹” or “submit the employer’s proposed greenfields arrangement for approval with a 12 month nominal expiry date³⁰”.

The proposed tightening of bargaining arrangements for greenfields agreements are all to the benefit of employers. Again the ASU rejects these proposed changes.

Recommendation 7: The current *Fair Work Act* establishes a clear set of rules and obligations in regards to enterprise bargaining. This should remain unchanged.

Industrial disputes and right of entry

[DRAFT RECOMMENDATIONS 19.1-19.8]

While the Commission believes that industrial disputes are not a major problem in Australia’s workplace relations framework the recommendations posed go a long way to severely restricting trade unions rights to organise and in turn defend workers interests.

The draft report recommends the following³¹:

- a. The FWC may suspend or terminate protected industrial action where the action is causing (or threaten to cause) an employer significant harm.
- b. The Act should be amended to give the FWC the discretion to withhold a protected action ballot order for up to 90 days, where it believes that the employees are using withdrawals of protected action as an industrial tactic.
- c. If an employer has prepared a reasonable contingency response to threatened industrial action, then it should be entitled to stand down employees without pay.
- d. Employers should have the right to pay employees for short duration strikes to circumvent the difficulties faced by employers where employees have engaged in, for example, a one minute stoppage. Alternatively, they should be able to deduct up to 15 minutes pay per person.
- e. Allow employers to deduct a minimum of 25% of normal wages for the duration of any work ban that impacts on the employees normal duties.
- f. The maximum penalties for unlawful industrial action should be increased.

The current industrial relations system has already significantly restrained unions’ capacity to defend workers. Without the ability to organise and take industrial action workers are powerless in the face of employers’ demands. Additional measures, such as those noted above, will only drive home this advantage further. The ASU is opposed to all of these recommendations.

²⁸ Productivity Commission Draft Report, Workplace Relations Framework, p.53

²⁹ Ibid, p.54

³⁰ Ibid, p.54

³¹ Ibid, Section 7 Industrial disputes and right of entry

Further the draft report recommends the Act should be amended “so that unions that do not have members employed at the workplace are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days³²”.

The ASU views the recommendation as an unnecessary impediment to union recruiting and representing members and potential members. Access to a site for only 2 occasions in 3 months makes it virtually impossible to recruit. If you cannot recruit members, then it is very difficult to encourage an employer to negotiate an agreement with you. You are therefore in a vicious cycle.

Trade unions need to have fair and reasonable access to a work site if they are to truly represent the interests of workers. If the union is ‘abusing’ its right of entry, the FWC already has a mechanism in place to test whether the union or employer are being unreasonable about the number of site visits.

In our original submission to the Productivity Commission dated 13 March 2015 we pointed out the balance between the ability of employees and employers to take protected action is still unequal. Employee protected action must only occur after a ballot of employees to be involved in the industrial action.

Further action arising from employee claims requires three days or more notice to employers of the commencement of the industrial action. Employer response action requires only notice to the bargaining representatives and ‘reasonable steps’ to be taken to notify employees. No actual period of notice time is required by the legislation. This is inequitable and should be changed to ensure that employers also be required to give 3 days’ notice of industrial action. If employers are allowed time to prepare for the effects of industrial action, employees should also be afforded this, particularly as their economic interests are being affected.

This point was acknowledged by the Commission in the draft report³³ but rejected. The Commission did contemplate a 2 day notice period, as opposed to 3, but decided there was not much value to this proposal either. It is the ASU’s view that the Commission ignores the great inequality in the giving of notice periods between employees and employers.

While the employer need not give any notice for a lock out which has serious financial and other implications for employees, the unions have to go through a laborious exercise which usually gives the employer 4 weeks (and more) notice before action is taken, i.e. The union must firstly apply to the FWC and then have a hearing in the Commission regarding the application for industrial action (this may take up to 1 week), then the FWC orders a ballot which usually takes 20 days or more to conduct. Then another day for the result to be known and then the union must give 3 clear business days’ notice to the employer before taking industrial action. And even at this point the employer can make an application to the FWC to terminate the action or to extend the notice period from 3 to 5 or even 7 days or the FWC can suspend the industrial action to a later date. Therefore notice to the employer could vary between 4 to 6 weeks.

Recommendation 8: Employers should be required to give three working days’ notice to bargaining representatives and employees of any proposed employer response action.

³² Productivity Commission Draft Report, Workplace Relations Framework, p. 708

³³ Ibid, p. 698

Alternative forms of employment

[DRAFT RECOMMENDATION 20.1]

The Commission's recommendation to make it unlawful to bargain about job security through the utilisation of terms that restrict the engagement of independent contractors, labour hire and casual workers³⁴ demonstrates the Commission places little value on the precarious nature of work. It is a well-known fact that some 25-30%³⁵ of the Australian workforce are casuals or in other forms of insecure work.

Modern awards and agreements currently contain common clauses which stipulate conditions like minimum hours of engagement; that casuals should only be used at peak times and that casuals should not displace permanent workers etc. Job security clauses such as these are important so that casual workers are not exploited by such methods as 'split shifts' or calling them in to work only for an hour or two or sending them home early at any time.

This is exploitation of an already vulnerable group of employees, which tempts employers to use casuals on a whim with no routine or stability. This behaviour would eventually threaten the 'permanency' of the permanent worker, where an employer may want to impose this erratic and spasmodic model on their permanent workforce.

Recommendation 9: Unions should be able to bargain about job security through the utilisation of terms that restrict the engagement of independent contractors, labour hire and casual workers.

Sham contracting

[CHAPTER 20.2]

The ASU welcomes the Commission's recommendation to recalibrate the test for sham contracting to limit the circumstances where an employer can escape prosecution for sham contracting. We also welcome the Commission's suggestion in replacing the 'recklessness' test with a 'reasonableness test'.

As per our original submission dated 13 March 2015 the current law lacks clarity in determining whether a worker is in a genuine independent contracting arrangement. This issue was recognised in the Commission's draft report³⁶.

The Commission looked at whether the introduction of a stricter statutory test would provide a better basis for efficient enforcement but found "there would be considerable difficulties and risks associated with a policy shift involving the rigid adherence to such a definition³⁷".

Given sham contracting disproportionately affects vulnerable workers who are at risk of exploitation or who have little bargaining power the ASU would be please if further measures could be introduced to ensure the difficulty in distinguishing between employees and independent contractors are remedied.

Recommendation 10: The *Fair Work Act* should be amended to strengthen the sham contracting clause and provide a clearer definition of a genuine independent contracting arrangement.

³⁴ Productivity Commission Draft Report, Workplace Relations Framework, p.733

³⁵ Lives on hold, Unlocking the potential of Australia's workforce report (2012) [online] Accessed at: <http://www.actu.org.au/our-work/independent-inquiry-into-insecure-work-in-australia/report>

³⁶ Productivity Commission Draft Report, Workplace Relations Framework, p. 722

³⁷ Ibid, p. 727

Domestic and family violence

[CHAPTER 12, REPAIRING AWARDS]

As per our initial submission dated 13 August 2015 the ASU would like to make special mention of the impact of domestic and family violence on women's ability to find and retain secure work. There have been reported incidents of family violence involving ASU members. The ASU believes that there are many more incidents of family violence occurring than are being reported.

We know that being in employment is a key pathway to leaving a violent relationship. The financial security that employment affords women can allow them to escape becoming trapped and isolated in violent and abusive relationships, and to maintain, as far as possible, their home and standard of living.

The ASU was the first union in Australia to insert a family domestic leave clause in an enterprise agreement. In 2010 at the Surf Coast Shire Council in Victoria, the Victorian & Tasmanian A&S Branch of the Union placed a clause which gives victims of domestic violence 20 days paid leave and a comprehensive set of conditions, including individual support and counselling.

Over the last four years this clause has been picked up by other unions and employers to the point that now some 1.6 million workers are covered by a family violence clause in their award or agreement. Recently the ASU clause has been recognised by the Fair Work Commission as one of a handful of Productive and/or Innovative clauses around the country.

As part of the 4 year modern award review the ACTU on behalf of unions has lodged a claim for domestic violence leave. This claim seeks variation to all 122 modern awards by inserting a family and domestic violence clause that would allow an employee to access 10 days paid leave per year. The ASU wholeheartedly supports the ACTU's claim.

Recommendation 11: Domestic and family violence leave should form part of all modern awards.

Equal pay

The Productivity Commission asks if equal pay for equal work is a workable concept³⁸. As demonstrated in our initial submission dated 13 August 2015 the ASU, together with four other applicants ran a successful equal remuneration case for social and community sector workers covered by the Social, Community, Home Care and Disability Services Industry Award 2010.

We strongly believe that equal pay for equal work is a workable concept. Gender and equal pay are significant issues and to ignore them will only perpetuate the wage differentials.

The ASU's Equal Pay Case established the value that is placed on work is related to gender and the market, without regulation, is not a sufficient way to regulate work in caring and other female dominated sectors. Pay inequalities are imbedded in the way we think about work, efficiency and profit and are often dismissed and legitimised by referring to the market as justification. We believe there is a fundamental need for intervention into the market and this can be achieved by improving concepts such as equal pay for equal work or equal pay for comparative work.

The ASU believes it is about finding the right mechanism to measure this concept as retreating to the market is no substitute for intervention to achieve equity.

We believe it is important to maintain a legislative framework to ensure equal pay. However it is important that the legislative framework is accessible and not unnecessarily burdensome for applicant workers and unions.

³⁸ Productivity Commission Draft Report, Workplace Relations Framework, p. 442

For example, in the Queensland and New South Wales State jurisdictions, there have been successful equal remuneration cases for NSW public sector librarians, child care workers, Queensland dental assistants and the Queensland social and community services workers involving the application of straightforward and evidence based principles using a two stage process in assessing the claim.

The first stage involves establishing that:

- i. The work is female dominated
- ii. The work is undervalued, and
- iii. The undervaluation is referable to the work being female dominated

The second stage involves a consideration of the appropriate steps to remedy that undervaluation so as to ensure that workers in the industry receive equal remuneration for work of equal or comparable value.

The ASU submitted that such an approach was appropriate in the equal remuneration case for social and community sector workers (Equal Pay Case) and continues to support this approach.

Furthermore, the ASU believes the Chair of the House of Representatives Standing Committee on Employment and Workplace Relations in their "Making it Fair"³⁹ report on Pay Equity and associated issues related to increasing female participation in the workforce made a telling observation, with which we agree, when she said:

"I am convinced that an alternative mechanism that allows for a non adversarial consideration of the undervaluing of women's work and a comprehensive scheme to correct undervaluation across industries is more efficient and preferable⁴⁰."

The recommendations of the Standing Committee are comprehensive and detailed, some have been implemented while others have not. Recreating the wheel and isolating the problem has been done many, many times. In the ASU's view it is time for real action with a combination of legislative change, approach change and commitment and targets to narrow the gap. To do otherwise is to watch the gender pay gap widen.

Recommendation 12: Consideration should be given to a non-adversarial scheme for correcting the undervaluation of women's work. The recommendations in the "Making it Fair" report should be implemented in full.

³⁹ House of Representatives (2009) Making it Fair, Pay equity and associated issues related to increasing female participation in the workforce [online] Accessed at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ewr/payequity/report.htm

⁴⁰ House of Representatives (2009) Making it Fair, Pay equity and associated issues related to increasing female participation in the workforce [online] Accessed at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ewr/payequity/report.htm