

**Progress denied:  
What the Productivity Commission's Draft  
Recommendations mean for  
workers.**

25 September 2015

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*“Fundamentally, excessive inequality makes capitalism less inclusive. It hinders people from participating fully and developing their potential.*

*Disparity also brings division. The principles of solidarity and reciprocity that bind societies together are more likely to erode in excessively unequal societies. History also teaches us that democracy begins to fray at the edges once political battles separate the haves against the have-nots.*

*A greater concentration of wealth could—if unchecked—even undermine the principles of meritocracy and democracy...*

*It is therefore not surprising that IMF research—which looked at 173 countries over the last 50 years—found that more unequal countries tend to have lower and less durable economic growth.”*

Christine Lagarde, Managing Director, International Monetary Fund, Address to the Conference on Inclusive Capitalism, 27/5/2014.

## Introduction

Unions work towards a fairer, more equal Australia. All Australians deserve to live in dignity and be socially included. The social contract upon which our living standards are based should give people the opportunity to achieve their potential but high and rising income inequality undermines these objectives.

Income inequality is an important and complex subject. Rising inequality is caused by many factors, including technological change and globalisation, as well as policy-related factors such as a reduction in the progressivity of the tax system, a fall in the relative value of the minimum wage, and a fall in union density. Inequality can have a range of negative consequences, ranging from increasing social atomisation and isolation and poor intergenerational social mobility, to possible effects on health and crime, to negative effects on economic growth. Concern about income inequality is not the domain of the eccentric. It is a central issue of mainstream economic theory and international economic policy institutions.

Our initial submission to the Productivity Commission clearly set out how policy makers had long ago devised the industrial relations system out of an acceptance that it was necessary to intervene in the relationships between workers and employers, so workers would be protected from exploitation and so that market incomes are distributed more equitably.

Inequality is an increasing problem in Australia. According to ABS figures, the Gini coefficient for gross household income (before tax and transfers) in Australia has increased from 0.419 in 2003-04 to 0.446 in 2013-14, a rise of 0.27 points or around 6%. Over the same period, the Gini coefficient for equivalized household disposable income increased from 0.306 in 2003-04 to 0.333 in 2013-14, a rise also of 0.27 points, around 8%.<sup>1</sup> The narrowing of the difference between gross and disposable income distribution over time suggests that the tax and transfers system is failing to address the rise in inequality due to the increasing spread of market incomes. Australia also had a higher level of inequality than the OECD in 2011 (the most recent cross country data) and a much higher level than the EU.<sup>2</sup>

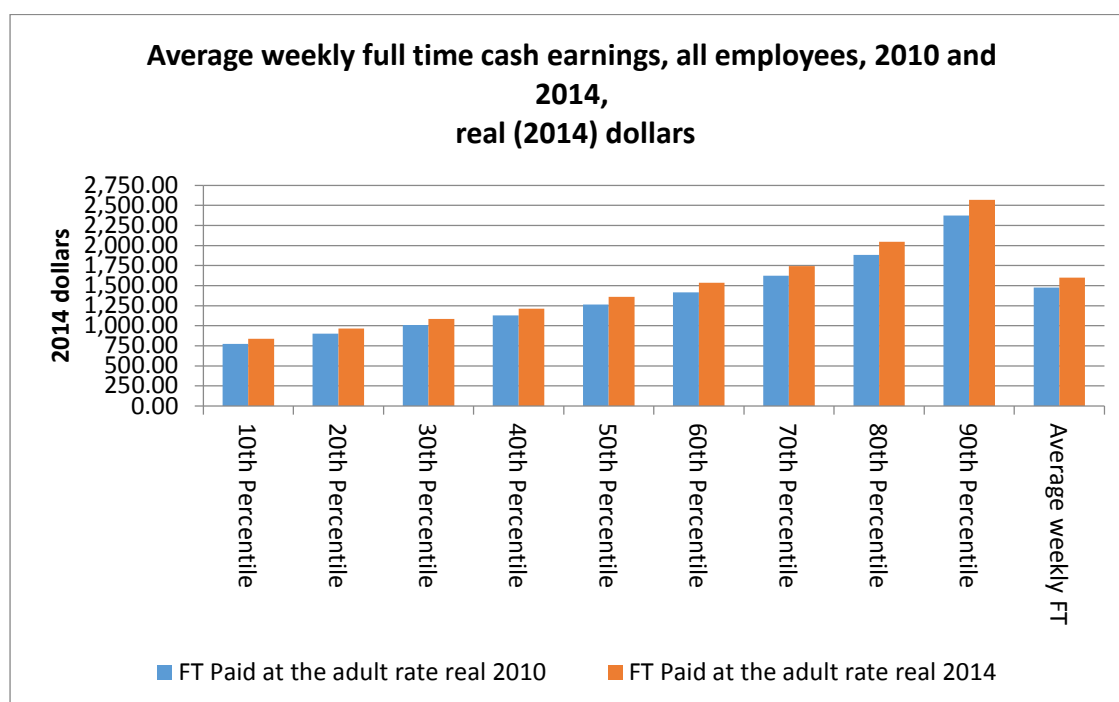
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<sup>1</sup> ABS Catalogue 6523.0 Household Income and Wealth, Australia, 2013-2014, Tables 1.1 and 1.2.

<sup>2</sup> OECD Income Distribution Database. Available from: <http://stats.oecd.org/Index.aspx?DataSetCode=IDD>.

Increasing inequality is also borne out by the reduction in minimum wage bite. The National Minimum Wage (NMW) has fallen by more than 20 per cent of Average Ordinary Time Weekly Earnings (AWOTE) in the 33 years since 1982, from 67% of AWOTE in June 1982 down to 43% (\$656.90) of AWOTE (\$1483.1) at June 2015. Over the same period of 1982 to 2015, while AWOTE has increased on average by more than one per cent per annum in real terms, the minimum wage has barely remained constant in real terms. The widening gap between the minimum wage and AWOTE is starker over the last ten years. From June 2005 to June 2015 AWOTE increased by a total of around 15% in real terms even with the global financial crisis, while the minimum wage increased less than two per cent in real terms.<sup>3</sup>

However, the increase in wages has not been distributed downwards, but rather has reflected the relative increase in wages towards the top of the income distribution. This is evident even in the short period between 2010 and 2014, where the distribution of employees' earnings continued to increase in percentage terms at the higher deciles relative to the lower ones. This further widens the income disparity between upper and lower earnings deciles in dollar terms.

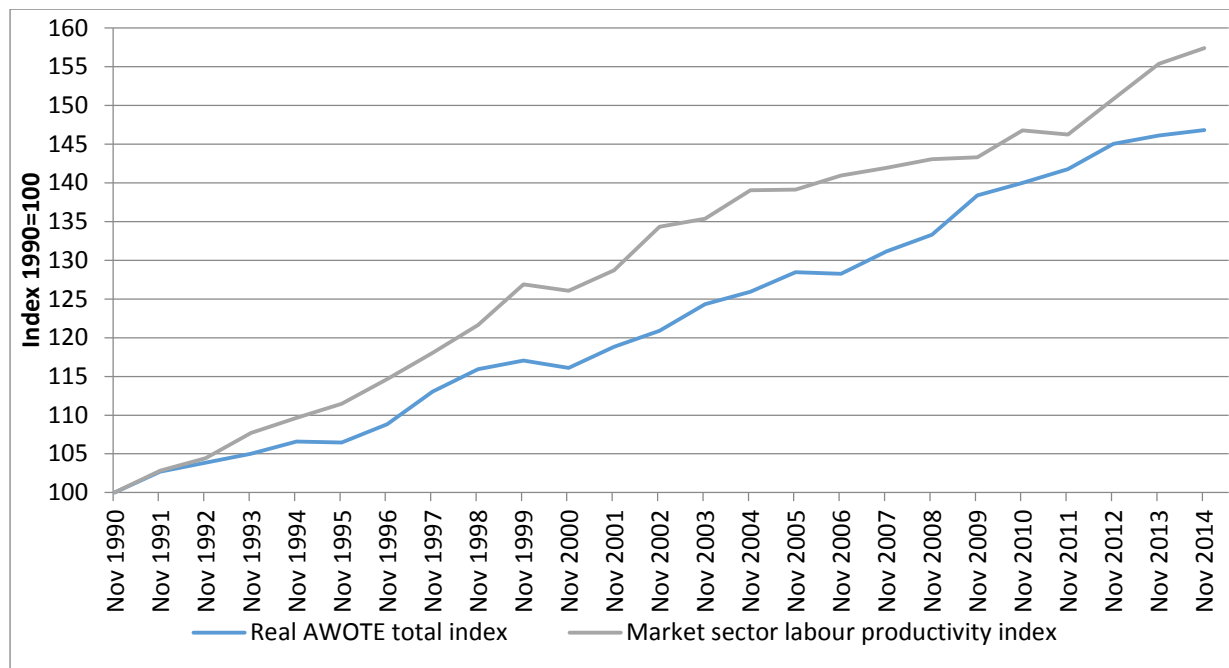


Source: ABS 6306.0, 2010, 2014.

<sup>3</sup> ABS Cat 6302, <https://www.fwc.gov.au/print/awards-and-agreements/minimum-wages-conditions/national-minimum-wage-orders>.

The continued earnings disparity is also reflected in the failure of real wages to keep up with growth in labour productivity. This is shown in the following chart for 1990 to 2015 which compares growth indices for AWOTE and labour productivity in the market sector (the more measurable part of national output). Moreover, the gap between productivity growth and wages growth is currently increasing.

**Average weekly ordinary time earnings are growing more slowly than labour productivity, in real terms, annualised, 1990 to 2015**



Source: ABS 5204.0, ABS 6402.0.

Nearly 19% of the workforce is paid in accordance with a minimum wage prescribed by an Award, being the lowest wage they can legally be paid. These lowest paid workers are predominantly located in service industries and, compared to other workers, are more likely to be casual workers. These are the workers who are most in need of policy measures that will assist them to improve their living standards. However, these are the workers that have the most to lose if the Productivity Commission’s draft recommendations are implemented.

Unions do not wish for Australia to become more like America, with large numbers of working poor, a disenfranchised underclass, and low intergenerational social mobility. We believe that Australians share our wish to avoid this outcome.

In 2011, we commissioned original research regarding Australians' perceptions of inequality.<sup>4</sup> The research found that Australians underestimate the level of wealth inequality in Australia. When asked to outline their ideal wealth distribution, Australians of a wide range of backgrounds choose a more equal distribution than that which is the Australian reality. This is true of the richest as well as the poorest Australians, and is likewise true irrespective of whether those persons identify as Labor, Greens, Liberal or National voters or as neither. Australians do not want wide economic disparities. They want to build a better future for themselves and their families.

We are concerned that many of the Recommendations in the Productivity Commission's Draft report will compound people's existing disadvantage and contribute to a more unequal society overall. The purpose of this submission is to highlight these effects in the hope that Productivity Commission will confine its final recommendations to repairing the system, rather than sabotaging it.

*"Widely unequal societies do not function effectively, and their economies are neither stable nor sustainable in the long-term.*

*When one interest group holds too much power, it succeeds in getting policies that benefit itself, rather than policies that would benefit society as a whole.*

*When the wealthiest use their political power to benefit excessively the corporations they control, much-needed revenues are diverted into the pockets of a few instead of benefitting society at large"*

Nobel Laureate & Former World Bank Chief Economist Prof. Joseph Stiglitz, *The Price of Inequality*, Allen Lane, 2012, p.83.

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<sup>4</sup> D. Neal, C. Govan, M. Norton and D. Ariely 2011, 'Australian Attitudes Towards Wealth Inequality and Progressive Taxation: A national survey of knowledge, attitudes and perceptions of wealth inequality and the minimum wage', Empirica Research, Prepared for the ACTU. Available from: <http://www.actu.org.au/media/296630/ACTU-Report-Inequality-and-Minimum-Wage.pdf>.

## Fair Minimum Wages and Conditions

Approximately one fifth of the Australian Workforce is already paid the lowest legal wage in an Award or a Minimum Wage order, and many more of them are reliant on safety net awards for some of their terms and conditions<sup>5</sup>. Around 30% of businesses employ a person on these minimum rates and a further 30% use these Award rates as guide for setting wages.<sup>6</sup> Around half of businesses use awards as their main method of setting pay, with around a quarter paying no more than the award minimum<sup>7</sup>. The issue of how minimum wages and conditions are set is clearly important to a lot of people.

Paying a wage that is on the line between legal and illegal, or just above it, would be less of a concern if those who receive minimum award wages and conditions were able to sustain a standard of living that met community expectations of what is fair. The trouble is that these workers are today comparatively worse off relative to other workers than they were 10 years ago when one compares the minimum wage to the average wage. Our research indicates<sup>8</sup> that whilst Australians believe the minimum wage is higher than it actually is, they also believe it should be higher. These beliefs are observed across a number of demographic sub groups and hold true regardless of which political party people identify themselves as voting for.

The Productivity Commission recommends changes to the way the minimum wage is set in future. These include changes that would see the Commissioners who decide the minimum wage needing to re-apply for their jobs every 5 years, and keeping those Commissioners isolated from the day to day job of the Fair Work Commission in resolving workplace disputes on the basis of “equity, good conscience and the merits”<sup>9</sup>. These changes would undermine their impartiality and independence. The Productivity Commission also suggests that what needs to be done now is “to moderate the growth rate of the minimum wage to below the growth in median wages”<sup>10</sup> and, in the longer term “maintain a roughly fixed ratio to median wages”<sup>11</sup>. This means that the Productivity Commission wants the minimum wage to fall even further behind the average wage, and never catch up. This means the problem of wage inequality could only get worse. To the

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<sup>5</sup> Casual employees accounted for 21.6% of employees as at May 2014. See ABS catalogue 6306.0, *Employee Earnings and Hours*, All Employees, May 2014 (latest issue available).

<sup>6</sup> See Table 5.1 in Fair Work Commission, *Australian Workplace Relations Study First Findings Report*, 29 January 2015. Available from: <https://www.fwc.gov.au/documents/awrs/AWRS-First-Findings.pdf>

<sup>7</sup> Ibid, Table 5.2.

<sup>8</sup> D. Neal, C. Govan, M. Norton and D. Ariely 2011, ‘Australian Attitudes Towards Wealth Inequality and Progressive Taxation: A national survey of knowledge, attitudes and perceptions of wealth inequality and the minimum wage’, Empirica Research, Prepared for the ACTU. Available from: <http://www.actu.org.au/media/296630/ACTU-Report-Inequality-and-Minimum-Wage.pdf>

<sup>9</sup> *Fair Work Act 2009* s. 578(b).

<sup>10</sup> Productivity Commission, *Workplace Relations Framework – Draft Report*, August 2015, page 322.

<sup>11</sup> Ibid 323.



hundreds of thousands of minimum wage workers who the Productivity Commission itself acknowledges are already “clearly in tough financial circumstances and face personal stresses and hardships”<sup>12</sup>, this is deeply distressing news.

But it is not just the minimum wages of ordinary workers that will decline if the Productivity Commission’s proposals are accepted. The Productivity Commission is also recommending that penalty rates be cut, but not for everyone – only for those who are already among the lowest paid in the country.

The workers who the Productivity Commission target for a reduction in their penalty rates work in industries where there is a high level of reliance on the minimum wages and conditions in awards. In fact over a third of the nation’s award reliant workforce are concentrated in those targeted retail, accommodation and food services and arts and recreation services industries, even though these industries account for less than a fifth of the total workforce<sup>13</sup>. These workers need their penalty rates to live from week to week.

The reasons why the Productivity Commission thinks that only some workers should have their penalty rates cut are confusing. The logic in part appears to be as follows:

- In some industries like health, emergency services and continuous manufacturing operations, the community expects seven day operation. Therefore, penalty rates at the level of around +50% for a Saturday and +100% for Sunday are appropriate.
- In other industries, like hospitality, entertainment, retailing, restaurants and cafes, the community expects seven day operation. Therefore, penalty rates at the level of around +50% for a Saturday and +100% for Sunday are *not* appropriate.

It’s a logic that we don’t follow. Moreover, there are a number of questionable assertions made along the way to reaching the conclusion that “While some parties lose, the overall community wide gains from reforms are positive”, which tend to mask the value judgement and policy choice that underlies that conclusion.

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<sup>12</sup> Ibid 330.

<sup>13</sup> According to ABS catalogue 6306 and ACTU calculations.

The Productivity Commission makes clear that it understands that its preferred losers are the workers who are already at the sharp end of Australia's inequality problem, and it even accepts that the penalty rate cuts it advocates for are not expected to improve business profitability<sup>14</sup>. Rather, the beneficiaries of cutting penalty rates are said to be consumers, the unemployed and the proprietors of small business, but the claims in respect of each group are highly speculative compared to the confidence with which Productivity Commission predicts the losses that will be felt by low paid workers.

The assertions made in relation to consumers and the unemployed are related, because they rest on the premise that lower Sunday penalty rates will lead to longer opening hours on Sunday and/or shops opening on Sunday which are currently closed. This is a premise that is built on:

- An admission that “there does not appear to be any empirical estimates of the degree to which wage relativities between Sunday, Saturday and weekday work affect labour demand in the hospitality, entertainment, retailing, restaurant and café industries at those times, and the total labour demand over the week”<sup>15</sup>;
- A finding that Coles Supermarkets sell more on Sundays in Victoria (which has deregulated trading hours and population of 5.84 million) than in Western Australia (which has restricted trading hours and a population=2.58 million)<sup>16</sup>. This is taken to predict that if businesses, many of which are small businesses, throughout the hospitality, entertainment, retailing, restaurant and café industries were open longer, people would spend more there. This is accepted as a prediction notwithstanding that the report which was used as the source of the Coles Supermarket statistics also noted with approval that the longer trading hours introduced in Perth were estimated to result in a transfer of market share from independent grocers (i.e. small businesses) to Coles & Woolworths of 10%<sup>17</sup>;

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<sup>14</sup> Above n 10, 525-526.

<sup>15</sup> Ibid 517.

<sup>16</sup> Population statistics from ABS (<http://www.abs.gov.au/websitedbs/d3310114.nsf/home/Population%20Pyramid%20-%20Australia>)

<sup>17</sup> Economic Regulation Authority of Western Australia, *Inquiry into Microeconomic Reform in Western Australia*, 30/6/2014 p290-291.

- An examination of Australia's and New Zealand's city restaurants listed on Tripadvisor (not exactly a recognised scholarly resource on which to place so much weight), to compare their opening hours. This showed that in New Zealand, where penalty rates are not regulated, those restaurants were open longer on Sundays and the proportion of restaurants open on Sundays in New Zealand was greater than those in some Australian cities. That the Productivity Commission could accept that these differences between countries are due to the differences in penalty rates is baffling, particularly when its own figures show that greater differences are observed between Australian cities (where penalty rates are the same)<sup>18</sup>.
- Evidence from a self-selecting sample of businesses in Queensland that indicated that smaller businesses in particular reduced their hours and employment hours in response to penalty rates. This was a survey that does not indicate which penalty rates in which industries it is referring to and does not measure the extent to which any reduced trading hours on any days were accompanied by increased staffing. Further, in referring to that survey, the Productivity Commission do not acknowledge that the actual costs of the transition to modern awards were highly variable. Many businesses would have experienced some reduction in labour costs including some penalty rates. Some businesses that commenced operating between 2006 and 2010 would have come from a base of zero award conditions. The Productivity Commission also ignores the material before it that part of the cost base problem for many retailers is that their landlords require them to open on Sunday.<sup>19</sup>; and
- Other survey material that the Productivity Commission itself identifies as subjective and lacking consistency.

By any measure, this a very shaky basis upon which to decide that those workers who are already among the lowest paid should be paid less.

Perhaps the biggest problem with the hypothesising about cutting penalty rates leading to job creation is employers' own research and the views expressed by the Productivity Commission itself. Research reviewed by the Productivity Commission indicates that there is a tendency to use younger, less experienced and cheaper labour on Sundays<sup>20</sup>. The Productivity Commission also notes preferences among shop proprietors that they themselves would prefer not to work on

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<sup>18</sup> Above n 10, Table 14.5 on page 519.

<sup>19</sup> ACRS 2912, *Sunday Trading in Australia*, Research Report, Department of marketing, Monash University, Melbourne (as cited in Productivity Commission (2015), above n 10, at 940).

<sup>20</sup> Ibid.

Sundays and suggests that more experienced staff would provide better service than the younger, less experienced staff that are currently preferred<sup>21</sup>. This tends to suggest that the preferred staffing change for many businesses would be to work an existing, more experienced employee on Sunday (possibly in place of the store owner/and or the existing Sunday worker), rather than hire any new staff.

*"I have worked Sundays for the last 25 years at the Coledale RSL. Given these sacrifices, the only positive impact of working on a Sunday is the money which is very important for the household budget.*

*My partner Brian used to be a coal miner but was injured at work in 2010 and lost his job. We have had to sell our house to cover debts, and we now rent.*

*I am already having trouble making ends meet. If my Sunday rates were cut to the Saturday rate, the cut in my income on top of the uncertainty of Brian's income will push me to the edge. "*

Mary Quirk - Bar Supervisor, Coledale RSL and United Voice member

The Productivity Commission has suggested that worker's be given one year's notice to adjust to their reduced pay, but it's clear that many workers would face significant uncertainty in seeking to move to other industries, particular those who live in regional areas.

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<sup>21</sup> Above n 10, 522.

## Closing the narrow gateway to improvement

Contrary to popular belief, Australia's Workplace Relations Framework has always provided for the making of collective agreements.

Collective bargaining is recognised worldwide as an important tool for workers to improve their pay and conditions. It is based on the premise, which the Productivity Commission accepts, that employees particularly suffer from unequal bargaining power<sup>22</sup>. When workers are left without a system of regulation that gives them rights to negotiate collectively and effectively, higher levels of income inequality are observed.

But what makes the difference is not just the fact that there is some access to collective bargaining by some workers. The broader and more accessible the system is, the better the impact on inequality. As a recent report from the United Nations International Labour Organization has stated, there is a distinction:

*"between collective bargaining systems that are narrow, or limited to the parties or bargaining unit, versus encompassing systems, in which collective bargaining agreements are extended to workers in the broader economic sector who are not members of the union. Under both systems there will be wage compression, but because narrow systems are limited to unionized firms the effect of the wage compression on broader wage inequality in the labour market will depend on the degree of unionization in the economy ... trade union density has, in general, fallen in both developed and developing countries. As a result, the wage compression effects of the narrow systems have become even more limited."*<sup>23</sup>

The limitations that already exist in our collective bargaining system include:

- Industrial action to support negotiations is only available at the enterprise level, hence the practical capacity to make collective multi-business agreements is poor.
- Access to industrial action where it is permitted is subject to numerous procedural restrictions.

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<sup>22</sup> Ibid 6.

<sup>23</sup> International Labour Office, *Labour Markets, Institutions and Inequality: Building Just Societies in the 21<sup>st</sup> Century* (2015) p 20.

*“Countries where a higher percentage of employees have collectively determined wages are also those with lower wage inequality. The opposite also holds true. Countries where fewer workers are covered by collective bargaining tend to have higher wage inequality...”*

*The stakes are high. We need to find ways to strengthen and extend the scope and inclusiveness of collective bargaining in order to enhance its equity effects in all countries. This will require sound policy choices and bold measures to shore up collective bargaining.”*

Susan Hayter, International Labour Organization<sup>24</sup>

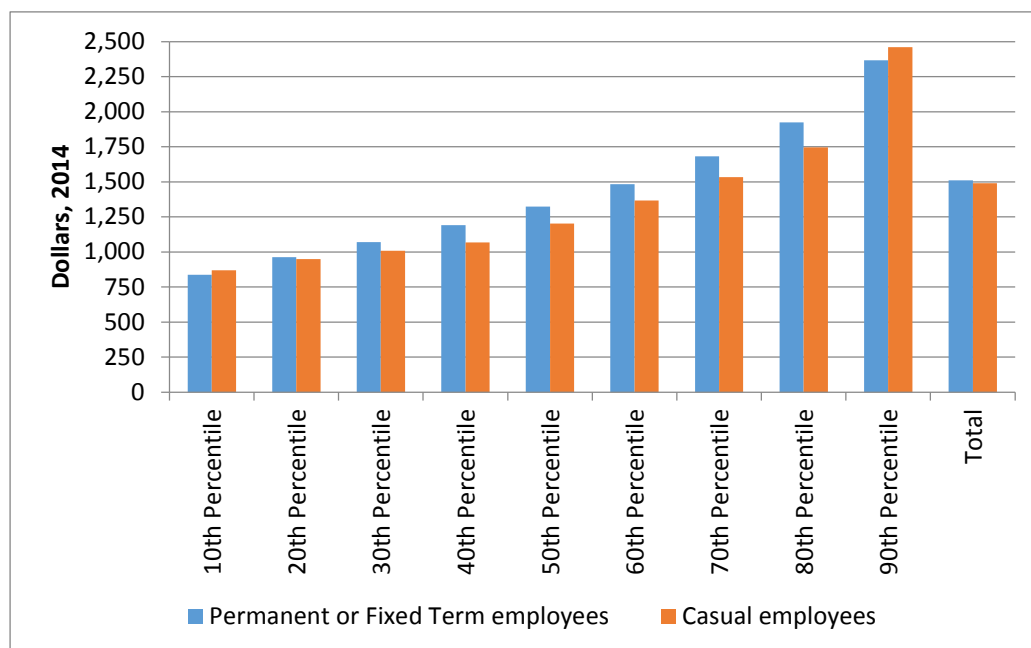
- Collective agreements are not permitted to prevent worker’s jobs being contracted out.
- Workers who are independent contractors are unable to participate in collective bargaining, even when their contract is to supply nothing other than the labour and where they work exclusively for the one business.
- Labour hire workers, even those who work routinely and exclusively at a particular workplace, are unable to participate in collective bargaining at that workplace or be covered by collective agreements that apply at those workplaces.
- Casual workers, who as a category are overrepresented in low paid work are acutely aware of their lack of job security, are often unwilling to take an active role in collective bargaining. Of all employees, 25% were earning less than \$600 per week in 2014.<sup>25</sup> Of the employees earning less than \$600 per week, 35.9% were dependent on award only, whereas for employees earning over \$600 per week, only 12.6% were dependent on award only. The following chart compares the distribution of full time weekly earnings for casual and permanent or fixed term employees in 2014. Except for the bottom decile where we can expect that a big proportion of workers are dependent on the minimum wage and casual loading, and the top decile which includes the most highly paid professional employees, the earnings of permanent fixed term workers exceed those of casual workers in every decile.

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<sup>24</sup> See Susan Hayter, 'Want to tackle inequality? Shore up collective bargaining', *Work in Progress*, International Labour Organization, 3 March 2015. Available at: <http://iloblog.org/2015/03/03/want-to-tackle-inequality-shore-up-collective-bargaining/>.

<sup>25</sup> ABS Cat 63060, *Employee Earnings and Hours*, Australia, May 2014.

Chart: Full time weekly earnings for permanent or fixed term, and casual employees, 2014



Source: ABS Cat 6306.0, *Employee Earnings and Hours*, Australia, May 2014.

- There are a number of topics that our collective bargaining system prevents from being addressed in collective agreements, for example protections against unfair dismissal for workers in their first 6-12 months of work. The International Labour Organisation has advised the government that these restrictions are inconsistent with its international obligations<sup>26</sup>.

Working within these limits, unions have had some success in attempting to improve the plight of workers who have little or no access, either in form or in substance, to collective bargaining. These measures include provisions in agreements that require an employer to allow casual workers to request to be made permanent, and provisions that ensure that labour hire workers engaged at the workplace are given conditions that are no less favourable than the directly engaged workers to whom a collective agreement applies. Workers do benefit from such measures, but they are far from a complete solution.

<sup>26</sup> ILO, Direct Request of the Committee of Experts on the Application of Standards and Recommendations, adopted 2013, published 103rd ILO session (2014).

Against that backdrop, it would be difficult to justify narrowing the access to and operation of our already heavily restricted collective bargaining framework, but that is exactly what the Productivity Commission has proposed be done. It has proposed the following further restrictions:

- That collective agreements must not interfere with an employer’s right to approach employees individually to re-negotiate key conditions such as overtime rates, penalty rates, allowances and arrangements about when work is performed.<sup>27</sup> A worker might be forced to give up to one year’s notice if they wished to revert back to the conditions contained in their collective agreement.<sup>28</sup>
- That collective agreements should cease to apply to employees when they become covered by an Enterprise Contract (a new form of instrument proposed by the Productivity Commission which is considered more fully below). Enterprise contracts would not be negotiated instruments, they would be template instruments written by employers. New employees could be required to agree to opt out of the collective agreement in favour of enterprise contract, as a condition of them being offered the job.<sup>29</sup>
- That casual workers cannot be covered by a collective agreement at all<sup>30</sup>.
- That collective agreements cannot regulate the terms of engagement of labour hire workers. This would mean that existing measures that unions have developed to ensure that these workers are not disadvantaged compared to their co-workers, would be no longer be allowed. <sup>31</sup>
- That an employer who flatly refused to respond to worker demands to bargain collectively could never face industrial action unless or until the union had commenced proceedings in the Fair Work Commission, proved that more than 50% of the workforce that would be covered by an agreement wanted to bargain collectively, and the Commission had decided it was “reasonable in the circumstances”<sup>32</sup> to make the relevant determination<sup>33</sup>.

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<sup>27</sup> Above note 10, Recommendation 15.2.

<sup>28</sup> Ibid, Recommendation 16.1.

<sup>29</sup> Ibid, Chapter 17.

<sup>30</sup> Ibid, Recommendation 20.1.

<sup>31</sup> Ibid, Recommendation 20.1.

<sup>32</sup> *Fair Work Act 2009* s. 237(2)(d).

<sup>33</sup> See above n 10, Recommendation 19.1.



These proposals of the Productivity Commission are simply irreconcilable with its opening platitudes that reflect the orthodox view regarding the necessity for collective bargaining. Its proposals can only lead to a more unequal society in which the first workers to experience the consequences will be those that are already most in need of a boost to their bargaining power.

## Privatising the Safety Net - Better off overall?

Our Industrial Relations system has matured over time to become a two tier system, comprised of:

- a minimum safety net of terms and conditions of employment set by legislation and the award system; and
- a collective bargaining framework that requires that collective agreements leave workers “better off overall” than would be the case if they were dependent on the minimum safety net.

This is intuitive and should be unsurprising - after all, how could one reasonably expect collective bargaining to have any sizeable impact on inequality if it didn't guarantee any improvements in workers' pay and conditions? Regrettably, the Productivity Commission doesn't share this view.

Rather, it sees something intrinsically wrong with the Fair Work Commission needing to be satisfied that workers be better off as a result of a collective agreement. It prefers that, instead of the Better Off Overall Test that currently exists, the Fair Work Commission apply a “No Disadvantage Test” which would require the Fair Work Commission “to identify how an agreement makes a class of employees worse off in order to reject an agreement”<sup>34</sup>. The Productivity Commission goes so far as to suggest that “the difference between those two tests should be marginal in theory”<sup>35</sup>. In other words, in the Productivity Commission's view is that there is a marginal difference between a collective agreement that is identical to an Award in all but title, and a collective agreement which provides sizeable wage increases, paid parental leave, access to paid training to progress professional development and the right to have workplace disputes determined by the Fair Work Commission.

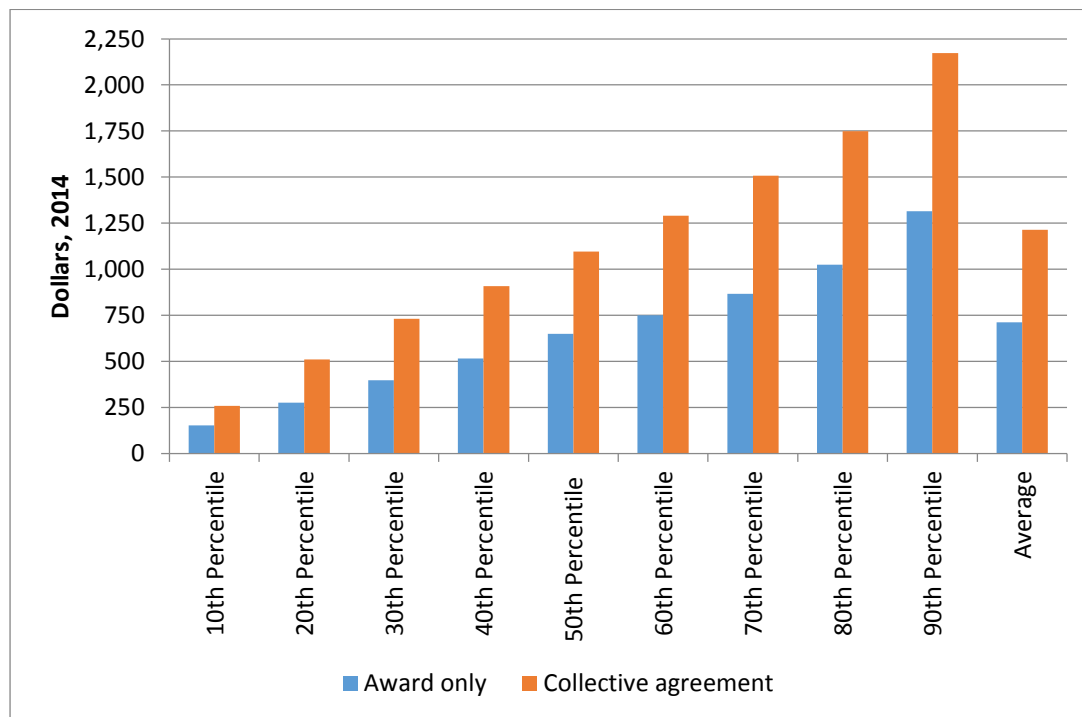
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<sup>34</sup> Above n 10, 574.

<sup>35</sup> Ibid.

The following chart shows the difference in weekly cash earnings (including salary sacrifice) for award-reliant workers compared with workers with collective agreements. <sup>36</sup>

**Chart: weekly total cash earnings for workers on award only and workers with collective agreements**



Source: ABS 6306.0 *Employee Earnings and Hours*, Australia, May 2014.

Even taking account of the possibility that award-reliant workers may be working more or less hours than those on collective agreements, it is clear that those on collective agreements earn significantly more per week and the disparity increases at higher earnings deciles.

The Productivity Commission also refers to complaints from employers regarding inconsistency in Fair Work Commission decisions that apply the Better Off Overall Test<sup>37</sup>. The potential for inconsistent decision making is a reality that cannot be engineered completely out of any system that requires human beings to make evaluative judgements, but the steps that the Fair Work Commission has taken - including producing guidance material for its members and having a dedicated team that conducts initial appraisals in accordance with set criteria - are sensible steps to reduce the likelihood of inconsistency. Fair Work Commission decisions regarding collective agreements are also subject to an appeal mechanism, which involves no filing fees and doesn't require legal representation. This ensures that there is a cheap and efficient way of reversing decisions that are incorrect.

<sup>36</sup> ABS 6306.0, *Employee Earnings and Hours*, Australia, May 2014.

<sup>37</sup> Above n 10, 575.

Even if one was convinced (and we're not) that, despite all these measures, the risk of inconsistent decision making was still too high, perhaps the most illogical reform proposal would be one which involved no oversight from the Fair Work Commission, no internal checks and balances and no right of appeal – for example permitting employers to apply the test instead. Perplexingly, such a model is a central feature of the Productivity Commission's proposal for Enterprise Contracts.

The Enterprise Contracts that the Productivity Commission propose have the following features:

- Enterprise Contracts would not be tailored to the individual, rather they would be templates that apply to classes or groups of workers.
- The content of the Enterprise Contract would be determined by the employer alone rather than negotiated with employees or their representatives;
- Rather than being subject to the Better Off Overall Test, the Enterprise Contract would use the same No Disadvantage Test proposed in relation to collective agreements. However, the employer would apply that test, not the Fair Work Commission;
- An employee who believed that an Enterprise Contract did not meet the No Disadvantage Test could make a complaint that might lead to the Enterprise Contract being varied prospectively, but no compensation would be payable beyond the base rate of pay in the award – so for example lost allowances, penalty rates and overtime payments would never be recoverable;
- Existing employees could “agree” to opt into Enterprise Contracts, but new employees could be required to sign up to them as a pre-condition for them getting the job;
- Enterprise Contracts would operate to the exclusion of a collective agreement, and collective agreements could not ban employees from opting in to a future Enterprise Contract. This means that an employer could start rolling out an Enterprise Contract that slashed the agreed pay and conditions as soon as it had agreed to a collective agreement, or even while negotiations for a collective agreement were underway;

- Enterprise Contracts would operate for a minimum of 12 months, during which time employees would have no right to collectively bargain<sup>38</sup>.

The similarities between Enterprise Contracts and the practical experience of Australian Workplace Agreements is striking. The most significant difference is that the pretence of genuine individual negotiation, which pervaded much of the promotion of Australian Workplace Agreements has been abandoned in favour of a more honest approach that acknowledges that there will be no negotiation: The Productivity Commission states that the aim of Enterprise Contracts is to permit “businesses to vary awards”<sup>39</sup> and describes them as “take it or leave it contracts”<sup>40</sup>.

This privatisation of the Award system to suit business clearly fundamentally attacks the notion that there be a safety net. Along with the abolition of the Better Off Overall Test, there is not even a policy signal that market wages and conditions *should* be superior to the safety net. Rather, the policy signal to employers is merely that they should make some effort to ensure that employees can’t prove they are worse off than the legal minimum. Coupled with the ability to supplant collective agreements – the only vehicle left in the system whereby workers can combine with some economic power to improve their conditions – the Enterprise Contracts proposal is further clear evidence that Productivity Commission either does not think that income inequality is a problem or thinks it is a problem that the industrial relations system should not attempt to address.

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<sup>38</sup> The Productivity Commission's draft report states, “It could also be possible for employees (with majority consent) to initiate an enterprise bargaining process after the enterprise contract had expired”. See above n 10, 625.

<sup>39</sup> Above n 10, 625.

<sup>40</sup> Ibid 622.

The Productivity Commission has not entirely abandoned the idea of individual bargaining though. Rather, it has proposed some extensions to the already seriously flawed system of Individual Flexibility Arrangements. Even though it's illegal to require a worker to sign an Individual Flexibility Arrangement as a condition of getting a job or staying in their job, research by the Fair Work Commission indicates that up to around half of the employers that make Individual Flexibility Arrangements break that law<sup>41</sup>. Further, even though employers are currently required to ensure that all Individual Flexibility Arrangements leave their employees better off overall, up to a quarter admit that they don't do this<sup>42</sup>. There is every reason to expect that these problems will continue (and will similarly affect Enterprise Contracts). But the Productivity Commission's recommendations are to water down the test that employers are supposed to apply to Individual Flexibility Arrangements (from Better Off Overall to No Disadvantage) and to allow an Individual Flexibility Arrangement to be locked in for up to 12 months after the employee says they want to terminate it. These changes clearly won't benefit workers and are just another way of undermining the safety net.

*"I've spoken recently with workers who have signed individual flexibility arrangements that basically take away their rights to overtime, penalties and things like that. Under the legislation, you must show how it would be more advantageous for someone signing an IFA as opposed to not, and one of the responses that they get for that is, "Well, you wouldn't get the work if you didn't sign it, so that's how you're better off."*

Matt Journeaux, Australasian Meat Industry Employees Union (AMIEU) Queensland Branch

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<sup>41</sup> This research was undertaken by Fair Work Australia as the Fair Work Commission then was. See Fair Work Australia, *General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements 2009-2012*, November 2012, Figures 4.6 and 4.3.

<sup>42</sup> Ibid Tables 5.5 and 5.7.

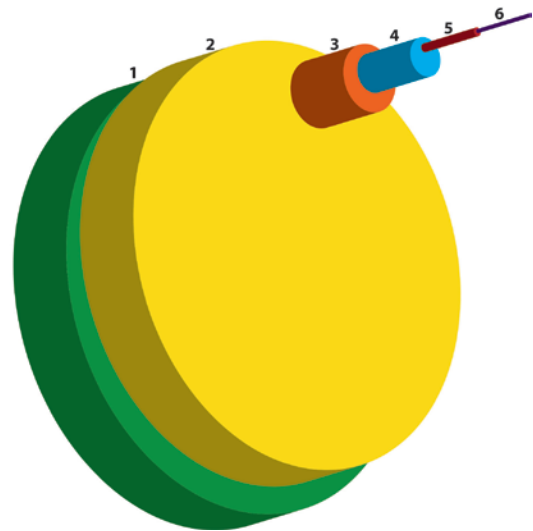
## Truth, Perception and Unfair Dismissal

Unfair dismissal laws attract a lot of attention, but the reality is that despite applying to around 90% of the Australian Workforce<sup>43</sup>, well under a quarter of 1 percent of the workforce make an unfair dismissal claim<sup>44</sup> and most (90% of that quarter<sup>45</sup>) are resolved by agreement. Less than a 1.5% of that quarter are ultimately successful in the Fair Work Commission<sup>46</sup> and less than a fifth of those get their jobs back<sup>47</sup>.

These statistics are borne out in the chart below, which helps show how small is the risk to employers of unfair dismissal applications. In 2012-12, a tiny fraction of the workforce, a mere 0.001%, made an unfair dismissal claim and were successful against their employer after arbitration. In the same year, only 0.0002% of the workforce made a successfully arbitrated unfair dismissal claim and were reinstated.

**2012 - 13 Unfair Dismissal vs Workforce**

Label	numbers	% of workforce	Source
1 Workforce	11849600	100	ABS cat 6105
2 Covered by Fair Work Act	10664640	90	PC draft report Fig 5.2
3 Lodged unfair dismissal claims	14818	0.125	PC draft report Table B1
4 Lodged unfair dismissal that proceeded to arbitration	402	0.003	PC draft report Table B2
5 Successful at arbitration	132	0.001	PC draft report Table B2
6 Reinstated after arbitration	20	0.0002	PC draft report Table B2



Even the Productivity Commission recognises that small businesses do not “accurately estimate the true probabilities”<sup>48</sup> of facing an unfair dismissal claim, leading to overreactions and exaggerated and biased claims for reform of the system. Notwithstanding this, the Productivity Commission has proposed a major shake-up of our unfair dismissal system.

<sup>43</sup> Above n 10, figure 5.2.

<sup>44</sup> Ibid 212.

<sup>45</sup> Ibid, Table B1.

<sup>46</sup> Ibid, Tables B1 and B2.

<sup>47</sup> Ibid, Table B2.

<sup>48</sup> Ibid, 228.

Unfair Dismissal rights are very important to workers. Losing a job is not only disruptive and deeply upsetting, it can also have severe financial consequences. Unfair dismissal laws provide workers with a right to get their job back, or some compensation for the loss of their job, in many circumstances where their sacking was harsh, unjust or unreasonable.

There are a number of reasons as to why a dismissal might be found to be unfair. For example:

- A worker might be accused of doing something wrong and denies it and the accusation proves to be incorrect;
- A worker might be correctly accused of doing something wrong, but their wrongdoing is not so serious as to warrant them losing their job (for example, the worker was 5 minutes late back from lunch);
- An employer might believe the worker has done something wrong, but doesn't give the worker a proper opportunity to respond to the allegation before dismissing them. This is often referred to as a breach of procedural fairness.
- An employee might not be meeting the employer's expectations for a period of time, but is not told this by the employer until they are dismissed for "persistent underperformance". This is also a breach of procedural fairness.

The Productivity Commission has recommended that "procedural errors by an employer should not result in reinstatement or compensation for a former employee"<sup>49</sup>. This opens up the prospect of workers like those in the two examples immediately above being left with no remedy. Curiously, the Productivity Commission suggests that employers who commit these procedural errors might be fined instead, rather than the worker being compensated<sup>50</sup>. If the unfair dismissal laws are to recognise that breaches of procedural fairness can be so serious as to warrant punishment, it is highly objectionable that it also be changed to guarantee that the victims of the wrongdoing are left without a remedy. An unfairly dismissed employee may well feel vindicated if the Fair Work Commission finds in their favour in these circumstances, but vindication does nothing to comfort the social dislocation associated with the loss of work and income.

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<sup>49</sup> Ibid, Draft Recommendation 5.2.

<sup>50</sup> Ibid, 233.



The further reforms proposed are likewise very difficult to comprehend by anybody who believes the system should be fair.

One thing that all dismissed workers have in common is a sudden drop in income, and that's why the fees for lodging an unfair dismissal claim are low (\$68.60). The Productivity Commission is considering raising that fee, as well as introducing a new fee that would be payable in order to take the case to a hearing<sup>51</sup>. Many workers represent themselves in unfair dismissal cases because they have no other option and could not afford to pay a lawyer. Any increase in fees could put pressure on them to abandon their claim or accept an unfairly compromised settlement.

The other major change proposed is to change the emphasis of the unfair dismissal system away from reinstatement. Currently, the unfair dismissal law provides that before a worker can be paid compensation for an unfair dismissal, the Fair Work Commission needs to be satisfied that the reinstatement of the worker would be inappropriate<sup>52</sup>. This is different to the way employment law generally works, and courts are traditionally very hesitant to force people into ongoing employment relationships. The difference is a deliberate one.

There might be a number of reasons why it is inappropriate for a worker to be re-employed in their old job, for example they may have found a new job or they no longer want to work for an employer who has treated them harshly, they may have suffered an injury which means they can't work for that employer anymore, or so much time might have passed that the employer has filled the position and there are no other comparable jobs available. All these reasons might explain why there are relatively few reinstatements ordered by the Commission each year – in 2013-14 just over 18% of cases that went to final hearing resulted in reinstatement.<sup>53</sup> But there are also important reasons why reinstatement should be the goal even if it is only realised in the minority of cases. For one, unemployment for no good reason is not good for anyone. But at the most basic level, if the Fair Work Commission decides that a worker should never have lost their job, an order for reinstatement is the only true way of putting the worker back in the position they would have been in if the employer had acted appropriately.

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<sup>51</sup> Ibid 231.

<sup>52</sup> *Fair Work Act 2009* s. 390

<sup>53</sup> Above n 10, Table B2.

## Conclusion

The main finding of the Productivity Commission's draft report is that the workplace relations system is not 'systemically dysfunctional' but needs 'repair'. Yet the Commission then recommends a raft of changes that in fact present a substantial diminution of workers' rights and a skewing of the Fair Work Commission's function more in favour of employers at employees' expense. Some of the recommendations attack the integrity and impartiality of the Fair Work Commission itself, such as the proposal to limit commissioners' appointments to five years and make their reappointment subject to a 'performance' review.

Often, the Commission's recommendations do not match the reasoning that precedes them and quickly lost are the acknowledgements at the report's start of the importance in our workplace relations system of fairness and redistributive justice; of addressing the power imbalance between worker and employer, and the need to balance the needs of both employees and employers.

Much of the justification for this attack on worker conditions such as fair minimum wages and penalty rates appears to be predicated on the myth that reducing minimum wages and conditions, regulations and protections, and expanding managerial prerogative will lead to greater economic growth and higher employment.

This is because the Productivity Commission's recommendations appear to be based on an outmoded neoliberal economic paradigm that was always controversial but has been increasingly discredited since the global financial crisis of 2008.

The World Bank, IMF and OECD, have all noted that the increase in inequality in many economies in the last three decades,<sup>54</sup> has had a negative effect on growth and prosperity.<sup>55</sup> These organisations have each indicated that a new approach, based on ensuring more equal distribution of income and opportunity, which generates local consumer demand and productivity, is critical to boosting the economic prosperity of nations<sup>56</sup> and ensuring higher and more durable growth,<sup>57</sup> to say nothing of addressing how wealth is shared within those nations.

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<sup>54</sup> "Inequality and Labour Market Institutions", IMF Staff Discussion Note (July 2015), p.5 and "In It Together – Why Less Inequality Benefits All", OECD (2015), p.23.

<sup>55</sup> "In It Together – Why Less Inequality Benefits All", OECD (2015), 20.

<sup>56</sup> "Inclusive Growth For Shared Prosperity", Swaroop, V. (2015), <http://blogs.worldbank.org/developmenttalk/inclusive-growth-shared-prosperity>.

<sup>57</sup> See Christine Laguarde, Managing Director, International Monetary Fund, Address to the Convergence on Inclusive Capitalism, 27/5/2014.

To put it simply, the Productivity Commission has missed the elephant in the room: inequality.

Australia's workplace relations system is a crucial plank in the bulwark against growing inequality but it needs strengthening, not weakening. It has already been weakened over time due to deliberate concessions to business and insufficient responses by regulators to changes in the nature and organisation of work.

Australia has retained employee protections higher than those in the US and UK which has helped slow the growth of income inequality here and prevented it reaching the levels experienced in those countries but Australia has still sunk from being one of the most equal countries in the OECD to the middle of the pack and the gap between rich and poor is widening.

Not only does the Commission's report fail to address inequality, it proposes a range of measures that would entrench or exacerbate it, and hurt the lowest paid. These changes would put our social cohesion at risk and accelerate us toward the US model and the social consequences that entails. The impact of the proposed changes would be disproportionately felt by the most vulnerable and disadvantaged in our society.

The objectives of the *Fair Work Act 2009* include providing a balanced workplace relations framework that is fair, cooperative, productive and socially inclusive and that promotes Australia's future economic prosperity<sup>58</sup>. The proposed changes to our workplace relations regime would undermine these objectives.

The report is a missed opportunity to meaningfully contribute ideas for a more productive, inclusive, equal and fairer Australia that tackles the challenges ahead. It fails to look to our future needs in regulating a new workforce in a new economy; it fails to provide ideas for strengthening the regulatory infrastructure and ensure a proper safety net for these coming changes.

For example, it fails to meaningfully address the gender pay gap and growing employment insecurity. It fails to suggest providing for portable long service leave, leave banks and benefit banks, and proper measures against sham contracting models and tax avoidance arrangements that rob the public purse of vital revenue. It fails to address the erosion of minimum entitlements and protections through labour hire arrangements.

The report fails to meaningfully promote the labour force participation of women, migrant workers and the unemployed. Instead, it pits workers against the unemployed as though reducing the conditions for the former would help the latter.

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<sup>58</sup> See Section 3 of the Act.

In this draft report, the principle of a level playing field for all, for unions and good employers, is overlooked in favour of fringe and minority interests. In short, the progress that could be made through measures to promote genuine productivity gains through greater workforce participation and co-operative, inclusive workplaces has been denied. We urge the Productivity Commission to reconsider its recommendations.

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