

# Productivity Commission SUBMISSION COVER SHEET (not for publication)



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## Table of Contents

Introduction .....	3
Summary of key ASU issues and recommendations .....	4
Fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net .....	5
<i>The Federal minimum wage</i> .....	5
<i>The Award system</i> .....	5
<i>National Employment Standards</i> .....	6
<i>Minimum Hours</i> .....	6
<i>Flexible working arrangements</i> .....	7
<i>Penalty Rates</i> .....	9
Productivity .....	10
Barriers to bargaining .....	11
<i>Good faith bargaining orders</i> .....	11
<i>Permitted matters</i> .....	12
<i>Multiple employer agreements [MEAs]</i> .....	12
<i>Industrial conflict and days lost due to industrial action</i> .....	13
Unfair dismissal .....	15
Appropriate scope for independent contracting .....	16
<i>Employee vs. Independent contractor</i> .....	17
<i>Home-based customer call work</i> .....	17
Transfer of Business .....	18
Women and the <i>Fair Work Act</i> .....	19
<i>Family friendly work arrangements</i> .....	19
<i>Domestic and family violence</i> .....	19
Equal remuneration case .....	20

## 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 has, during its existence, established on behalf of its members significant numbers of federal and state awards and agreements providing terms and conditions of employment. Prior to the introduction of the *Fair Work Act*, the ASU had established about 200 Federal awards providing terms and conditions of employment for the Union's members, supplemented by hundreds of enterprise bargaining agreements. The same applied in State IR systems.

Following the introduction of the *Fair Work Act*, the ASU has continued to be a significant participant in the Fair Work system both as a bargaining union and in relation to the establishment of minimum terms and conditions of employment through modern awards. The Union's members are covered by a large number (approx. 20) of the modern awards because of the diversity of our membership. The ASU continues to actively bargain on behalf of members.

The ASU is responding to the Productivity Commission's terms of reference as over 50% of our membership are women, many of whom are employed in the social and community service sector and clerical and administrative sector. Our experience indicates that a strong and secure safety net is vital to ensuring these workers receive a fair and reasonable wage.

In addition as a lead bargaining union in Local Government, Electricity, Water, Airlines, Rail and Business Equipment the ASU has worked within the terms of the *Fair Work Act* to continue its work in obtaining the best possible enterprise agreements for its members.

The ASU has submissions to make and recommendations which are based on the experience of the Union since the commencement of the *Fair Work Act* in July 2009.

## Summary of key ASU issues and recommendations

1. Minimum wage – The review of minimum wages should be removed from the Productivity Commissions terms of reference. Minimum wages should be set by an Expert Panel of the Fair Work Commission as per the current *Fair Work Act*.
2. Minimum hours - The intention of the legislation was to provide for a 38 hour week entitlement. There should be guaranteed regular hours and employees must have an absolute right to refuse to work in excess of this period [unless under an averaging system]. The words in Section 62(1) 'unless the additional hours are reasonable' in the *Fair Work Act* should be removed to guarantee all employees work the same number of hours per week.
3. Flexible work arrangements – 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”.
4. Penalty rates - Penalty rates should be removed from the Productivity Commissions terms of reference. The ASU believes penalty rates should be set by the Fair Work Commission in accordance with the *Fair Work Act* in its current form.
5. Good faith bargaining - Employers should not be permitted to put agreements to employees without a declaration by FWC that the process of bargaining has been exhausted. Similarly, once an employer has commenced any form of communication with employees about the possibility of any type of collective agreement, the employer should be required to issue the notice of employee representational rights, to ensure that all bargaining agents are on the same footing and can represent and bargain effectively on behalf of those that they represent.
6. Permitted matters - The *Fair Work Act* should be amended to remove the restriction on permitted matters for bargaining.
7. Multi-employer agreements - The *Fair Work Act* should be amended to allow additional employers to be added to an existing MEA in appropriate circumstances. In addition, employees covered by MEA's should be able to take industrial action during bargaining under the Act, like all other employees.
8. Industrial action - Employers should be required to give three working days' notice to bargaining representatives and employees of any proposed employer response action.
9. Unfair dismissal - 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.
10. Unfair dismissal – All unfair dismissals should be the subject of a conciliation conference and genuine attempts at conciliation, including the power to compel persons to attend conferences. Further, where there are reasonable prospects of an agreed outcome, conciliation officers should be empowered to adjourn matters enabling the parties to exchange documentation and reach a settlement.
11. Independent 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.
12. Transfer of business - Transfer of business rules should be amended so employers do not have the opportunity to outsource work through corporate restructure thereby avoiding the requirement to apply existing industrial instruments. The test should be whether work has transferred, whether or not there is a direct transmission and whether or not there are transferring employees.
13. Family friendly work arrangements - Family friendly work arrangements should form part of all modern awards.
14. Domestic and family violence - Domestic and family violence leave should form part of all modern awards.
15. Equal remuneration – 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.

## Fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net

### *The Federal minimum wage*

The ASU strongly supports legislated minimum entitlements that provide for a strong and secure safety net of working conditions and entitlements through minimum wage decisions, Modern Awards and the National Employment Standards.

We are concerned the questions posed by the Productivity Commission will invariably affect lower paid workers more than those on higher wages. Two of the main issues dealt with in the Issue Papers, namely minimum wages and penalty rates are associated with low paid workers.

The ASU is concerned that women earn just 81.2% percent of what their male counterparts make. While many factors contribute to the gender pay gap, one reason is that women are overrepresented in low-wage work with 58% of minimum wage workers being women<sup>1</sup>. The ASU sees minimum wage increases as an important tool in ensuring this wage gap doesn't increase any further. There is an important gender equity component to the minimum wage.

We question why minimum wages are part of the Productivity Commissions inquiry given the Government's continued assurance that the setting of modern awards, including penalty rates and the minimum wage, will continue to be the responsibility of the Fair Work Commission.

**Recommendation 1:** The review of minimum wages should be removed from the Productivity Commissions terms of reference. Minimum wages should be set by an Expert Panel of the Fair Work Commission as per the current *Fair Work Act*.

### *The Award system*

According to the most recent Australian Bureau of Statistics report into Employee Earnings and Hours<sup>2</sup>, 18.8% of employees have their pay set by a modern award. This group of employees is highly represented within the ASU's membership of social and community service workers and clerical and administrative workers.

For example in the social and community service sector 70% of our membership are female with approximately 80% being reliant on the Social, Community, Home Care and Disability Services Industry Award 2010. Despite trying to negotiate enterprise agreements in the sector we are restricted by the respective organisations' funding provisions.

Paragraph 1.1 of *Issues Paper 1: The Inquiry in Context* notes that there is growing demand for people working in social services and that the workplace relations environments of those providing social services often differ from those in other occupations. (page 4). Social services includes the social and community services sector. The social and community services sector is almost exclusively funded by Federal and State governments.

In 2012, workers in the social and community services sector were the subject of an Equal Remuneration Order which awarded increases of between 23% and 45% following a successful application by the ASU and other unions. The Order will be phased in over eight years and when fully implemented, will go a long way towards addressing historic gender based undervaluation of work in the social and community services sector. However, these workers continue to rely very heavily on the terms of the Social, Community, Home Care and Disability Services Industry Award 2010 with respect to conditions of employment such as allowances, overtime and penalty rates.

When bargaining occurs in the social and community service sector it almost never deals with wages or wage related matters such as allowances, overtime and penalty rates. It is not possible to seriously bargain

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<sup>1</sup> Ibid.

<sup>2</sup> Australian Bureau of Statistics, Issue: 6306.0 - Employee Earnings and Hours, Australia, May 2014

around these matters as employers are only funded to pay Award wages and conditions and no more. They do not “control the purse strings”, the funding bodies do and the funding bodies are never at the bargaining table as they are not the employer. This vicious circle has made enterprise bargaining a difficult exercise for most of the industry. This issue was the subject of extensive evidence and submissions in the *Equal Remuneration Case 2012*

These issues were raised in the Productivity Commission Inquiry into the Contribution of the Not-for Profit Sector in 2009/2010 with the final report acknowledging the sector-wide issue of low wages and lack of career paths.

***“Recommendation 10.2***

*In order to ensure that not-for-profits can sustain their workforces, and as wages are a major factor in the successful recruitment and retention of staff, Australian governments purchasing community services need to base funding on relevant market wages for equivalent positions. Costings need to take into account the skill sets required to perform the purchased services and be indexed appropriately to market wage growth within that industry sector<sup>3</sup>.”*

A strong relevant safety net is therefore essential for those in this sector who will never be able to use bargaining for wage increases or for other important conditions such as allowances, overtime and penalty rates.

It is also important that Modern Awards are able to be reviewed periodically by the Fair Work Commission to ensure that as industries evolve, award reliant workers have secure employment, continue to be able to maintain a decent standard of living and are appropriately compensated for working unsocial, irregular or unpredictable hours. This is the only way of ensuring that the social and community services sector can attract and retain highly skilled workers to ensure high quality service provision, particularly in the current environment, acknowledged by the Productivity Commission, where there is growing demand for people working in social services.

The ASU strongly opposes any changes to the current legislative framework which would have the effect of reducing the conditions of employment for workers who rely upon Modern Awards.

## ***National Employment Standards***

The framework of employee rights and obligations consists principally of the provisions of the National Employment Standards as contained in the *Fair Work Act* and modern awards, supplemented for a significant minority of employees by collective agreements.

Modern awards and agreements cannot operate with respect to an employee to the detriment of that employee’s NES entitlements.

The ASU supports the NES as together with the minimum wage orders and modern awards it makes up the safety net that cannot be altered to the disadvantage of an employee. However we have a number of observations to make about the operation and drafting of these entitlements which we believe could be improved in the following areas:

- Minimum Hours
- Flexible working arrangements
- Penalty Rates.

## ***Minimum Hours***

The first NES entitlement appears to provide a maximum working week for full time employees of 38 hours per week. However, this entitlement is poorly drafted and does not provide the entitlement it purports to provide.

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<sup>3</sup> Productivity Commission (2010) Contribution to the Not-for-Profit Sector – Research report [online] Accessed at: <http://www.pc.gov.au/inquiries/completed/not-for-profit/report>

The relevant provision of the NES [section 62 of the FW Act] reads:

62 Maximum weekly hours

Maximum weekly hours of work

(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:

(a) for a full-time employee—38 hours; or

(b) for an employee who is not a full-time employee—the lesser of:

(i) 38 hours; and

(ii) the employee's ordinary hours of work in a week.

Our concern is that the 'entitlement' to a maximum working week of 38 hours per week is immediately qualified by the rider 'unless the additional hours are reasonable' which largely renders the entitlement unenforceable. The terms of the NES as stated operate as fundamental minimum entitlements: no award or agreement provision can provide a term of employment detrimental to the provisions of the NES.<sup>4</sup>

Our concerns were played out in bargaining about this NES entitlement with TNT - see the TNT Express Customer Service Agreement 2011-2013[AG2010-24253]. This agreement effectively sets the minimum working week for employees at 40 hours per week contrary to the spirit and intent of the NES. This requires that all employees work a minimum of 40 hours per week being 38 ordinary hours and two hours of overtime each and every week being 'reasonable additional hours' in the view of the employer.

The ASU objected to the approval of this agreement on the grounds that it was unfavourable to employees compared to the provisions of the NES specifying a maximum working week of 38 hours. In response to the Union's concerns, the tribunal accepted an undertaking<sup>5</sup> from the employer that employees could refuse to work these additional hours where such hours were "unreasonable" in accordance with the terms of section 62(3) of the Act. If employees could demonstrate unreasonableness, they could work 38 hours with the deduction of two hours pay at overtime rates.

In our submission to the tribunal we stated this places an unreasonable burden on the employees concerned; firstly in having to justify on a weekly basis their entitlement to a maximum 38 hour week and secondly by requiring them to take a pay cut to achieve this outcome. The 40 hour week at TNT arose from the previous existence of a rostered day off arrangement [allowed under averaging rules] which maintained their 38 hour week. Now they are required to work 40 hours without an RDO by virtue of the poor wording in the NES.

This outcome also unfairly reversed the onus for demonstrating the unreasonableness or otherwise of the proposed additional hours onto the employees, when it is clearly the intent of the s62(1) of the *Fair Work Act* that it is the employer who should bear this onus.

**Recommendation 2:** The intention of the legislation was to provide for a 38 hour week entitlement. There should be guaranteed regular hours and employees must have an absolute right to refuse to work in excess of this period [unless under an averaging system]. The words in Section 62(1) 'unless the additional hours are reasonable' in the *Fair Work Act* should be removed to guarantee all employees work the same number of hours per week.

## *Flexible working arrangements*

The NES provides employees with a legal right to request flexible working arrangements. These arrangements are important especially to women who are more likely than men to use these arrangements to care for children or for other family members.

<sup>4</sup> *Fair Work Act* sections 44 and 55

<sup>5</sup> Decision of SDP Hamburger [2011] FWAA 398

The ASU supports flexible working arrangements and we are concerned employers can refuse a request on 'reasonable business grounds'.

Section 65 of the Act provides for requests for flexible working arrangements and Section 76 also provides an NES entitlement to additional periods of unpaid parental leave.

Employers are prohibited from contravening the terms of the NES in section 44 of the Act. However, this section also provides that no orders can be made with respect to the provisions of section 65 (5) or 76 (4):

#### **44 Contravening the National Employment Standards**

(1) An employer must not contravene a provision of the National Employment Standards.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection 65 (5) or 76(4).

Note 1: Subsections 65 (5) and 76(4) state that an employer may refuse a request for flexible working arrangements, or an application to extend unpaid parental leave, only on reasonable business grounds.

Note 2: Modern awards and enterprise agreements include terms about settling disputes in relation to the National Employment Standards (other than disputes as to whether an employer had reasonable business grounds under subsection 65 (5) or 76(4)).

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 disputes 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. As highlighted above, modern awards do not allow for settling of disputes about the terms of an award or the NES by arbitration other than by consent arbitration.

Further Sections in the *Fair Work Act* that include 'reasonable business grounds' are:

Section 146 dealing with modern awards further provides:

#### **146 Terms about settling disputes**

Without limiting paragraph 139(1)(j), a modern award must include a term that provides a procedure for settling disputes:

(a) about any matters arising under the award; and

(b) in relation to the National Employment Standards.

Note: FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Section 739 states:

#### **739 Disputes dealt with by FWC**

(1) This section applies if a term referred to in section 738 requires or allows FWC to deal with a dispute.

(2) FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:

(a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to FWC dealing with the matter; or

(b) a determination under the *Public Service Act 1999* authorises FWC to deal with the matter.

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 3:** 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".

## *Penalty Rates*

Since the early 1900s penalty rate payments have been used as both a deterrent to employers and as compensation for workers for work performed outside ordinary hours. During the past decade there has been increasing calls by employers and small businesses to either reduce or scrap penalty rates with the justification that work practices have shifted and we now live in a 24/7 economy.

As most of Australian workers do not work on weekends or nights the 24/7 economy has not resulted in a 24/7 working life for most.

Recent research indicates that Sunday continues to remain a day for connecting with family and the community. Furthermore it has been shown frequently working a combination of weekends and nights, or just evenings/nights, was associated with the highest work-life interference<sup>6</sup>. Unsocial work hours that involve evening, night or weekend work are associated with a range of negative outcomes for health, family and personal relationships<sup>7</sup>.

Penalty rates are intended as compensation for working unsociable hours and the negative outcomes associated with these hours. The ASU is concerned the removal or reduction of penalty rates in Modern Awards will fail to achieve the modern award objective to ensure "a fair and relevant minimum safety net of terms and conditions", taking into account a range of considerations which include "relative living standards and the need of the low paid".

Many industries where ASU members work have penalty rates including: local government, airlines, information technology, call centres and the social and community service sector where employees often work 24hours around the clock.

For example many ASU members covered by the Social, Community, Home Care and Disability Services Industry Award 2010 provide support for people with disabilities, young people, homeless people and women experiencing domestic violence in residential accommodation which operates 24/7, and receive shiftwork penalties. Garbage collectors, Librarians, and Parking Officers covered by the Local Government Industry Award 2010 receive an additional penalty payment for weekend work, and public holidays. Airline workers at airports, in operations, freight, engineering and catering work outside ordinary hours, with many on 24hour 7day per week rotating shifts.

The ASU has many members who work shift work and/or on call in many industries. For example, in the electricity industry power station and control room operators work 7.00pm-7.00am 12 hour shift 365 days per year. This is similar in the water industry, airline industry, and in social and community services. If working hours were all reduced to ordinary hours on a 24/7 basis, then millions of workers, many performing essential services would lose thousands of dollars per year and would no longer be compensated for working unsocial hours e.g. nights, weekends, public holidays.

<sup>6</sup> Daly, T, 2014. *Evenings, nights and weekends: working unsocial hours and penalty rates*. [online] Available at: [http://www.unisa.edu.au/PageFiles/34117/PenaltyRatesReport\\_Oct2014%20Final\\_R1.pdf](http://www.unisa.edu.au/PageFiles/34117/PenaltyRatesReport_Oct2014%20Final_R1.pdf)

<sup>7</sup> Ibid.

These workers view 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.

The ASU believes penalty rate considerations are a matter for the independent umpire, the Fair Work Commission. The determination of penalty rates requires discretionary consideration based on the nature of work being performed and the circumstances under which it is performed.

Again we question why penalty rates are part of the Productivity Commissions inquiry given the Government's continued assurance that the setting of modern awards, including penalty rates and the minimum wage will continue to be the responsibility of the Fair Work Commission.

**Recommendation 4:** Penalty rates should be removed from the Productivity Commissions terms of reference. The ASU believes penalty rates should be set by the Fair Work Commission in accordance with the *Fair Work Act* in its current form.

## Productivity

The ASU is concerned that the slowdown in productivity may be misinterpreted and exaggerated by employer groups to justify measures that may have little or no relevance to Australia's future productivity performance. We do not accept that industrial legislation reforms designed to reduce labour costs and increase business profits is the answer.

Peetz addressed the extent to which industrial relations policy affects productivity finding it is what happens at the workplace (the decisions management makes and the relationship the business has with employees and their representatives) that can have a noticeable effect on productivity<sup>8</sup>. "Often what is being sought will have little impact on economic efficiency and productivity, but will have significant implications for the distribution of power and hence income – that is, for fairness<sup>9</sup>."

Australia's labour productivity growth for total economy has increased by 2.2%<sup>10</sup>. The Australian Bureau of Statistics' National Accounts show that gross value added (GVA) per hour worked – a measure of productivity that measures the contribution to the economy of each individual producer, industry or sector – increased by 0.2% in the September 2013 quarter for a total of 1.3% between September 2012 and 2013<sup>11</sup>. It further increased by 0.2% in the latest September 2014 quarter and 1.9% through the year<sup>12</sup>. This growth is supported in the first major study of Australian workplaces since 1995 which found employers believe that workplace productivity levels are steady or improving under the existing regime<sup>13</sup>.

Employer organisations arguing the *Fair Work Act* has limited business productivity is an argument that is hard to sustain, particularly when you look at how the growth in real wage levels has declined to its slowest pace in at least 15 years. At the same time productivity growth is expected to remain a little above its pace of much of the past decade<sup>14</sup>.

The facts are that labour productivity has risen every quarter since the *Fair Work Act* was introduced in June 2009. In the 'Workchoices era' between 1996-2009 labour productivity was stagnant or going backwards. In fact, in March 2009 it went backwards by 0.6% in trend terms. Labour productivity only picked up again after the introduction of the *Fair Work Act* in June 2009.

The ASU is concerned employer groups will use this Inquiry to propose cutting penalty rates and the federal minimum wage under the guise of improving productivity. Contrary to the mythology propagated by some employer groups, conservative think tanks and commentators', life under the *Fair Work Act* has resulted in wages and days lost through industrial action being at record lows, while labour productivity and profits are up.

<sup>8</sup> Peetz, D. 2012. *Does Industrial Relations Policy Affect Productivity?* [online] Available at: [http://www98.griffith.edu.au/dspace/bitstream/handle/10072/49919/83134\\_1.pdf?sequence=1](http://www98.griffith.edu.au/dspace/bitstream/handle/10072/49919/83134_1.pdf?sequence=1)

<sup>9</sup> Ibid.

<sup>10</sup> PC Productivity Update (2014) [online] Accessed at: <http://www.pc.gov.au/research/recurring/productivity-update/?a=135935>

<sup>11</sup> Australian Bureau of Statistics, Issue: 5206.0 – Australian National Accounts: National Income, Expenditure & Product, Sept 2013

<sup>12</sup> Australian Bureau of Statistics, Issue: 5206.0 – Australian National Accounts: National Income, Expenditure & Product, Sept 2014

<sup>13</sup> Workplace Express (2015) Snapshot of Australian workplaces, 30 January 2015

<sup>14</sup> Reserve Bank of Australia (2015) *Statement on Monetary Policy* [online] Accessed at: <http://www.rba.gov.au/publications/smp/2015/feb/pdf/0215.pdf>

## Barriers to bargaining

The ASU believes as a matter of principle that parties should be free to bargain on any matter they choose. With some restrictions, parties should be able to resort to industrial action to support their positions. Both parties should have access to the FWC to resolve bargaining issues and enhance bargaining. Barriers to good faith bargaining should be removed as much as is reasonably possible.

The ASU is a lead bargaining union in the following industries: Local Government, Electricity, Water, Airlines, Rail, Business Equipment and in Social and Community Services. The ASU has worked within the terms of the *Fair Work Act* to continue its work to obtain the best possible enterprise agreements for its members. The ASU has sought to exercise its rights under many parts of the legislation relating to bargaining and is familiar with how many of these provisions operate in practice.

The Union notes that the industrial action provisions in the *Fair Work Act* as they apply to Unions are essentially the same as those which applied to employee organisations under the Howard Government's *Workplace Relations Amendment (Work Choices) Act 2005*.

The *Fair Work Act* introduced some new provisions regarding bargaining including:

1. The imposition of specific 'good faith bargaining' obligations on all parties
2. Access to majority support determinations, scope orders and bargaining orders to support bargaining

The ASU supports these measures but with some reservations.

## Good faith bargaining orders

The good faith bargaining obligations imposed on all bargaining agents by the *Fair Work Act* are important and the ASU supports them. However, it is well established by the Act and decisions of the tribunal that these obligations do not require that bargaining result in an agreement.

The good faith obligations relate mainly to process issues and while important are not determinative of any particular outcome. Good faith bargaining orders cannot prevent so-called 'surface bargaining' whereby a bargaining agent [usually the employer] goes through the motions of bargaining but has no real intention of making an agreement.

There have been limited orders and decisions in respect to bargaining orders. The ASU has been granted a number of bargaining orders. The overall impact of these provisions of the Act seem to be limited, at least until this point in time<sup>15</sup>.

A number of issues also arise from the commencement of bargaining. Where an employer genuinely decides to initiate bargaining by the issuing of the relevant notice prescribed by the legislation, the initiation of bargaining may be straightforward and the interests of parties protected.

Where an employer decides not to bargain or where the employer decides to prepare the way to get an agreement made that is in the interests of the employer by talking directly to employees without issuing a formal notice of employee representational rights [which would trigger the appointment and recognition of bargaining agents], the intention of the Act to have good faith bargaining is defeated.

Actions of employers to attempt to deal directly with employees have been upheld by decisions of the tribunal as consistent with the legislation.

The ability of the employer to put a proposed agreement directly to employees without the agreement of the bargaining representatives is also, in the submission of the ASU, contrary to the intentions of the good faith bargaining obligations in the Act.

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<sup>15</sup> *Fair Work Act* Review Background Paper, table 4, page 14

**Recommendation 5:** Employers should not be permitted to put agreements to employees without a declaration by FWC that the process of bargaining has been exhausted. Similarly, once an employer has commenced any form of communication with employees about the possibility of any type of collective agreement, the employer should be required to issue the notice of employee representational rights, to ensure that all bargaining agents are on the same footing and can represent and bargain effectively on behalf of those that they represent.

## Permitted matters

The ASU does not support the current restriction on those matters that can be bargained for. Section 172 provides [in part]

### 172 Making an enterprise agreement

*Enterprise agreements may be made about permitted matters*

(1) An agreement (an *enterprise agreement*) that is about one or more of the following matters (the *permitted matters*) may be made in accordance with this Part:

- (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
- (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
- (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
- (d) how the agreement will operate.

While these provisions remove most of the prohibited content rules from the former *Workplace Relations Amendment (Work Choices) Act 2005*, the ASU does not support an artificial limitation on the range of matters about which employers and employees can freely bargain.

**Recommendation 6:** The *Fair Work Act* should be amended to remove the restriction on permitted matters for bargaining.

## Multiple employer agreements [MEAs]

The predominant form of enterprise bargaining under the *Fair Work Act* is single enterprise bargaining. There were more than 17,000 single enterprise agreements as at September 2014 and just 59 multi-enterprise non-greenfields agreements<sup>16</sup>. The Act continues the unwarranted presumption against industry level bargaining by strictly limiting access to multi-employer agreements.

Where two or more employers are related bodies corporate or engaged in a joint venture or common enterprise or where they can otherwise obtain single interest employer authorisation, they can bargain together.

However, it is important to note that single interest authorisations are the prerogative of employers. Unions have no role in this process pursuant to the legislation.

Multiple enterprise agreements are also possible between groups of employers and their employees. However, this can only be done by consent of all parties and protected industrial action in support of multi-employer agreements is not permitted. In fact, any industrial action in support of so-called pattern bargaining is unprotected and not available. In addition, good faith bargaining orders cannot be made with regard to MEAs.

The ASU submits that the ability to take protected industrial action in support of multiple employer agreements is both desirable and appropriate. Bargaining representatives should have the ability to instigate

<sup>16</sup> Australian Government (2015), *Trends in Federal Enterprise Bargaining September 2014* [online] Accessed at: <http://docs.employment.gov.au/node/34579>

protected industrial action where related corporations are created by a business rather than a meaningful measure of whether there is a common interest.

An existing exception to this rule against taking protected action regarding MEAs is where a low paid bargaining authorisation is in place following a decision of FWC. Good faith bargaining orders can be obtained to assist low paid bargaining [but protected industrial action is still not permitted]. Low paid bargaining authorisations can be sought by any bargaining agent, including employee bargaining representatives, including unions. Where a low paid bargaining authorisation is in place, the FWC may in certain circumstances make a low paid bargaining determination if the parties cannot reach agreement.

Access to multi-employer agreements is therefore extremely limited and except in the case of low paid bargaining [yet to be fully tested] allows little or no scope to employee organisations to pursue these types of agreement if employers are opposed.

The ASU has had considerable experience in the use of multi-employer agreements under the *Fair Work Act* as well as under its predecessors. MEAs can be particularly useful and relevant in sectors, such as the social and community services [SACS] where employers depend on a common funding source. Examples of these are in Community Health Centres, Neighbourhood Houses and Librarians Centres and Community and Legal centres.

In respect to improving the level of wages and salaries in the SACS sector bargaining is difficult due to funding constraints, therefore a limited number of employers and employee organisations in the sector have found it useful to negotiate such agreements with regard to other cost neutral matters.

The ASU's experience over many years has however been that the process of negotiating such agreements is tortuous in the extreme given the nature of the employers in the SACS sector. That is to say, the sector is characterised by a large number of poorly resourced employers lacking access to human resources and industrial relations advice and expertise.

***Case Study: Neighbourhood Houses in Victoria***

During 2005 the ASU in conjunction with the Association of Neighbourhood Houses & Learning Centres started the process of negotiating an MEA for Neighbourhood House employees. There are around 400 Neighbourhood Houses throughout Victoria, these ranged from bigger centres in metropolitan Melbourne to small centres in regional Victoria.

As Neighbourhood Houses are run by committees of management, many of whom have little or no industrial knowledge, the ASU and the employer's representative visited the Neighbourhood Houses to outline the benefits of an MEA. This process in itself took more than 8 months given the number of houses and the locations of these houses. Once the final MEA had been reached the ASU and the employer's representative had to again visit all of these houses to explain the final agreement. A ballot then had to be conducted at every single Neighbourhood House with the MEA being voted up. This process took in excess of 2 years.

One of the most significant difficulties faced by the union in utilising MEAs most effectively is the inability to add additional employers to the MEA once made. In a number of cases, employers have been unable to meet requirements for employee approval of agreements and have thus been unable to be covered by the MEA as approved by the FWC. Once procedural issues have been resolved, it has been too late for willing employers and employees to be added to the MEA.

<p><b>Recommendation 7:</b> The <i>Fair Work Act</i> should be amended to allow additional employers to be added to an existing MEA in appropriate circumstances. In addition, employees covered by MEA's should be able to take industrial action during bargaining under the Act, like all other employees.</p>
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### ***Industrial conflict and days lost due to industrial action***

While the *Fair Work Act* contains most of the same provisions as the *Workplace Relations Amendment (Work Choices) Act 2005* with regard to protected industrial action by employees and employee organisations, the ASU notes and supports the limitation of employer protected action to industrial action in

response to employee claim action. Employers cannot initiate protected action against employees in pursuit of an agreement such as by means of lockouts or other industrial action as was previously permitted under the *Workplace Relations Amendment (Work Choices) Act 2005*.

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. Other limitations also apply including the requirement to give three clear days' notice of intended action, which allows employers to put in place measures to avoid the consequences and impact of the proposed action.

Section of the FW Act provides as follows:

#### **414 Notice requirements for industrial action**

##### *Notice requirements—employee claim action*

(1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

(2) The period of notice must be at least:

(a) 3 working days; or

(b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph—that period of notice.

##### *Notice of employee claim action not to be given until ballot results declared*

(3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

##### *Notice requirements—employee response action*

(4) Before a person engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

##### *Notice requirements—employer response action*

(5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:

(a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and

(b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.

##### *Notice requirements—content*

(6) A notice given under this section must specify the nature of the action and the day on which it will start.

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.

The ASU further notes from the example of the action of Qantas in immediately grounding its fleet in November 2011 – an action that was not industrial action as such – shows that employers have a considerable ability to influence the outcome of bargaining disputes by taking immediate action which is not protected industrial action but which is nevertheless in response to employee claim action and can lead to the termination of that action when the employee claim action is not of itself sufficient to warrant intervention by the tribunal.

As can be seen from the decision below, made in response to an application by the Federal Minister, that it was the unilateral and immediate action of Qantas itself in this matter which brought about the legislative trigger leading Fair Work Australia to terminate not only Qantas's foreshadowed action but also the employee claim action. It was the employer's threatened action which the tribunal found was of sufficient concern to attract a mandatory response from the tribunal:

"[10] It is unlikely that the protected industrial action taken by the three unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries. The response industrial action of which Qantas has given notice, if taken, threatens to cause significant damage to the tourism and air transport industries and indirectly to industry generally because of the effect on consumers of air passenger and cargo services. The Qantas evidence was that the cost to it alone is \$20 million per day."

By immediately taking unilateral and unnecessary non industrial action [in the legislative sense] as well as threatening protected employer response action by way of lockout, Qantas was able to bring about the termination of employee claim action which would otherwise have not invoked action by the Minister or the tribunal.

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

## Unfair dismissal

The ASU has welcomed the removal of arbitrary limits on who can seek protection for unfair dismissal. This is an important aspect of fairness in the workplace. The Union's Branches are heavily involved in providing representation for members who believe that they have been unfairly dismissed.

Despite the success of the conciliation processes under the FWC, the ASU believes that further reform could assist more cases being resolved at that stage.

In the experience of the ASU, Australian industrial tribunals have a history of bringing a practical and informal approach to the resolution of industrial applications. The objects of the *Fair Work Act* remain consistent with this tradition. Section 3 observes that the Act provides for workplace relations laws that are accessible, balanced and fair. In the case of unfair dismissals the object of achieving a "fair go all round" is explicitly referred to at s281(2). Section 381(1)(b) also states the objects of the act in providing procedures for unfair dismissals that are "quick, flexible and informal."

Since the introduction of the *Fair Work Act* procedures associated with the conduct of unfair dismissal applications have altered significantly. Matters can now be commenced by way of telephone application, documents can be filed and served by way of facsimile and e-mail. Significant resources have been invested in the establishment of conciliation services aimed at resolving matters by consent, with a minimum of legality and fewer costly proceedings. Recent statistical reports suggest that where conciliation conferences are conducted by the Fair Work Commission, they have had a high rate of success in resolving matters by agreement between the parties.

The ASU's Branches are principally responsible for dealing with unfair dismissal applications. ASU Branches have reported mixed experiences in the success and utility of telephone conciliations. While these are at times an efficient manner in dealing with applicants and cases in remote and regional locations, Branches also report difficulty in achieving effective conciliation outcomes via telephone conciliations in a significant number of instances.

Members feel frustrated that they cannot see the conciliator and 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 9:** 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.

In addition, despite the pragmatic focus of the objects and administration of the legislation, the ASU has an increasing trend of unfair dismissal applicants being denied any access to the conciliation stage of the process. This occurs when a party to the proceedings opposes the holding of a conciliation conference under section 398 and FWC sends the matter straight to a fully contested hearing.

Section 398 provides:

### **398 Conferences**

- (1) This section applies in relation to a matter arising under this Part if FWC conducts a conference in relation to the matter.
- (2) Despite subsection 592(3), FWC must conduct the conference in private.
- (3) FWC must take into account any difference in the circumstances of the parties to the matter in:
  - (a) considering the application; and
  - (b) informing itself in relation to the application.
- (4) FWC must take into account the wishes of the parties to the matter as to the way in which FWC:
  - (a) considers the application; and
  - (b) informs itself in relation to the application.

The general power of the FWC to hold conferences and to compel persons to attend is set out in section 592 which provides such a power generally but not in respect to certain matters including unfair dismissal cases.

In the ASU's experience the tactic of opposing conferences under section 398 or refusing to attend has been adopted on a number of occasions by employers, frustrating attempts to explore settlement options under the supervision of a conciliator. Instead, matters can be listed directly for hearing, at which time orders are made for the preparation of witness statements and the filing and service of documents. Proceedings then become contestable, lengthy, costly and highly legalistic. In many cases the applicant or their industrial organisation may not have sufficient resources available to pursue the matter further or may simply be unable to afford any further representation.

This "short circuiting" of the conciliation process is, in the Union's submission, clearly contrary to the objects of the *Fair Work Act* and can be highly prejudicial in terms of denying applicants the right to an informal, affordable and effective system of justice.

**Recommendation 10:** All unfair dismissals should be the subject of a conciliation conference and genuine attempts at conciliation, including the power to compel persons to attend conferences. Further, where there are reasonable prospects of an agreed outcome, conciliation officers should be empowered to adjourn matters enabling the parties to exchange documentation and reach a settlement.

## **Appropriate scope for independent contracting**

The ASU is concerned about our members who work in the call centres industry due to sham contracting. In our experience call centres are combining sham contracting with work from home arrangements to further reduce their liability to employees, such as OH&S and access to workers compensation. As 'independent contractors' the minimum wages in the Contract Call Centre Award 2010 does not apply, and contractors are exposed to low wages through a variety of insidious employment practices such as:

- Operators paying their own costs including superannuation and insurance;
- Cuts to per call rate when quality control standards are not met;
- No minimum number of calls guaranteed;

- No minimum length of shift;
- Operators having no way of checking if their pay has been calculated correctly;
- Operators are responsible for nominating shifts they are available for. Rosters are then drawn up (which can take up to 3 hours) with none of the operators being paid for their time doing this.

## Employee vs. Independent contractor

The ASU has viewed several employment contracts from one of the largest Call Centres operating in Victoria. We have compared some common indicators that contribute to determining whether a person is an employee or independent contractor and make the following observations:

- **Control:**  
*An employee performs work, under the direction and control of their employer, on an ongoing basis. An independent contractor has a high level of control in how the work is done.*  
The call centre operators have a set list of criteria that must be met and questions that must be covered in each conversation. It is almost scripted. The workers are penalised if such 'quality assurance' procedures are not met. This indicates an employee relationship as having control and being scripted are mutually exclusive to each other.
- **Hours of work:**  
*Under agreement, an independent contractor decides what hours to work to complete the specific task. Whereas an employee generally works standard or set hours.*  
The workers log onto the program each Tuesday night to select what hours they would like to work and schedule their own roster. This process can take up to three hours and workers are not paid for this time.
- **Expectation of work:**  
*An employee usually has an ongoing expectation of work, an independent contractor is usually engaged for a specific task.*  
Although the workers re-sign their contract every couple of weeks, most of them have been engaged in the work for a substantial time, one worker has been with this company for three years. They all have an expectation of ongoing work.
- **Risk:**  
*An employee bears no financial risk, an independent contractor bears the risk for making a profit or a loss on each task. An IC usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy.*  
These workers do have their own insurance policy and their pay is cut when quality assurances are not met.
- **Tools and equipment:**  
*An employee usually has tools and equipment provided by the employer, or they are provided with an allowance for tools. An IC uses their own tools and equipment.*  
Although workers use their own computers for work, the specialised program is created and owned by their employer. It is this 'tool' that is critical to the job, and not particularly the computer but the program that is the most important tool.

## Home-based customer call work

Work from home arrangements are increasingly favoured by Customer service contractors as yet another way to limit the company's liability to workers. Roughly 21% of Australian call centres currently have a remote of home based agent programme and nearly a third (31%) plan to have such a program in the next 12 months.

### Case Study: Faye

Faye is applying for home-based work as a customer service/marketing rep. At the job interview she is informed that the company will set up appropriate technology in her home, which she thinks is great. But she is also told that she'll have to provide an ABN because she'll be working as a contractor. As a contractor, she must attend a week's mandatory training in the company's IT systems for no pay. She'll be responsible for all her own expenses incurred as part of work, she must pay for and maintain WorkCover and public liability insurance, and she won't receive any paid leave or superannuation. The company assures her that she'll be compensated with a higher rate of pay; she'll be earning around .99 cents per eligible call. "You work for yourself" the company says.

“But you’re certainly not allowed to sub-contract the work, and if we find you’ve strayed from the call script we give you, we can terminate your contract with 3 days’ notice in writing”. Faye knows the contract is unfair, but she has been looking for work in the industry for over a month; she knows someone like her can’t hope for much better.

The ASU believes more education on employee rights and sham contracting needs to happen. Home based work must not be used as a vehicle for exploitation under the guise of flexible working arrangements.

Section 357 the *Fair Work Act* is meant to protect employees from being subject to sham contracting. The Union believes stronger enforcement of existing laws and tougher legislation and penalties are necessary to prevent this widespread issue.

**Recommendation 11:** The *Fair Work Act* should be amended to strengthen the sham contracting clause and provide a clearer definition of a genuine independent contracting arrangement.

## Transfer of Business

A considerable number of employer organisations have criticised the operation of the Transfer of Business provisions of the Act.

In 2008, the ASU welcomed key elements of the new provisions of the then *Fair Work Bill* dealing with transfer of business, particularly the elimination of the 12 months life on transmitting agreements. However, the Union remains concerned that the new provisions do not deal with all the situations where employers can effectively transmit businesses or parts of their business to other entities without employees being able to have their terms and conditions of employment fully and appropriately protected.

This is because the new Act retained a key element from the *Workplace Relations Amendment (Work Choices) Act* 2005, that is, that industrial instruments do not transfer unless there are transferring employees.

The ASU submits that this means that the effectiveness of the Act in maintaining the integrity of the safety net of awards and agreements and protecting employees whose work is effectively transmitted is not comprehensive and effective in all circumstances.

The ASU is concerned about a fundamental flaw in the Act which leaves the whole transfer of business section impotent. That is if no employees transfer to the successor company or if the successors company does not employ any previous employees then the transfer of business mechanism is not triggered. This occurs even if these companies are interrelated.

Therefore, despite the obvious interrelatedness of some of these companies and the transfer of business between them, because a corporate transaction has been able to be constructed that corrals the existing employees in companies on their existing conditions but provides for new employees to be engaged in a different “new” company, there is an ability to avoid the current awards and agreements just because no existing employee transfers to the new entity. This results in employees working side by side on different terms and conditions of employment. This is unfair and inequitable and in our view should not be allowed to continue.

A further example of transfer of business rules being resisted by an employer is the case of Aurizon (a rail freight company) which applied to the FWC in 2014 to terminate 14 enterprise agreements. The case has been heard and a decision of the FWC is pending. In its submission to the Commission, Aurizon argued these instruments should not have transferred to it from Queensland Rail, that these instruments were irrelevant or inappropriate for its business and felt it should not be bound by these agreements.

This is a poor argument indeed when Aurizon clearly knew that when you acquire a company you acquire assets and liabilities and under the *Fair Work Act* industrial instruments transfer to the successor business. Aurizon is basically in the same business as Queensland Rail and to try and terminate the enterprise agreements and place the employees on the minimum rates contained in the Rail Industry Award 2010 is a woeful industrial practice which is to the great detriment of employees.

**Recommendation 12:** Transfer of business rules should be amended so employers do not have the opportunity to outsource work through corporate restructure thereby avoiding the requirement to apply existing industrial instruments. The test should be whether work has transferred, whether or not there is a direct transmission and whether or not there are transferring employees.

## Women and the *Fair Work Act*

As a union with significant female membership the ASU sees many examples of working women struggling to balance a career and a family. As a society we have been advocating balance for decades. This is difficult when the *Fair Work Act* provision of "right to request" flexible hours doesn't mean you will get them. As we have outlined above the legislation does not allow women to challenge an unreasonable refusal to provide flexibility.

All we can do is appeal an unreasonable refusal through a collective agreement. This is inequitable because women are most likely to be those providing primary care and are also the group most likely to be in a weaker bargaining position. Workplaces that fail to provide family-friendly environments risk their productivity and losing skilled workers.

## Family friendly work arrangements

As part of the 4 year modern award review the ACTU on behalf of unions has lodged a claim for a family friendly work arrangements clause. This claim seeks variation to all 122 modern awards by allowing an employee a: right to return to part time work from parental leave; right to revert to position/work arrangement previously held prior to taking parental leave; safe work arrangements during pregnancy; and paid leave for the purpose of attending appointments necessary. The ASU wholeheartedly supports the ACTU's claim.

**Recommendation 13:** Family friendly work arrangements should form part of all modern awards.

## Domestic and family violence

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 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.

We acknowledge recent changes to the *Fair Work Act* to recognise domestic and family violence through the NES with the right to request flexible working arrangements however we would like to see provisions for domestic and family violence addressed in modern awards.

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 14:** Domestic and family violence leave should form part of all modern awards.

## Equal remuneration case

The gender pay gap in Australia is not narrowing, it is widening as recent ABS statistics for 2014 show that the pay gap between Australian women and men is 18.8%<sup>17</sup>. This is despite a significant change to the *Fair Work Act* which introduced the concept of equal remuneration for work of equal or comparable value. A change designed to make it easier to ensure women could achieve equal pay.

Previously the *Workplace Relations Act 1996* and its predecessor Acts provided:

### **623 Equal remuneration for work of equal value**

(1) A reference in this Division to **equal remuneration for work of equal value** is a reference to equal remuneration for men and women workers for work of equal value.

This was changed in the *Fair Work Act* which now provides:

### **302 FWC may make an order requiring equal remuneration**

#### *Power to make an equal remuneration order*

(1) FWC may make any order (an *equal remuneration order*) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

#### *Meaning of equal remuneration for work of equal or comparable value*

(2) *Equal remuneration for work of equal or comparable value* means equal remuneration for men and women workers for work of equal or comparable value.

There is no doubt this change to the legislation has made a difference. The only successful equal pay case federally has been under the *Fair Work Act* because of this change. Previously of the 17 or so cases run under the predecessor legislation none had been successful.

The ASU is well placed to critique the effectiveness of these mechanisms to gain equal pay as we ran the only successful case federally under the *Fair Work Act* for Social and Community Sector workers covered by the Social, Community, Home Care and Disability Services Industry Award 2010.

The ASU, together with four other applicants, initiated this case in respect of workers in the social, community and disability services sectors. The claim was lodged in March 2010 and involved extensive proceedings over nearly two years before a Full Bench of the Fair Work Commission. An interim decision was made in May 2011 and a final decision in February 2012<sup>18</sup>. The decision operates in respect to certain classifications in the modern Social, Community, Home Care and Disability Services Industry Award 2010.

The ASU welcomed the successful outcome of the case which will ensure equal remuneration for many employees in these important sectors when fully implemented. In the May 2011 decision the Full Bench unanimously concluded that "for employees in the SACS industry there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with workers in state and local government employment"<sup>19</sup>.

This case was preceded by a successful case for the Queensland Social & Community Sector workers where the Queensland Industrial Relations Commission found that a range of factors contributed to the undervaluation of work in the relating to the Queensland Community Services and Crisis Assistance State Award and 'a pattern emerges that gender is at the core of present work value of the community sector' and the 'work has been undervalued on a gender basis'. These workers received wage increases that range from 18% to 37%.

While the changed legislation was critical to the success of the case in the federal jurisdiction, it did not come without significant cost, effort and preparation. The successful application required extensive witness and other evidence as the ASU case statistics demonstrate:

<sup>17</sup> Australian Bureau of Statistics, Issue: 6302.0 – Average Weekly Earnings, Australia, Nov 2014

<sup>18</sup> [2011] FWAFB 2700 and [2012] FWAFB 1000

<sup>19</sup> [2011] FWAFB 2700 at par 291

- 33 days of hearings/inspections
  - 9 days inspections of 16 non-government organisations in VIC, SA, QLD, NSW
  - 4 days inspections of 6 government and local government comparators in NSW and VIC
  - 20 hearing days (7 for witnesses)
- 76 Witnesses statements for applicants
  - 20 witnesses cross examined
  - 56 witnesses unchallenged
- 187 Exhibits
- 10,000 plus pages of evidence
- 886 pages of transcript
- 33 parties and interveners filed one or more written submissions including 8 govt or govt agencies (C'th, VIC, NSW, QLD, ACT, TAS, SA) and AHRC plus 18 employer or industry groups.
- 21 organisations announced an appearance (excluding applicants)
- ASU cost – Tens of thousands of dollars (excluding ASU staff hours)

To get the true cost of this achievement you have to multiple this many times by the costs of each of the governments, agencies, employers and employer groups involved.

This landmark case will not be easily emulated. It took a major union like the ASU (assisted by other unions and the ACTU) to initiate and prosecute this case. It involved the hiring of barristers and other experts, organising many witnesses and devoting hundreds of hours of work by key ASU staff from around the country. This is obviously something that individuals and/or small organisations can never hope to replicate.

We are not advocating against having a legislative framework or a process for determining equal pay. Although successful in the current framework we have to reflect on there being a better way to narrow the gender pay gap.

The ASU believes the Chair of the House of Representatives Standing Committee on Employment and Workplace Relations in their "Making it Fair"<sup>20</sup> 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 preferable"<sup>21</sup>.*

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 15:** 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.

<sup>20</sup> 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](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ewr/payequity/report.htm)

<sup>21</sup> Ibid.