

Labour Regulation: Is There a Case for Major Reform?

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**Submission to the Productivity Commission Inquiry
into the Workplace Relations Framework**

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Introduction and summary

This submission has been prepared by a group of researchers, spread across four institutions. Our expertise spans the disciplines of law, economics, management and industrial relations, and we include amongst our ranks many of Australia's leading scholars in the field of labour law and regulation. We draw here not only on our own research, and that of others in our field, but on the practical experience of workplace relations that many of us have gained in acting for management, unions and/or workers, whether in legal practice or otherwise.

Our purpose is to make the following general points about Australia's current system of labour regulation and the approach that we believe the Productivity Commission should take in reviewing it:

1. The regime established by the *Fair Work Act 2009* (Fair Work Act) is based on a balance or accommodation between competing interests and objectives, arrived at after a lengthy period of change and upheaval in both the conduct and regulation of workplace relations. The balance may not be a perfect one, and there may well be a case for adjustments to specific elements of the regime. But the Commission should not countenance major reforms that would disturb the existing balance, without clear and compelling evidence that there is a *need* for change, that change cannot already be achieved or accommodated within the existing system, and that the change in question will not have adverse effects on efficiency or equity. The costs of change (and of uncertainty over potential change) need to be considered, as well as the potential to pursue improvements in productivity through means other than labour regulation (such as improving management and leadership in the workplace). For the reasons we go on to expound, we do not believe that there is sufficient reason at this point to strike out in a new direction or to dismantle key aspects of the present system.
2. Labour markets do not function as spot markets, and are generally characterised by a range of 'market imperfections' associated with inefficient markets. These reasons alone provide an economic rationale for extensive regulation of labour market processes and the employment relationship with the firm to improve labour market functioning and allocative efficiency. Employment relationships also have a number of important non-market dimensions not easily accommodated by a competitive market perspective. These dimensions imply a structured inequality of bargaining power between individual employees and employers that are (and should be) addressed by labour law. It is important too that any changes to the existing system of labour regulation avoid exacerbating the already significant levels of social and economic inequality in Australian society.
3. There is no compelling evidence that any particular new or revised approach to labour regulation would deliver superior economic and social outcomes. In particular, neither international nor domestic studies support the argument that minimum wage or employment protection laws *necessarily* have an adverse impact on employment levels. Similarly, the impact of worker representation and collective bargaining is highly dependent on context. Studies that purport to identify evidence of 'problems' with labour regulation based solely or primarily on the opinions, perceptions or guesstimates of those affected by that regulation should not be treated as reliable. On the other hand, the Commission is

entitled to place weight on the *absence* of compelling evidence as to the negative effects of a particular aspect of the current regime, where it might reasonably have been expected that such evidence could have been produced by those seeking change.

4. The use of an 'independent umpire' to set and adjust minimum employment conditions, as well as to help resolve workplace disputes, has been a distinctive element of the Australian approach to labour regulation since its inception. In playing that role, the Fair Work Commission (FWC) and its predecessors have proven themselves to be flexible and adaptive institutions that have consistently retained the confidence of those who regularly use their services. The FWC plays a vital role in ensuring not only that key aspects of the present regulatory regime operate fairly, but that they are *perceived* to do so. But it also, especially in relation to minimum standards, ensures that the system operates flexibly, allowing conditions to be adjusted as new problems or evidence come to light. That role should be maintained.
5. No system of labour standards can operate with any credibility or integrity if employers are allowed to use superior bargaining power to contract out of those standards. This is true whether the contracting out takes the form of statutory individual agreements (which in practice rarely resemble the customised, mutually beneficial arrangements portrayed by their proponents), or of contracts which seek to disguise what are in reality employees as 'independent contractors'. The existing safeguards in relation to these forms of contracting out should be maintained, or in at least one instance (the reporting of individual flexibility arrangements) strengthened. We also note the impracticality of any system of statutory individual agreements that is both widely used *and* subject to meaningful scrutiny and safeguards.
6. The exemptions in the *Competition and Consumer Act 2010* that protect negotiated terms and conditions of employment from being challenged as anti-competitive should be retained. To do otherwise would be to create an unworkable degree of instability and uncertainty for the entire system of labour regulation, besides being incompatible with many of the fundamental principles underpinning that system.
7. Although the Fair Work Act improved the degree of compliance with Australia's obligations under applicable international labour standards, when compared to the previous 'Work Choices' regime, a number of aspects of the current regime continue to cause concerns. The Commission should be very wary of making any recommendations which would further compound the already disturbing levels of non-compliance.
8. The coherence and intelligibility of the present system of labour regulation has already been improved by the move to a 'national' system, the modernisation and rationalisation of awards, and certain elements of the drafting of the FW Act. But there is still scope for improvement. Issues that arguably require legislative attention include the absence of a national standard on long service leave and the unnecessary degree of prescription in the rules concerning the making of enterprise agreements and the taking of protected industrial action.

In the sections that follow, we expand on those general themes. If the Commission would like to pursue any of the issues we have raised, or has any queries about the submission, we are happy to provide further information or to meet with members or representatives of the Commission.

1. The need for care before disturbing the current balance

Our existing system of labour regulation is based on a balance or accommodation between competing interests and objectives. When the Rudd Government formulated the Fair Work legislation, in the wake of the major reforms of 1993, 1996 and 2005, it was endeavouring to steer a middle course, albeit imperfectly, between the interests of capital and labour – and to balance the goals of fairness for employees with flexibility for employers (Stewart 2009: 5–8, 45–50). Compared to Work Choices, the new system had a stronger emphasis on collectivism and greater constraints on managerial prerogative. But in contrast to the Keating Government’s *Industrial Relations Reform Act 1993*, and *a fortiori* the old conciliation and arbitration system, both unions and what is now the Fair Work Commission (FWC) were given less of a role in a system much more concerned with *individual* rights and protections (Bray and Stewart 2013). And key elements of the Work Choices system plainly survived (Forsyth and Stewart 2009).

It may be argued, of course, that the present balance is wrong, either in particular or indeed in more fundamental respects. There is, however, no great groundswell of public opinion against the main institutions or processes we use to regulate the labour market. Most of the major areas of business concern, such as penalty rates or union rights of entry or exaggerated wage claims, arise only in selected industries. Most of our economic fundamentals are generally thought to be sound, even if we face certain challenges or vulnerabilities. Our standard of living is still considered to be among the highest in the world.

Stability and predictability are desirable goals of labour regulation (Giudice 2014). The costs of enacting and implementing major changes to the legal framework are substantial, both in terms of parliamentary resources, and the need for businesses, unions and others to educate themselves about the changes and adjust their practices accordingly. Not only does legislative reform give rise to adjustment costs, it imposes opportunity costs in potentially distracting attention from more fruitful endeavours regarding productivity. There are, therefore, sound reasons to be cautious of legislative change (see eg Borland 2012; Giudice 2014; Creighton 2014).

The potential to pursue improvements in productivity through means other than changes to labour regulation should be emphasised. Arguably, we should be talking more about education and training, the use of technology and – especially – improving management and leadership in the workplace. There is now an extensive body of research which demonstrates that a key driver of workplace productivity and innovation is the quality of management (Bloom and Van Reenan 2007; Armstrong et al 2010; Jiang et al 2012). This body of work shows that where management is able to deploy a range of high performance work and management practices, organisations are able to significantly improve a range of human resource outcomes (including employee engagement and lower employee turnover), productivity and financial performance, customer satisfaction, and workplace innovation. (For extensive reviews of this research, see Posthuma et al 2013 and Combs et al 2006.) The research also demonstrates that whilst some firms identify restrictive legal provisions, including labour regulation, as a factor limiting the take-up of such practices, other

factors such as management capability play a far more significant role in inhibiting the diffusion of such performance enhancing management and work practices. Whilst the work is largely international, there is now a growing body of research on high performance work practices in the Australian context that shows findings consistent with the international research (see eg Buttigieg and Gahan 2008; Green 2009; Robin et al 2014).

The overarching principle stated in the terms of reference for the Commission's inquiry recognises the high degree of legislative change in labour regulation over recent years, and the need for any change to be durable in the long term:

An overarching principle for any recommendations should be the need to ensure a framework to serve the country in the long term, given the level of legislative change in this area in recent years.

Notably, the terms of reference speak of the government's objectives in commissioning the Inquiry as being to 'identify future options to improve the laws'. Rather than propose a set of concrete recommendations for change to labour regulation, we believe the preferable course is for the Commission's Final Report to propose options for further consultation and discussion, and in this way contribute to the formulation of more durable policy. This is the soundest method for ensuring that any change will be stable over the medium and long term.

It is vital that the Commission not propose major reforms that would disturb the balance of the present system, without clear and compelling evidence that there is a *need* for change, that change cannot already be achieved or accommodated within the existing system, and that the change in question will not have adverse effects on efficiency or equity. It is especially important that the Commission closely scrutinise the assertions of employers who are (in a sense quite understandably) seeking to reduce labour costs and maximise profits, or who would prefer to run their businesses without the inconvenience of dealing with trade unions. Likewise, attempts by unions or other groups to propose improvements or additions to what is already an extensive and detailed 'safety net' of minimum conditions and protections should require clear justification, especially if they add to labour costs.

We note further that some aspects of the regime introduced in 2009 are still being bedded down, a process that in a sense will not be completed until the first four-yearly review of the modern award system ends in early 2016. At some point, after nearly three decades of constant change and upheaval, it would be useful to settle on a regulatory system and give it a real chance to operate. For the reasons we go on to expound, we do not believe that there is sufficient reason at this point to strike out in a new direction or to dismantle key aspects of the present system.

2. The economic critique of labour regulation

It has become a fundamental tenet of modern labour law that 'labour is not a commodity' (see eg O'Higgins 1997). This principle is, for example, recognised in the Declaration concerning the aims and purposes of the International Labour Organisation (ILO) annexed to that body's Constitution.

Yet for many commentators, labour markets are characterised as operating in a similar way to a perfectly competitive spot market in which, left to their own devices, forces of demand and supply

will operate to generate equilibrium at full employment. This approach has been caricatured by Solow (1990) as treating the labour market as analogous to 'the supply and demand for dead fish'. Even to the extent that this traditional perspective concedes that legal regulation or institutions may have some positive role, their optimal scope is viewed as limited to enforcing property rights and ensuring efficient contracting between individual workers and employers (Deakin and Wilkinson 2006: 279). As Deakin et al (2014:3) note, this view naturally leads to the conclusion that legal 'intervention' in the labour market 'must always be understood as upsetting the competitive process and distorting market outcomes'.

It is useful to emphasise the conditions that the traditional competitive market model assumes labour markets typically approximate (Gahan and Harcourt 1998). To operate as an efficiently functioning market the competitive model makes a number of what might be termed heroic assumptions (Dow 1997):

- The competitive model assumes that both workers and firms have full information about prevailing wages and job opportunities in the broader labour market (Kaufman 2012; Collins 2000). This would also imply for example, that in forming employment relations both workers and firms have adequate knowledge about the other party's track record, and capabilities to live up to their side of any bargain. For example, it would imply that employees were able to easily acquire information about a firm's prior workplace health and safety record; or their prior record in promoting equal opportunities for both women and men, or for persons with other attributes often facing discrimination in employment. It would likewise imply that a firm could easily acquire information about a prospective employee's track record, prior experience and skill base.
- The competitive model assumes that, as factors of production, both workers and firms are perfectly mobile and are able to take job opportunities in the external labour market as and where they arise (Boal and Ransom 1997). This view assumes that the cost of gathering information about market conditions and alternative opportunities are negligible (Boeri and van Ours 2013). These assumptions are problematic for a number of reasons. As Mortensen (1986: 849) has noted: 'The time workers spend unemployed, movements from job to job during their work life, and the allocation of working life between market work and alternative activities in a dynamic environment are all left inadequately characterized.'
- The competitive model likewise assumes that neither workers nor firms have adequate labour market power to influence wage rates (Kaufman 2009; Boeri and van Ours 2013). The theory of pure monopsony predicts that a firm is able to pay a wage less than the wage that would prevail in a competitive labour market. Many economists have been traditionally reluctant to accept this hypothesis, other than in the more extreme case of a single buyer in a relatively isolated setting. Yet as Manning (1996, 2013) and others (Boal and Ransom 1997; Boeri and van Ours 2013; Kaufman 2009, 2010a, 2012) have shown, there is extensive empirical evidence demonstrating various mechanisms through which employers are able to exercise monopolistic power in the labour market.
- Finally, the competitive model assumes that the benefits and costs associated with either firm or worker behaviour accrue to those parties directly involved in the exchange, but not

the broader society or other interested parties (ie, there are no externalities) (Manning 2012). Economic theory more generally recognises that where a market transaction (for example, wage negotiation between labour market agents) has consequences for other market participants, regulation may provide a means to correct these distortive effects (Deakin and Wilkinson 2006; Traxler and Kittel 2000).

Given all this, it is difficult to believe that the traditional competitive market model could be viewed as providing an adequate description of how labour markets and employment relations operate in practice. However, the tendency to equate labour markets to this ideal type remains a pervasive and persistent view (Gregg and Manning 1997; Kaufman 2012). Hence the view that labour market regulation generally has a distortive effect on labour market outcomes has persisted. This has occurred despite the fact that a large body of theoretical and empirical literature amassed over the last half century in the field of labour economics has shown that labour markets do not function as a competitive spot in which the wage operates as an efficient market signal to workers and firms to determine their supply or demand for labour (Manning 2013).

This work has highlighted a wide range of ways in which labour markets deviate from the competitive model and, in doing so, provide economic grounds for active intervention to correct for identified market failures in a broad range of areas. Those areas do not just include minimum wages, but extend to equal pay (Manning 1996), affirmative action (Holzer and Neumark 2000), work and family balance (Hegewisch and Gornick 2011), employment protection (Bassanini et al 2009; Autor et al 2007; Belot et al 2007), union recognition and collective bargaining (Aidt and Tzannatos 2008), and workplace health and safety (Elsler et al 2010), among other things.

Indeed, controversies over whether labour market regulation is likely to be efficiency enhancing have intensified over the last two decades. These debates have centred in particular on the question of whether globalisation and technological change have rendered existing institutional arrangements more costly in a world characterised by growing uncertainty and disruptive events that require rapid responses from economic actors for firms to remain competitive (Hayter 2011).

Overall, then, what do the range of empirical studies suggest are the effects of labour regulation on the efficient functioning of labour markets? As a number of scholars have noted, the variety of approaches to empirically assessing the effects of different labour market interventions and institutions make it difficult to provide a comparative assessment. Moreover, the methodological issues involved in making definitive assessments of the effects of labour regulation on economic outcomes are considerable, and these shortcomings inevitably raise some doubts about the robustness of reported results.

Perhaps more significant, however, is that many studies, irrespective of whether they report positive or negative consequences, typically indicate that the efficiency effects are relatively small or non-significant. In a major review of studies investigating the economic consequences of labour market regulations in a number of discrete areas, Betcherman (2012: 1) concluded:

On balance ... the impacts of [labour market] institutions are smaller than the heat of the debates would suggest. Efficiency effects of labour market regulations and collective bargaining are sometimes found but not always, and the effects can be in either direction, and are usually modest. Distributional effects are clearer, with two effects predominating: an

equalizing effect among covered workers but groups such as youth, women, and the less skilled disproportionately outside the coverage and its benefits.

The review by Skedinger (2011) of studies on the economic effects of employment protection laws reached a similar conclusion: that there is relatively weak evidence for any impact (negative or positive) on employment or unemployment levels. It was noted that 'the evidence is not all that strong regarding many of the cherished and most visible notions in the public discourse surrounding employment protection' (2011: 7–8).

These general findings also characterise the available Australian evidence. In a review of the domestic and international research, Peetz (2012: 286) concluded that:

There is some evidence that industrial relations policies that enhance fairness enhance economic performance. However, although this is a trend on average, the effects are conditional; they are not consistent or universal. What can be said with more certainty is that, in any specific workplace, industrial relations can make a difference to productivity. The decisions management makes, and the relationship it has with employees and unions, will shape what happens in the workplace and can have a noticeable effect on productivity.

These findings are supported by other analyses undertaken in recent years. Hancock (2012), for example, examined how the introduction of enterprise bargaining in the early 1990s influenced productivity growth in different industries. He concluded that the evidence showed little support for the view that enterprise bargaining had any appreciable impact on productivity growth over the period to 2010. In a more broad ranging analysis of the impact of successive labour reforms introduced in the last decade, Borland (2012) examined wages growth and earnings inequality, labour market adjustment, labour productivity growth and industrial disputes. He concluded that there was 'little evidence ... of an effect from the industrial relations reforms made in the 2000s'. Consistent with the international evidence, he found that the primary effect of these reforms had been distributional rather than efficiency enhancing.

Deakin and Wilkinson (2006: 294) have astutely observed that observations such as those made above suggest that a general case for the efficiency enhancing effects of labour market regulation 'should not be translated into uncritical support for all aspects of existing labour law systems'. This observation echoes a broader line of work exploring the economic consequences of different types of institutions designed to address the same types of market failures (see eg Baumol et al 2007).

Empirical and theoretical research within economics and industrial relations also suggests a need to move beyond a narrow focus on interventions design to correct market failures. Sugden (1998), for example, suggested that labour market regulations may be justified not only on the basis of correcting market failure or addressing some more undesirable outcome of market forces (such as discrimination), but may be required to create the preconditions for markets to operate effectively in the first place. That is to say, regulation may serve a 'market *creating*' function as well as a protective or market correcting function.

This proposition has been developed by a number of scholars (see eg Rubery and Wilkinson 1994; Howe et al 2006), but perhaps most forcefully by Deakin and Wilkinson (2006). Drawing upon the notion that human capabilities provide the foundation for individuals with the opportunity to

participate in society (Sen 2002; Nussbaum 2006), they noted that economic justifications for labour market regulation may derive from the need to ensure individuals have the appropriate endowments and capabilities to fully participate in the labour market. Protection for children, persons with disabilities or individuals facing a barrier to drawing on and effectively deploying their personal endowments represent cases where regulation may play a positive economic role by enhancing the capacity of individuals to negotiate various labour market transitions over the life course. These forms of intervention would extend from training, forms of income security and employment insurance through to positive obligations on employers to provide flexible work arrangements for women returning to work following pregnancy.

Regulatory justifications may also extend to consideration of how individuals or industrial parties might effectively draw on the provisions and instruments provided through labour regulation. For example, Australian research highlights the differential capabilities of employers to effectively leverage the collective bargaining process, with 'repeat players' reporting greater capacity to prosecute their industrial claims in bargaining – and greater willingness to utilise the federal industrial tribunal for assistance in resolving bargaining disputes (Forsyth et al 2012). This reflects broader international research (see eg Dubin 2012) which highlights the differential capacity of employers who suffer an external shock to effectively respond within existing regulatory arrangements. Whilst these difficulties may in part reflect the competitive position of the enterprise, Dubin concluded that responsiveness was also conditioned by the capacity of employers to build positive workplace environments and high-trust relationships with their workforce, as well as different 'mindsets' held by key decision-makers as to the regulatory environment and how adjustments should be pursued.

Finally, we are concerned with how any reform process is likely to influence the capacity to ameliorate social and economic inequality. As a number of high profile studies have recently demonstrated (see eg Atkinson 2008; Standing 2011; Piketty 2014), growing inequality has emerged as a pervasive feature of contemporary developed countries. Growing inequality has been linked to a wide range of adverse outcomes, from health and wellbeing to social cohesion (Wilkinson and Pickett 2009). Labour market regulation plays a significant role in determining the levels of inequality that are likely to pervade any society (Adams and Deakin 2014; Koeniger et al 2007; Bazan 2000; Standing 1999). These concerns are now widely shared by international institutions such as the United Nations, the ILO, the OECD, the World Bank and the IMF (see eg Department of Economic and Social Affairs 2013; Ostry et al 2014; Cingano 2014; ILO et al 2014). In the Australian context the last 25 years have been associated with both growing prosperity and rising inequality (Wilkins 2015), and growing gaps in the labour market outcomes for young people, women and low skilled workers. Our concern then is that changes to the existing system of labour regulation should avoid exacerbating the already significant levels of inequality in Australian society. At the very least, any case for change needs to consider how regulatory reforms impact inequality.

3. A question of evidence

The Commission has stressed that it intends to adopt 'a critical, evidence-based approach to differing claims about the impacts of different configurations of the system' (Issues Paper 1, p 14). Four general points can be made about the evidence available to the Commission in this respect.

Firstly, we would argue that limited reliance should be placed on studies that purport to identify evidence of major ‘problems’ with labour regulation, based solely or primarily on the opinions, perceptions or guesstimates of those affected by that regulation. For example, the World Economic Forum’s *Global Competitiveness Report* does no more than establish what selected business leaders *think* are the problems caused by ‘restrictive’ labour regulation. There appears in any event to be no clear correlation between the perceptions of a particular country’s labour laws and its overall ‘competitiveness’ or economic performance (see eg Guidice 2012).

Secondly, as we have noted in the previous section, a dispassionate review of international studies on the effects of particular approaches to labour regulation would conclude that there are few clear lessons to be learned, that the impact of labour laws tends to be context-specific, and that there is no magic/silver bullet. To quote Deakin and Sarker (2008), the truth is that ‘legal rules do not operate in a straightforwardly instrumental way to reshape economic outcomes’. If they did, and if labour regulation operated in the ways assumed by the likes of Botero et al (2004), we might expect to see evidence of a clear disparity between economic performance in countries such as the United States, with its tradition of fewer/lower labour standards and weaker protection of workers, and countries such as Australia or Germany that have adopted much stronger or more ‘rigid’ controls. In fact, there is no obvious evidence of any such disparity. To the contrary, a longitudinal leximetric analysis of labour laws in France, Germany, Japan, Sweden, the UK and the US has shown that greater protection of workers has no consistent relationship to unemployment levels, but *is* positively correlated with labour’s share of national income (Deakin et al 2014).¹

At the very least, it can be said that there is enough evidence to cast doubt on the neoclassical economic critique of protective labour laws. In relation to minimum wages, for example, the FWC has repeatedly concluded, after exhaustively reviewing the available evidence, that ‘modest minimum wage adjustments lead to a small, or zero, effect on employment’ (*Annual Wage Review 2013–14* [2014] FWCFB 3500 at [442]).² In our view, that is an eminently reasonable position to take, and is supported by a considerable body of research undertaken and commissioned by the FWC itself.³

In a similar vein, a recent review by Doellgast and Benassi (2014) as to research on collective bargaining suggests that the involvement of trade unions in the negotiation of wages and employment conditions can, depending on the context and parties, have either positive or negative effects. This latter view reflects our own practical experience – that what generally matters more to

¹ The analysis in this research adopts a more sophisticated approach to the leximetric analysis of labour regulation than that adopted by Botero et al and subsequently used as the basis for the labour regulation segment of the World Bank’s *Doing Business* report. For an explanation of the leximetric method and examples of its use in relation to Australia, see eg Mitchell et al 2010 and Gahan et al 2012. These studies draw on similar data to that used by Deakin et al.

² As a recently-published study (Leonard et al 2014) which traverses the expansive UK and US literature on the employment effects of minimum wages observes: ‘Few economic relations are more strongly held or more vigorously defended than the adverse employment consequence of a rise in the minimum wage.’

³ No less than 28 internal and external research reports have informed the FWC’s minimum wage-setting panel in its task over the last six years, examining issues that include the extent of award reliance and the effects of minimum wages on incentives to bargain: see <https://www.fwc.gov.au/creating-fair-workplaces/research/annual-wage-review-research/previous-research>.

the productivity of a particular workplace is not the legal regime under which employment relations are conducted, but the quality of leadership (on the part of both management *and* any union(s) involved), the level of trust and cooperation between key individuals and the prevailing culture within the organisation.

Thirdly, we believe that the Commission should pay due respect to the conclusions of the panel that last reviewed the Fair Work legislation, in relation to its macroeconomic effects. According to Edwards et al (2012), there was no evidence to support the widely expressed view by business leaders that the legislation was holding back productivity. Nor could it be said that the legislation had increased industrial disputation. It is true that the 2012 Review was required to assume the appropriateness of the objects of the current Act, and could not consider alternative models. But nevertheless the Review should be treated as a useful source of analysis, except where a compelling case can be made that its analysis was faulty. In our view, its general conclusions were sound.

Fourthly, the Commission should give weight to the *absence* of compelling evidence as to the negative effects of a particular aspect of the current regime, where it might reasonably have been expected that such evidence could have been produced by those seeking change. For example, despite the ample opportunity for employer groups or their political allies to commission credible independent studies of the impact of unfair dismissal laws in Australia, this has never been done. This is despite the obvious opportunities presented by the varying approaches taken by different States in the 1970s and 1980s, or the different position of smaller and larger corporations under the 'Work Choices' regime that operated from March 2006 to June 2009. When the Howard Government sought in the early 2000s to justify its belief that exempting small businesses from unfair dismissal claims would create thousands of new jobs, its sole empirical support lay in a single study (Harding 2002), the methodological shortcomings of which were quickly exposed (see Senate Employment, Workplace Relations and Education Legislation Committee 2003, Freyens and Oslington 2007: 9; and see further Robbins and Voll 2005).⁴

A similar point applies to the assessment of the effect of award standards on matters such as basic wage rates, penalty rates or casual loadings. For many years, there were significant differences – at least in certain industries, such as retail or hospitality – between different awards in different States. On 1 January 2010, the previous mix of federal and State awards was displaced, at least for most workers, by the 'modern awards' for which Part 2-3 of the Fair Work Act provide. These awards are required to set national standards, without reference to State (or Territory) boundaries. In order to ease the transition from the old award standards to the new, especially in industries where there had previously been significant disparities between the States, the Australian Industrial Relations Commission formulated a set of transitional arrangements that required the modern award rates to be phased in over a four year period, from July 2010 to July 2014.⁵ During that period, some rates went up and others went down: for example, some casual loadings rose from 20% or even lower to 25%, while others were reducing (at least for newly hired workers) from as high as 33%. In theory at least, both the pre-2010 position and the 2010–14 transition period should offer an excellent basis

⁴ Compare the more limited analysis in Freyens and Oslington 2013, which is concerned primarily with the 'small' cost to employers of complying with the unfair dismissal provisions of the Fair Work Act, without endeavouring to assess the potential benefits they might have.

⁵ See *Award Modernisation* (2009) 187 IR 146; 191 IR 377; and see further Creighton and Stewart 2010: 269–72.

on which to study the economic and social impact of increasing or reducing wages, loadings or penalty rates, at least in selected industries. If so, the failure to commission or release such research might suggest that the effects of such changes are not as dramatic or straightforward as may often be suggested.

4. The role of the ‘independent umpire’

The use of a publicly funded and independent tribunal to set and adjust minimum employment conditions, as well as to help resolve workplace disputes, has not only been a distinctive element of the Australian approach to labour regulation, it remained so throughout the series of changes that have occurred over the past three decades.

In performing the role of an ‘independent umpire’ as part of the federal industrial system, the FWC and its predecessors have inevitably courted controversy. Given the politically charged nature of the area for which it is responsible, not to mention the social and economic significance of some of its decisions, it is unsurprising that over the years the federal industrial tribunal has come under occasional attack from unions, employer groups and the political parties that represent their interests – or that there has sometimes been debate or dissension within the tribunal itself. Understandably too, the political pressures generated by the tribunal’s work have prompted occasional attempts to restructure or reconstitute the tribunal to promote the interests of certain stakeholders (see eg Macintyre 2004).

At present the FWC is under public attack from certain employer groups who, under the pretext of a concern about ‘inconsistency’ in decision-making,⁶ have been seeking to persuade the Abbott Government to create an ‘independent appeals jurisdiction’ for the tribunal. No public details have emerged as to the precise workings of such a process, which we understand remains under consideration by the government.⁷ It is unclear, for instance, whether it might involve a reconfiguration of the FWC itself, or the creation of a court or tribunal to sit above the FWC. It is also unclear whether any new body would hear appeals in the strict sense, and if it did whether it would substitute for the current Full Bench system or add an extra layer of review; or whether it would perform the more limited function of judicial review presently undertaken by the Federal Court, and if so again whether it would supplant or supplement that court.⁸ At any event, the real object of this proposal, as has become clear from subsequent complaints about the previous Labor government’s

⁶ See eg ‘New appeals body needed for consistent rulings: AMMA’, *Workplace Express*, 14 February 2014. For a cogent refutation of this complaint, see Ross 2014: 8–15. In our opinion, which we believe would be shared by a great majority of the practitioners that appear before it, the FWC experiences no greater degree of inconsistency in decision-making than would be expected of any court or tribunal. What inconsistency there is typically occurs at first instance, where it can be readily corrected on appeal. On the rare occasions that Full Benches disagree, it has been customary for the President to convene a special five-member bench to resolve the disagreement: see eg *CFMEU v Queensland Bulk Handling Pty Ltd* [2012] FWAFB 7551; *Re Canavan Building Pty Ltd* [2014] FWCFB 3202.

⁷ See ‘No formal decision yet on appeals panel: Abetz’, *Workplace Express*, 15 September 2014.

⁸ As to the existing mechanisms for appeal and review of FWC decisions, and the distinction between those concepts, see Creighton and Stewart 2010: 134–7.

alleged ‘stacking’ of the tribunal, is evidently to marginalise the current leadership of the FWC and empower a new group of decision-makers with views more ‘friendly’ to business.⁹

We return to the question of ‘stacking’ below. But before doing so we should make clear our general view that the FWC has earned the right to continue to play a central role in the regulation of employment and workplace relations. Whatever our disagreements with particular decisions or approaches adopted by the tribunal, we consider that both it and its predecessors have proven themselves to be flexible institutions that have been able to adapt very successfully to the changing demands of the legislation they are required to administer, and of the broader industrial relations environment (see Forbes-Mewett et al 2003; Stewart 2004, 2011; Acton 2011; Forsyth 2012). The FWC, like the AIRC before it, has also been able to retain the confidence of the great majority of those who regularly use its services (see eg Edwards et al 2012: 249). This includes, in our experience, most employer representatives, whatever their frustrations with the legislation that the FWC is called upon to administer or the tribunal’s unwillingness to make changes in their favour.

As examples of the federal tribunal’s ability to adapt and improve its operations and procedures, we would highlight:

- the open and consultative mechanisms used now to review minimum wages and award conditions, drawing (among other things) upon processes previously adopted by the Australian Fair Pay Commission;
- the exploration of more proactive forms of intervention that can assist larger organisations not just to resolve existing disputes, but to promote more cooperative workplace relations (see Stewart et al 2014);¹⁰
- the FWC’s willingness to commission useful research to inform its deliberations,¹¹ especially in the absence of other government funding for initiatives such as the Australian Workplace Relations Study;
- the range of other measures recently introduced to improve efficiency and accountability, as part of the FWC’s Future Directions initiative (see eg Ross 2014), including pilot programs (some of which have now been established on a permanent basis) to improve access to justice for self-represented parties in the increasing numbers of individual employment disputes brought before the tribunal.¹²

⁹ See eg FWC structure is top heavy and old fashioned, says AMMA’, *Workplace Express*, 18 September 2014; ‘Fill vacancies with business people: AMMA’, *Workplace Express*, 26 February 2015.

¹⁰ The FWC’s interest in this issue has extended to the establishment of an Australian Research Council-funded project that involves researchers assessing previous initiatives by the FWC and its State counterparts, including the ‘Hunter model’ adopted by Newcastle-based members of the NSW Industrial Relations Commission (see Harrison 2014). Details of some of the case studies completed so far as part of this project can be made available to the Commission on request from the lead researcher, Professor Mark Bray of the Newcastle Business School.

¹¹ See eg Forsyth et al 2012 and Layton et al 2013, as well as the research referred to above in n 3.

¹² These schemes, which involve both unfair dismissals and general protections claims, have received generally positive evaluations from the Centre for Innovative Justice (2013a, 2013b, 2013c).

This is not to deny that ways might be found to improve the operation of the FWC, beyond those matters within the immediate control of the tribunal itself. For example, a case can be made for reviewing the skills and qualifications needed to discharge what is now a rather different and more varied mix of functions than was required in the days when the tribunal’s job was primarily one of collective dispute resolution. But we emphatically reject the suggestion that there is something ‘wrong’ with the present composition or decision-making of the FWC, or that there is a need to create a new court or tribunal to take over some or all of its functions. We say this for three reasons.

Firstly, the accusation that the present tribunal has been ‘stacked’ by the previous Labor government is at the very least an overstatement. We have reviewed the background of the present FWC members, concentrating on their work and professional history prior to their original appointments. Those who had primarily been union officials, or primarily represented employees in their legal work, or worked closely with Labor but not so much Coalition governments, have been categorised as ‘worker’ appointments. Conversely, those who had primarily represented employers or worked most closely with Coalition administrations have been categorised as having an ‘employer’ background. That leaves a few whose records are entirely mixed, including public servants who have worked as much for one side of politics as the other.

We accept that our approach is a crude one, especially given that (a) even members who were primarily or originally associated with one side have often worked on the other side as well, and (b) more importantly, a member’s pre-appointment background should (and typically does in our experience) say nothing about how they discharge their duties – a point to which we return below. Nevertheless, for what they are worth, here are our figures on the present FWC,¹³ broken down in various categories:

Figure 1 – Pre-appointment background of FWC members as at March 2015

	<i>Employer</i>	<i>Worker</i>	<i>Neither/mixed</i>
All members	21	25	4
Presidential members	11	9	2
Commissioners	8	12	2
Dual appointments from State tribunals	2	4	0
Labor appointments	12	25	4
Coalition appointments	8	1	0

Note: all figures exclude part-time appointments to Expert Panel only

These figures do not suggest that there is any great imbalance in the composition of the present FWC. It is true that they reveal previous Labor governments were twice as likely to appoint members from a worker rather than an employer background (noting that some of the current members were appointed by the Hawke/Keating governments, many of whose other appointees have now retired). But this arguably just corrected an imbalance left by the previous Coalition government led by John

¹³ The authors of the submission are grateful to Gabrielle Golding for her assistance in preparing these figures.

Howard, which between 1996 and 2007 appointed only two members with a union or worker background (Gillard 2007). It is also pertinent to note that there is no public record of how many qualified applicants from an employer background actually applied for FWC positions under Labor.¹⁴

Our second reason for resisting any push to supplant the FWC is that we see the tribunal not just as playing a vital role in ensuring that key aspects of the present regulatory regime operate fairly, but as helping to sustain the *perception* that the system is a fair one. This is, we believe, an important if underrated aspect of the Australian system of labour regulation. The concepts of a 'fair' wage, or of a 'fair go all round' in relation to dismissal, speak not just to the content of labour standards, but to the integrity and independence of those who adjudicate their application. In our experience, and that we would say of most practitioners, it is highly unusual to find instances of evident bias on the part of members of the FWC (or previous federal tribunals). It is the personalities and styles of individual members that tend to matter more than their pre-appointment backgrounds. Indeed we are not aware of any research that suggests a general correlation between a member's background and their propensity to find for or against employers.¹⁵

The concept of an independent umpire can survive the controversy of an occasional run of appointments that seem to favour one side, or a period during which stakeholders become frustrated with some of the umpire's rulings. It even survived the efforts of the Howard Government to marginalise the AIRC, including through encouragement given to the industrial parties to use alternative dispute resolution providers (Riley 2009; Forsyth 2012). But the very notion of an independent umpire would be destroyed by a heavy-handed government intervention that sought to remove some or all of the FWC's decision-making powers and relocate them to a new group hand-picked by the government. At such a point, it would be difficult to sustain any confidence in the integrity of the new process.¹⁶

Our third reason for preferring to retain the FWC in its current form relates to its specific role in administering the modern award system. Awards play an important role in supplementing the basic and universal standards set by the National Employment Standards (NES), especially in regulating working time and compensation for various forms of 'non-standard' work, and by reference to the circumstances of particular industries or occupations. If Australia is to retain an award system, as we believe it should, then it seems to us essential to ensure that the system continues to operate flexibly, allowing conditions to be adjusted as new problems or evidence come to light.¹⁷ It is hard to

¹⁴ The Rudd and Gillard Governments publicly advertised positions on the FWC, following which there was a confidential selection process that included consultations with stakeholders. The present Minister for Employment has indicated that he intends to abandon this process and directly approach possible candidates: see 'Abetz signals he will "cold-call" for FWC appointments', *Workplace Express*, 25 February 2015. We should add that there is nothing in the Fair Work Act that directs the use of any particular process for selecting FWC members.

¹⁵ Cf the limited study of unfair dismissal decisions by the AIRC conducted by Southey and Fry (2010), which revealed a 'mildly significant correlation' between the substantive outcome of the claim (ie, in favour of worker or employer) and the work background of the member concerned.

¹⁶ This is a point that has also been made by the Law Council of Australia in opposing any change to the existing appeal mechanisms: see 'Don't change FWC appeal process: Law Council', *Workplace Express*, 1 September 2014.

¹⁷ As to the evidence-based approach that the FWC rightly brings to the process of varying modern awards, see eg *Re Victorian Employers' Chamber of Commerce and Industry* [2012] FWAFB 6913; *4 Yearly Review of*

imagine how that could feasibly be done by anything other than an independent authority, operating with delegated statutory authority. Since the FWC is that body at present, consistency of decision-making and (again) preservation of public confidence would suggest that it continue to play that part. We would add that any fair assessment of the FWC's role in supervising and adjusting the modern award system created in 2008–09 needs to await the conclusion of the first four-yearly review, something that on present indications will not happen until sometime in 2016, after the Commission's inquiry has been completed.

Finally, we note in passing that while we have concentrated in this section of the submission on the FWC, we do not mean to suggest by omission that we are not supportive of the work done by other regulators. We would highlight in particular the creative and constructive ways in which the Fair Work Ombudsman (FWO) (and formerly the Workplace Ombudsman) have contributed both to greater understanding of the labour regulation system, and to compliance with labour standards in industries or sectors where previously very little was done or achieved by way of enforcement.¹⁸ It is vital, we believe, that present levels of funding for the FWO be maintained to enable a continuation of its valuable work.

5. Contracting out of labour standards

No system of labour standards can operate with any credibility or integrity, in our view, if employers are allowed to use superior bargaining power to contract out of those standards.

There are two particular forms of contracting out that are of potential concern. The first involves the use of individual statutory agreements, such as the system of Australian Workplace Agreements (AWAs) that operated under the *Workplace Relations Act 1996* from 1997 to 2008. Historically, these have been sought by employer groups, and promoted by conservative governments, for their capacity to allow individual employees and their employers to negotiate terms that suit their particular needs. But the evidence is overwhelmingly clear: they are almost always standardised arrangements that involve no element of individual flexibility at all, other than (sometimes) in relation to performance-based pay. Their predominant purpose, in lower-paid, weakly unionised sectors, has been to contract out of key award entitlements, thereby lowering labour costs and increasing managerial prerogative. In higher-paid, more unionised sectors (such as mining), by contrast, they have typically been used to block collective bargaining, preclude the taking of protected industrial action or negate union rights of entry.¹⁹ What statutory individual agreements have not generally done, on the other hand, is improve productivity (Peetz 2005, 2007: 71–2). And as the Fair Work Review pointed out, many of the forms of flexibility that were available to employers under the AWA system could be (and indeed often have been) obtained under collective enterprise agreements instead (Edwards et al 2012: 126–7).

Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [23]; *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

¹⁸ See eg the comprehensive study of the FWO's operation and impact by Howe et al (2014).

¹⁹ For research on AWAs that supports these assertions, which also accord with our own practical experience, see eg Roan et al 2001; van Barneveld and Arsovska 2001; Mitchell and Fetter 2003; Peetz 2004; Waring and Burgess 2006; Queensland Industrial Relations Commission 2007; Sutherland 2007.

This is not to say that there should be no capacity for genuine individual flexibility. Indeed the current system provides that in various ways, not least through over-award (or over-enterprise agreement) arrangements that can take effect at common law. As far as the two statutory arrangements sanctioned by the Fair Work Act are concerned, individual flexibility arrangements (IFAs) and high-income guarantees, we believe that more research is necessary to assess just how useful they are and whether they are meeting their objectives. In relation to IFAs, there are worrying indications from the limited information available (principally a study conducted for the General Manager of what was then Fair Work Australia) that these instruments are predominantly being initiated by employers and are often being imposed without any meaningful negotiation or employee input. For example, over half of all multiple-IFA employers, and over a third of those with a single IFA, were reported as having required employees to sign the agreement as a condition of being hired or having their existing employment continue (O’Neill 2012: 43, 48) – a practice that is clearly unlawful under the current legislation.²⁰ Against that background, we would indicate our support for the recommendation by the Fair Work Review (Edwards et al 2012: 109) that employers using IFAs be required to notify the FWO whenever such an arrangement is made. This would make it easier for the FWO to audit the use of such arrangements and take appropriate action where the statutory safeguards are breached.

Beyond that, we believe that there may well be scope to consider more creative ways in which individual flexibility can be injected into the application and variation of award standards. But consistently with the views expressed in section 4 of this submission, we believe that this is something that can be left to the judgment of the FWC.

Whatever changes are made, however, should not simply allow employers to use superior bargaining power to remove the protections and entitlements otherwise offered by an award or enterprise agreement, or indeed the fair Work Act itself, unless there is a clear benefit to the employee concerned. If there is a reason at all for having award standards, or collectively-agreed conditions, or the capacity to take industrial action, or union rights of entry, then it should not be possible for employers to negate those rights or protections by the imposition of ‘take it or leave it’ individual contracts.

As a final note on this point, experience also tells us that a system of individual statutory agreements cannot work in practice unless (a) they are being used in small numbers, or (b) there are no meaningful safeguards, or at least no active scrutiny or approval of their content. This was convincingly demonstrated by the Work Choices legislation. Under the original AWA provisions, as enacted in 1996, all AWAs had to be scrutinised for compliance with (among other things) the then no-disadvantage test, by either the Office of the Employment Advocate (OEA) or (in some cases) the AIRC. Research indicated that the scrutiny was not always as vigilant as it should have been (see eg Mitchell et al 2005). But at a practical level the system generally seemed to work. From March 2006, under the Work Choices reforms took effect, AWAs could take effect as soon as they were made, with only limited scrutiny by the OEA. With the abolition of the no-disadvantage test, allowing AWAs to be used more or less at will to undercut award entitlements, their use leapt from around 2% of the workforce to as much as 7% (Edwards et al 2012: 119). Again, at a practical level, the system

²⁰ See eg *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064; and see also *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [73]–[80].

seemed to work. But when in 2007 the Howard Government imposed a ‘fairness test’²¹, to be applied by the new Workplace Authority, the system effectively collapsed. The Authority simply did not have the staff to process so many agreements.²² Although AWAs could still take effect immediately, many employers had to wait months (and in some cases over a year) for confirmation as to their validity. Where agreements were found to fail the fairness test, they were retrospectively cancelled, leaving thousands of employers liable to compensate their employees for any shortfall as against award entitlements (Sutherland 2009: 103). As this episode demonstrates, a system of statutory individual agreements is simply unworkable in practice, unless employers are effectively free to make them without official scrutiny, or the safeguards are such as to dissuade their use by most businesses.

The other possible form of contracting out that some groups have sought is the ‘freedom’ for workers to provide their services as independent contractors, rather than as employees. With the sole exception of outworkers in the textile, clothing and footwear industry, the Fair Work Act does not seek to extend minimum standards or the great majority of its protections to workers who are supplying their labour through a business of their own.²³ This potentially creates an incentive for businesses to avoid the operation of the Act, as well as other laws dealing with matters such as superannuation, workers compensation and long service leave, and thereby reduce their labour costs, by engaging workers as independent contractors rather than as employees. The corresponding benefits for workers may be limited, especially given the fact that the personal service income provisions in Divisions 84–87 of the *Income Tax Assessment Act 1997* effectively treat most contractors working for a single ‘client’ in exactly the same way as an employee rather than as a business for taxation purposes (Creighton and Stewart 2010: 162–9). Nevertheless, there is evidence that ‘sham contracting’ or ‘disguised employment’ is rife in certain industries (see eg TNS Social Research 2012; Fair Work Ombudsman 2011).

At present the absence of a statutory definition of ‘employment’ means that it is largely left to the common law to determine whether a worker is an employee or not. It may be argued (from various perspectives) that the common law is not adequate to this task (see eg Stewart 2002; Roles and Stewart 2012). But at least an independent adjudicator (in the form of a court or tribunal) is currently required to determine, on the totality of the relationship and not merely the label applied to it, whether a person is working for someone else’s business or operating their own. Recent decisions in the federal courts have indeed shown that even the most carefully drafted arrangements that endeavour to portray a worker as an independent contractor may be treated as

²¹ As required by the Workplace Relations Amendment (A Stronger Safety Net) Act 2007, which took effect in July 2007 with retrospective application to all AWAs and collective agreements made after 7 May 2007.

²² A fact that the Director of the Authority later conceded: see ‘We struggled with fairness test: Bennett’, *Workplace Express*, 9 September 2008.

²³ Exceptions here are the general protections in Part 3-1, which extend to independent contractors most of the protections afforded to employees, and the new bullying provisions in Part 6-3B, which cover any ‘worker’ as (very broadly) defined in the *Work Health and Safety Act 2011*.

employment contracts, if the practical reality of the arrangement is that the worker has no business of their own and is working entirely for the benefit of someone else's business.²⁴

It has sometimes been suggested – especially by lobby groups funded by business interests – that workers should have an absolute and unfettered right to ‘choose’ to work as independent contractors. But if a business could engage what were in substance employees as independent contractors, merely by presenting them with a standard form contract recording their consent to such a categorisation, it would not merely overturn the decisions just mentioned: it would undermine the entire system of labour standards.

6. The interface with competition law

The Commission has raised the issue of whether workplace relations should continue to be ‘effectively excised from competition law’ (Issues Paper 5, p 6). Section 51(2)(a) of what is now the *Competition and Consumer Act 2010* (CC Act) currently protects negotiated terms and conditions of employment – and more particularly *collective* agreements – from being challenged as anti-competitive under various provisions in Part IV of the Act. To the extent too that Part IV (or other parts) of the CC Act is concerned with contracts, arrangements or understandings relating to the supply or acquisition of ‘services’, it is relevant to note that this term is defined in s 4 in such a way as to exclude ‘the performance of work under a contract of service’ (ie, a contract of *employment*).

The exemption in its current form has been in the federal legislation since 1977 and has been examined by three major review committees, all of which have recommended its retention.

The Hilmer Report (1993) recommended the retention of the exemption on the basis of maintaining consistency with federal industrial relations legislation. It also highlighted the concern that removing the provision could infringe relevant ILO Conventions ratified by Australia which allow for employees’ freedom to organise and form trade unions.²⁵

The National Competition Council (1999) assessed whether the public benefit in maintaining the exemption outweighed any likely detriment to the community. The benefits associated with maintaining the exemption were identified as maintaining the primacy of industrial relations legislation in dealing with the labour market; ensuring compliance with Australia’s international treaty obligations (including ILO Conventions); the certainty that the exemption provided with respect to the potential application of the anti-competitive conduct provisions of the legislation to employment agreements and arrangements; and the reduced transaction costs that arise from the fact that employee collective agreements do not have to be assessed for anti-competitive effects.

The costs to the community as a whole of maintaining the exemption were identified as the potential for employee collectives to obtain strong bargaining positions relative to employers, resulting in increased labour costs being passed on to consumers of goods and services; and the

²⁴ See eg *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 279 ALR 341; *Morrow v Tattsbet Ltd* [2014] FCCA 1327. A similar approach has been adopted by the UK Supreme Court: see *Autoclenz Ltd v Belcher* [2011] ICR 1157.

²⁵ The relevant ILO Conventions are *The Freedom of Association and Protection of the Right to Organise Convention*, 1948, No. 87 (Convention No. 87) and *The Right to Organise and Collective Bargaining Convention*, 1949, No. 98 (Convention No. 98).

potential for collusive behaviour between employers and collectives of employees, again resulting in increased labour costs. However, the National Competition Council considered that these potential costs were slight given the impact of competition regulation on employers operating in competitive goods and services markets (exerting downwards pressure on business costs), and the role of the industrial relations framework in focusing on enterprise level agreement making which controls the extent of potential collusive conduct by employers and collectives of employees. The Review ultimately concluded that the benefits of the exemption outweighed the potential costs to the community and recommended its retention.

More recently, the Competition Policy Review (2014) has also endorsed the idea, at least as a general principle, that the legality of employment arrangements should be left to the separate regulatory regime established by the Fair Work legislation. The policy rationale, which it accepted, is that 'labour markets are not in all respects comparable to other product or service markets' (2014: 241).

The labour market has never been treated for regulatory purposes in the same way as markets for other 'commodities'. Indeed as noted earlier in the submission, the principle that labour is not a commodity has become a fundamental tenet of modern labour law. There is a long history in this and other industrialised market economies of legislative intervention to moderate the operation of labour market forces in order to avoid anti-social exploitation of labour, to promote social justice, to enhance social stability and/or to assist in the management of the economy. Subjecting workplace relations to competition law would quite conceivably mean that some (or perhaps many) outcomes of that regulatory system could be challenged as being anti-competitive. This would depend on the difficult issue of whether the provisions of the Fair Work Act could be construed as being subject to Part IV of the CC Act. At the very least, considerable uncertainty would be created as to the validity of modern awards and agreements.

It is especially important to appreciate that 'collusion' is the very essence of any industrial relations system that promotes freedom of association and permits collective bargaining over employment conditions. Collusion between workers is what trade unionism is about: hence the legislation that has been around since the nineteenth century to prevent courts invalidating all union agreements as being in restraint of trade under the common law (see eg Industrial Relations Act 1996 (NSW) s 304).

It is clear from the above that no committee reviewing the exemption has supported or offered any justification for a change to the status quo whereby workplace relations is 'effectively excised from competition law'. However, to explore the impact of such a change if it were to be supported, it is useful to look at a specific example: the application of Part IV of the CC Act to single-enterprise agreements. Were these instruments, and the conduct of employers and employees in creating such instruments, to be subject to Part IV, this would create an untenable regulatory burden on the ACCC and require it to make assessments of the labour market which fall outside its current regulatory expertise.

Part VII of the CC Act contains a notification and authorisation process to permit conduct to occur that would otherwise breach certain provisions of the statute. With respect to Part IV of the CC Act, the notification and authorisation provisions potentially allow 'collective bargaining' conduct (for example, by a group of independent contractors) that would otherwise constitute a contract, arrangement or understanding that would substantially lessen competition, or breach the cartel

provisions (including the prohibition on ‘exclusionary provisions’ which, in effect, prohibit collective boycotts). The statutory test applied by the Australian Competition and Consumer Commission (ACCC) is one of ‘public benefit’ – whether the public benefit from the proposed conduct would outweigh the anti-competitive detriments of permitting the conduct to occur (see CC Act ss 90, 93AC(1)). Importantly, the ACCC makes this assessment in all cases before bargaining can occur and considers public submissions on the likely effect of each notification or authorisation before making a determination.

There are compelling reasons why this model of examining the merits of proposed collective bargaining on a case by case basis would be untenable in the context of labour relations. First, the sheer volume of agreement making in the labour relations arena would quickly overwhelm the ACCC. Second, the public benefit test as interpreted and applied by the ACCC and the Competition Tribunal is ill-suited to a labour relations framework in which collusive conduct plays a central role. The focus of decision making is on ‘voluntary’ agreement making – voluntary participation and voluntary outcomes (not binding on any of the actors involved) in order to mitigate the anti-competitive effect of permitting collective agreement making to occur. Exclusionary provisions, while theoretically capable of authorisation, are not permitted in practice. In the history of the provisions only one application containing a proposed exclusionary provision has ever been approved by the ACCC, and this decision was reversed on appeal to the Competition Tribunal.²⁶ Third, the expertise of the ACCC is in the regulation of product and services markets. It has neither the expertise, nor the historical or popular legitimacy, to regulate labour markets.

The notification and authorisation provisions within the CC Act do not allow for a system of collective *bargaining*; instead they permit, in very limited circumstances, collective *agreement making*. Thus, collective agreements that might otherwise breach the CC Act will be permitted, provided that no coercive conduct is involved and no compulsory outcomes are reached (McCrystal 2009: 291). In one example involving freelance journalists seeking to bargain collectively with large media outlets, the ACCC conceded that the journalists subject to the authorisation ‘will have no choice but to negotiate individually with the targets [of collective bargaining] if that is each target’s preference’.²⁷ This sits uncomfortably in the context of the Fair Work legislation, which requires employers to bargain in specific circumstances, and enshrines good faith bargaining and the right of employees to take protected (lawful) industrial action.

We believe that there are strong reasons for continuing the general exemption. No review has ever suggested otherwise or produced a compelling reason for such a change. To do otherwise would be to create an unworkable degree of instability and uncertainty for the entire system of labour regulation, besides being incompatible with many of the fundamental principles underpinning that system.

²⁶ ACCC Determination, Application for Authorisation lodged by the Victorian Farmers Federation on behalf of its member chicken meat growers, 2 March 2005, Authorisation Nos A40093 and A90931; *Re VFF Chicken Meat Growers Boycott Authorisation* [2006] ACompT 2. For discussion, see Pengilley 2006.

²⁷ ACCC Determination, Application for Authorisation lodged by MEAA in respect of collective negotiations of the terms of engagement of freelance journalists by Fairfax Media Limited, ACP Magazines Ltd, News Limited and Pacific Magazines, 26 May 2010, Authorisation No A91204 at [4.45].

A further issue raised by the Commission relates to the possible modification of ss 45D and 45E of the CC Act (Issues paper 5, p 6). The exemption discussed above does not extend to these provisions. Arguably, provisions such as s 45D do no more in practice to outlaw secondary boycott conduct than the common law 'industrial torts' (see Creighton and Stewart 2010: 808). It is unclear that this additional layer of regulation is necessary.

As for s 45E, it prevents an employer from making a contract, arrangement or understanding with an organisation of employees that contains a provision restricting the freedom of the employer to supply goods or services to, or acquire goods or services from, another person. On present authority, s 45E does not operate to impede the scope of enterprise agreement making under the Fair Work Act, as a single-enterprise agreement under the Act is not generally made with an 'organisation of employees', and such an agreement is not in any event a 'contract, arrangement or understanding' (*Australian Industry Group v Fair Work Australia* [2012] FCAFC 108). This understanding of the interaction between s 45E and the enterprise agreement making provisions of the FW Act reduces potential complexity and conceptual confusion over the permitted content of enterprise agreements. This is appropriate. If there are to be limits on the subject matter of enterprise agreements, they should be dealt with by the Fair Work Act itself. Indeed, complex choices have been made within the FW Act over the permitted content of agreement making, following years of uncertainty and highly complex proscription of agreement content which reached its zenith under the Work Choices legislation.

There have been suggestions that s 45E should be expanded to cover single-enterprise agreements and limit the capacity of employers and their employees freely to agree to protect the employment security of relevant workers by requiring independent contractors or labour hire workers to be paid equivalent rates to directly employed workers. This approach would undermine the degree of latitude permitted to employers and their employees with respect to the matters over which they wish to bargain and, not coincidentally, it would have the flow-on effect of artificially strengthening the position of employers at the bargaining table. Such an approach would increase red tape and complexity within the system and decrease the extent to which parties are able to strike the best bargain for the particular circumstances of that enterprise. It would also strengthen the employer's ability to circumvent an agreed enterprise bargain by utilising labour hire and contractor labour at a cost below that agreed with their employees.

7. International labour standards

The object of the FW Act refers to the need to provide workplace relations laws that 'take into account Australia's international labour obligations' (s 3). Previous object clauses, in the *Workplace Relations Act 1996* and before it the *Industrial Relations Act 1988*, have also contained references to Australia's international labour obligations.

In general, the Fair Work Act improved compliance with Australia's obligations under the ILO Conventions to which it is a signatory, when compared to the previous 'Work Choices' regime. An example is the inclusion of the good faith bargaining and majority support determination provisions in Division 8 of Part 2-4. These provide a legal right for workers to engage in collective bargaining in specific circumstances, in contrast to the previous legislation which permitted collective bargaining on a largely voluntary basis only (Creighton 2012).

However, under the Fair Work Act there continues to be a number of areas where compliance with ILO obligations is questionable. In particular, the Act's regulation of industrial action is more restrictive than permitted by ILO Convention No 87 on the Right to Organise and Convention No 98 on the Right to Organise and Collective Bargaining, as well as the International Covenant on Cultural and Political Rights to which Australia is a signatory (McCrystal 2010: ch 10).

The restrictions on the content of agreements in Part 2-4 of the Fair Work Act likewise do not appear to be fully consistent with the guarantees of autonomous bargaining which are set out in Article 4 of Convention No 98. This non-compliance is compounded by the lack of any capacity to take protected industrial action in relation to the inclusion of impermissible content in agreements (Creighton 2012: 60–1).

The somewhat cavalier attitude of governments of all political complexions to Australia's voluntarily assumed international obligations significantly compromises Australia's standing as a member of the international community in general, and as a foundation member of the ILO in particular. We suggest that the Commission should be very wary of making any recommendations which would further compound the already disturbing levels of non-compliance.

8. Complexity

According to a helpful model developed by Schuck (1992), as applied by Sutherland (2013a, 2013b, 2014) in her studies of the content of enterprise agreements, there are at least four dimensions of 'complexity' that may be considered in relation to any legal system:

- technicality (the extent to which specialist knowledge is required to understand the system's rules and processes);
- density (the number of rules that the system involves or contains);
- differentiation (the number of different instruments or decision-making systems that operate as part of the regime); and
- uncertainty (the extent to which the rules of the system are 'open-textured, flexible, multi-factored and fluid').

By any of these measures, the Australian system of labour regulation must be regarded as extremely complex. This includes the phenomenon of 'layering' highlighted by Bray and Waring (2005), whereby multiple regulatory instruments – including statutes, awards, registered agreements, employment contracts and organisational policies – operate to determine the rules of an employment relationship. But other problems can be identified as well, including increasing incoherence and prolixity in the drafting of federal industrial legislation during the 1990s and 2000s (Stewart 2005).

Since the Work Choices legislation, however, which took each of the dimensions of complexity to new highs (or lows), there has been a marked improvement. The drafting of the Fair Work Act was consciously designed to make the legislation 'simple and straightforward to understand in terms of structure, organisation and expression', and to '[reduce] the compliance burden on business (for example, by avoiding "micro-regulation" and overly prescriptive provisions and by conferring broad

functions and appropriate discretion on Fair Work Australia)' (Explanatory Memorandum, Fair Work Bill 2008, [r.4]). While not entirely successful in these aims, the new legislation was a marked improvement on its predecessor. As Stewart (2009: 10) noted at the time:

Although still lengthy, it has a far more simple and straightforward style than the complex and convoluted provisions that abound in the Workplace Relations Act. Outlines appear at the beginning of each main part and there are frequent 'signposts' to alert readers to other relevant provisions. Definitions of the various words and phrases used in the Act are conveniently listed in a dictionary that appears in s 12. With rare exceptions, the provisions are structured in a logical sequence that makes them far easier to read and comprehend than the legislation it is replacing. It is also worth emphasising that less is left to regulations than had become the norm under the Workplace Relations Act.

The present system has also been improved in two other important respects. One is the move to a 'single, national system' for the private sector that was started under the Work Choices legislation and continued under the Fair Work legislation. Outside Western Australia, where the Barnett Government has refused to heed calls from the local business community to join the other States in referring powers to the Commonwealth, non-government employers no longer need to be concerned about having different workers covered by federal and State awards. Nor, with one major exception noted below, is it necessary for such employers to refer to both federal and State legislation to identify minimum employment conditions.

The other major improvement has come with the modernisation and rationalisation of awards. The process of transitioning from 4,000 or so federal and State awards to a little over 120 modern awards (including a small number of modern enterprise awards that are still in the process of being created) has been a lengthy and challenging one for practitioners and regulators, let alone for the parties actually covered by them. But that transition is virtually now complete. It is far easier than it has ever been for a worker or small business to determine which award applies to them and what rates must be paid. Significantly too, the FWC and FWO have been collaborating during the present four-yearly review of modern awards to explore ways to make awards even simpler to read and understand. This has included developing an 'exemplar' version of the security industry award, which has been successfully tested with small business users (Sweeney Research 2014), as a possible new template for all modern awards. Among other things, it provides tables of pay rates that incorporate loadings and penalty rates, rather than requiring users to undertake what are often complex calculations. It has also been decided that, besides the official copy of each award, an 'annotated' version will be produced, containing summaries of relevant NES provisions and links to legislation.²⁸ This initiative promises to further reduce the technicality and uncertainty of modern awards.

There is, however, still scope for improvement. Some of that can and will happen under the current system, as the example just given illustrates. But other issues arguably require legislative attention. For example, it is difficult to see why, alone out of all the established entitlements to absence from work, long service leave is still largely left to the States and Territories to prescribe, when annual,

²⁸ See *4 Yearly Review of Modern Awards* [2014] FWCFB 9412.

personal, parental and community service leave are all dealt with comprehensively in the NES.²⁹ The limited provisions about long service leave that *do* appear in the NES, in Division 9 of Part 2-2 of the Fair Work Act, are exceedingly hard to interpret and apply.³⁰ Whether the ‘anachronistic’ concept of long service leave should be abandoned, or conversely extended through greater portability of entitlements, is a legitimate subject for debate (see eg Thornthwaite and Markey 2014). But if it is to be maintained, we see no reason why it should not be the subject of uniform national regulation, as the Fair Work Review recommended (Edwards et al 2012: 101–2).

A further area for improvement concerns the rules for making enterprise agreements or taking of protected industrial action. Without going into too much detail, we would highlight the possibility for improvements by:

- *specifying the procedural requirements for making enterprise agreements at a higher level of generality.* The legislation might, for example, simply say that employees have to be informed of their right to representation, be given a reasonable explanation of any proposed terms, genuinely agree to those terms, be better off on balance than under an otherwise applicable award, and so on. It could be left to the FWC to develop guidelines or a code of practice to indicate how those requirements might be met, while leaving the tribunal with the ultimate discretion as to whether the broad statutory criteria have been satisfied in any given case.
- *removing the unnecessary degree of prescription of the matters that can permissibly be the subject of an enterprise agreement.* The Fair Work Act did not fully deliver on the commitment to ‘remove the [Howard] Government’s onerous, complex and legalistic restrictions on agreement content’ and allow parties ‘to reach agreement on whatever matters suit them’, subject only to the requirement that the terms be ‘lawful’ (Rudd and Gillard 2007: 14–15). Instead, under pressure from employer groups, the then Labor government retained the requirement that an agreement deal only with ‘matters [directly] pertaining’ to the relationships covered by the agreement, a formula that has long been the subject of confusing and inconsistent judicial rulings (Creighton and Stewart 2010: 305–11). Although marginally lessening the degree of ‘prohibited content’ compared to the Work Choices legislation, and thus reducing the incentive for parties to negotiate parallel or ‘side’ agreements to deal with lawful but ‘non-pertaining’ issues (Stewart and Riley 2007), the current approach still creates wholly unnecessary transaction costs. We would also observe that the insistence by employer groups that agreements should be prohibited from dealing with issues such as job security or facilities for trade unions runs counter to the logic of encouraging enterprise-level bargaining. If some employers are persuaded to agree to deal

²⁹ So far as we aware, long service leave was not included in the Australian Fair Pay and Conditions Standard (the precursor to the NES that was created by the Work Choices legislation) simply because of the historical accident that in 1996, when first referring powers to the Commonwealth, Victoria negotiated to retain responsibility for long service leave (along with other matters such as workers compensation and occupational health and safety), but *was* prepared to let the Commonwealth regulate annual leave, personal leave and parental leave: see *Workplace Relations Act 1996* Sch 1A, as supported by the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic). The list of matters both referred and excluded by Victoria in 1996 is still largely reflected in the content of the NES and the division of legislative responsibility effected under the current Fair Work Act: see Creighton and Stewart 2010: 118–20, 240–5.

³⁰ See eg *Maugham Thiem Auto Sales Pty Ltd v Cooper* (2014) 222 FCR 1.

with such matters, as part of the price of reaching agreement with their employees, the mere fact that other employers (or business representatives) think that they ought not to have made such concessions is not of itself a reason for preventing them from doing so – any more than agreements can or should be rejected because they offer unwisely generous (or miserly) wage increases or leave entitlements. These are matters that should be left to the parties concerned, subject to the limits otherwise set by the legislation as to unlawful terms, compliance with the NES and the better off overall test.

- *lessening the degree of prescription in relation to ‘employee claim action’*. At present, a bargaining representative (typically a union) for a group of employees that wishes to take protected industrial action in support of claims relating to a new enterprise agreement is forced to comply with extraordinarily detailed requirements before it can even confirm their willingness to do so. As with the making of enterprise agreements, we believe that it would be more sensible to express the existing requirements at a higher level of generality (for example, that a majority of the group support taking action) and to consider dispensing with, among other things, the need for formal permission from the FWC.

Finally, we note that with much of the transition to the Fair Work regime now complete, it would be useful to consider what to do about the large and (for the most part necessarily) complex *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Where its provisions still have ongoing relevance, as for example with the recognition of pre-2010 service for NES purposes or the continuing operation of pre-2010 agreements, those rules could usefully be re-enacted in a new and much shorter statute that would be easier to read and understand. It may also be timely to revisit the idea of whether there should be a ‘sunset date’ for older agreements, so as to spare parties the need to continue to refer to the provisions of long-repealed statutes (see Creighton and Stewart 2010: 337–42).

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