

Inquiry into the Workplace Relations Framework

ACTU Submission to the Productivity
Commission

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About the ACTU

The Australian Council of Trade Unions is the peak body representing almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights.

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Abbreviations

AIRC	Australian Industrial Relations Commission
AWA	Australian Workplace Agreement
BOOT	Better Off Overall Test
C&A Act	<i>Conciliation and Arbitration Act 1904</i>
C&A Commission	Conciliation and Arbitration Commission
FW Act	<i>Fair Work Act 2009</i>
FW Commission / FWC	Fair Work Commission
FWA	Fair Work Australia
FWBC	Fair Work Building Industry Inspectorate
FWBI	<i>Fair Work (Building Industry) Act 2012</i>
FWO	Fair Work Ombudsman
IFA	Individual Flexibility Arrangement
ILO	International Labour Organisation
IR Act	<i>Industrial Relations Act 1988</i>
NES	National Employment Standards
PC	Productivity Commission
RO Act	<i>Fair Work (Registered Organisations) Act 2009</i>
TCPA Act	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
UD	Unfair Dismissal
WorkChoices	<i>Workplace Relations Act 1996 as amended by the Workplace Relations Amendment (Work Choices) Act 2005</i>
WR Act	<i>Workplace Relations Act 1996 as amended until March 2006.</i>

Key points and observations

The objectives of the industrial relations system:

- At the most fundamental level, the objectives of our industrial regulation system are based on a broad and enduring social consensus: Workers rights must be protected and there must be a policy intervention to alter the market distribution of incomes in their favour. The outputs of this consensus have positive social effects both within the workplace and beyond it.
- The capacity of the system to meet those objectives has deteriorated over time due to deliberate concessions to the interests of business and also because of insufficient responses by regulators to changes in the nature and organisation of work and the behaviour and organisation of capital.

Australia in context:

- Our system has, appropriately, been shaped by the principles embodied in international conventions. However, there is more to be done by Australia bring its laws into conformity with the principles it purports to concur with and there are further international obligations that it is appropriate for Australia to assume. There are some valuable examples from overseas jurisdictions that apply those principles in collective bargaining frameworks more suited to the modern organisation of work.
- Free trade agreements can have the effect of undercutting domestic employment norms and standards with little capacity to challenge them in readily accessible Courts and Tribunals. The labour movement has developed a policy response to this problem which we endorse and commend to the PC.

Competition policy:

- Labour markets are not product markets and labour is not a commodity: labour is inseparable from the human actors who provide it. Those that suggest that worker collectivism needs to be limited on competition policy grounds fail to appreciate that capital itself is inherently collective in nature. This misapprehension (or world view) may also be at least partly responsible for the failure of the industrial relations system to provide an adequate framework for multiple employer bargaining and its related failure to permit bargaining outcomes with the locus of economic control to flow through to reliant parties in the labour supply chain.

The evolving labour market:

- The transformation of the labour market through from the accord era onward and the economic shocks that followed thereafter, including the GFC, have shown that the industrial relations system is inherently flexible and compatible with employer's desires for the efficient allocation of resources. This flexibility has however come at cost for large sections of the workforce.
- The transformations seen in the labour market over that period have many disturbing aspects including insecure work, rising inequality, hours and skills mismatches, a growing gender pay gap, a growing reliance on temporary foreign workers and the consequences of life cycle transformations. Many of these issues are not capable of being addressed by the industrial relations system alone, particularly for so long as that system remains obsessed with relations at the workplace between a single employer and its employees.

Economic impacts of the system:

- Labour markets can never approximate idealised markets. Real world labour markets are at best characterised as dynamic monopsonies in which many of the 'frictions' which prevent adjustment are not perverse incentives or dysfunctional institutions but important parts of the social fabric and inseparable from the market itself.
- It is not possible to say that changes in the industrial relations framework over recent decades have been the cause of the upswing, downswing and recovery in productivity growth seen over that period. It may be the case that industrial relations policies affect the productivity of individual workplaces, but their effect on net economic performance is minimal. The most important economic solutions lie elsewhere.
- Although further changes in the industrial relations framework might bring minor improvements in workplace productivity, these kind of incremental advances in international competitiveness are dwarfed by other factors such as currency fluctuations, taxation policy and the head-office investment strategies of global producers.
- All regulatory frameworks impose some compliance costs which are necessary and unavoidable. The most significant drivers of compliance costs in recent years have been transitional in nature. Aside from these, the key routine costs for unions are associated with protected action ballots, right of entry permit renewal and the reporting requirements under the RO Act. The latter is a burden which unions are content to bear given the clear and balanced objectives of transparency and democracy. We believe the system of right of entry requires some improvements.
- The costs of participating in FW Commission are largely impacted by the choice to engage external legal representation.
- The regulatory history of recent decades of a combination of concessions to capital and a failure to keep pace with changes on the labour market have resulted in regulatory gaps and incentives for exploitation.

- Some steps have been taken to recognise that individual workers who are independent contractors are workers nonetheless who should benefit from the types of rights and protections offered to workers who are employees, however these steps are insufficient. A clearer discriminator between contractors and employees than that which the common law has developed is required. The desirable reform is one which permits single worker contractors who do not subcontract their work to gain proper worker protections and rights, including the right to bargain alongside other workers collectively with those who engage them. At the very least, the current sham contracting provisions require substantial amendment to shift home responsibility to employers more effectively, and complementary tax law changes to ensure that if two workers are doing the same job under the same conditions, they should be paying the same tax.
- The limited regulatory oversight which accompanied the growth in casual employment seen in previous decades has been characterised by a lack of a unified position as between the common law, industrial tribunals and the legislature over what casual work is or what it should be. The practical result has been that, in large measure, employers decide where the boundaries are merely by choosing to describe a worker as casual. Through the present review of modern awards, unions in many sectors are attempting to give workers more choice about their form of engagement, however there are more comprehensive policy changes that have been suggested to overcome the difficulties faced by large numbers of the casual workforce that warrant further consideration. These include a legislative definition of a casual worker which draws on common law principles, pre-requisites to engaging casual workers and the extension of minimum standards to casual workers.
- Labour hire exists purely as an avoidance strategy and its continued operation in the present regulatory settings is untenable unless one accepts that the workers who are engaged by labour hire agencies are second class citizens. A first order issue is ensuring that labour hire workers engaged in a workplace – however temporarily – have the same level of industrial citizenship as the employees they work with.
- The key requirement for a worker to be sponsored by a specific business as a condition for that worker to continue to hold their visa (and consequential lawful right to remain in Australia), can and does create circumstances where the employee does not act to protect their interests and are exploited by some employers. This is bad for those workers and for the labour market more generally. Jobs and training opportunities should be maximised for Australian citizens and permanent residents and the labour market testing regime around temporary workers should accordingly be rigorous. As a nation we should be skilling up our workforce rather than searching for reasons not to. Where genuine temporary shortages occur that cannot be filled locally, temporary workers must be employed according to Australian pay and conditions, be safe in their workplace, and have access to government services on an equal basis with all Australians.
- The claims of burdensome transfer of business effects in voluntary transfers between related entities are highly exaggerated, and fail to appreciate that applications for exemptions in relation to the transfer of instruments can be made in relation to transfers that are *likely* – that is the orders can be made pre-emptively to provide certainty. It is

hard to conceive of any situation where an order would be refused where it was sought by consent, particularly given the nature of the matters that the FW Commission is required to consider in deciding whether to grant it. Rather, we see the main difficulty in relation to transfer of business being the treatment of accruing entitlements, where there is potential for some unintended effects that disadvantage workers.

- We are concerned by the current capacity in the FW Act for an employer to make an agreement with a start-up or temporary workforce, for the purpose of locking down conditions in a workplace. In circumstances where the number or identity of the workforce changes significantly within 1 year after a non greenfield agreement is approved, the workers upon demonstrating majority support should be able to bring forward the nominal expiry date of the existing agreement.

The Safety Net:

- The minimum wage fixation decisions of FWA and the FW Commission under the present framework have been modest and predictable and there is no basis upon which to assert that they have resulted in any negative employment effects.
- Whilst we regard the institutional and procedural framework for setting the minimum wage as appropriate, we are of the view that it could be made more effective by a clearer articulation of its re-distributional purposes to more squarely concentrate on reducing inequality and the incidence of low pay. This is first order issue relative to a theoretical consideration of an in-work benefit that is exceedingly unlikely to be funded.
- There must be continue to be a mechanism to assess the adequacy and relevance of the discounted wage arrangements for apprentices, trainees and juniors taking into account factors such as changing community standards, changes in the labour market, industry characteristics, evidence of the productivity and experience of these workers, and the needs of the low paid.
- Modern awards contain matters that must be regulated in order to ensure that employees have access to fair wages and conditions. Estimates of the proportion of employees reliant on award conditions is variable but at least 18% rely on awards for their rate of pay and up to 35% may rely on them for other conditions of employment.
- The exploitative practices adopted by employers following the enactment of *WorkChoices*, which enabled award conditions to be removed, clearly demonstrates that the risk to employees of eliminating or reducing award regulation is not simply theoretical.
- The award system has been thoroughly reviewed on numerous occasions over more than two decades, in processes initiated by both the C&A Commission/AIRC and the legislature. It has retained industry differences for good reason. There is no case for another round of consolidation or review, and the entrenched legislative review process has been burdensome and has achieved nothing that could not have been achieved without it. The compulsory four yearly review process should be abolished in favour a mechanism that enables parties to apply for an award variation where necessary on the basis of a genuine contest on the merits within a concrete factual setting.

- It is undesirable and inefficient to have both the PC and the FW Commission conducting parallel inquiries into penalty rates. This is particularly the case to the extent that the Minister has ruled out any legislative change concerning penalty rates.
- The PC should not assume that industrial relations system is naïve to arguments concerning the “24/7 economy” – the FW Commission and its predecessors have been dealing with versions of the argument for over 60 years. Employees should be appropriately compensated for working long hours at inconvenient and unsociable hours.
- Some of the most vulnerable employees rely on penalty rates to make ends meet. These employees include the low paid, women, and those in regional/rural areas. Close to 40% of the Award dependent workforce is employed in two industries – Accommodation and Food Services and Retail Trade. These are the industries where the loudest critics of penalty rates reside. A fact that rarely features in the debate is that even mid-senior levels of workers in those awards - such as Retail staff with some management responsibility, Cooks, Bar Staff, Front of House Staff and Waiters in Fine Dining Restaurants – have rates of pay that mean they would still receive less than Full Time Average Weekly Total Earnings even if they worked a full time week at double time for every hour worked.
- There is nothing extraordinary about our industrial relations system providing for penalty rates. They should remain part of the safety net maintained by the FW Commission and bargaining parties should continue be free to modify them on a “better off overall” basis through collective agreement making.
- The content of the National Employment Standards is largely based on safety net standards developed by the AIRC through the Award system. In broad terms that content is uncontroversial and unobjectionable, however there are some particular features of the National Employment Standards that warrant further development. In particular:
 - the rights to request a change in work arrangements or an extension of parental leave need to oblige employers to reasonably accommodate such requests and be underscored by an effective right of review;
 - the minimum redundancy standards now included in the NES have seen little change, notwithstanding that much has changed in terms of the economic position of Australia and the make-up and structure of the modern workforce. Modern working arrangements are such that the dated exclusions from redundancy pay concerning:
 - casual work (even where it is regular);
 - work on successive fixed term contracts;
 - “ordinary and customary turnover of labour”; and
 - obtaining “suitable” alternative employment that does not recognise prior service.
 are having harsh and unintended effects on some workers. This requires rectification.
- Subject to our observation below, we are of the view that a national long service leave standard should be developed. The preferred model would ideally be based on the standards contained in the legislation covering general employment in

South Australia and the Northern Territory but incorporate selected features from elsewhere. The standard should operate nationally and only exclude workers covered by existing industry portable long service leave entitlements.

- There is much to recommend a national portable long service leave scheme, however devising such a scheme would involve interaction with superannuation and financial services sectors and potentially others. The issues of both the NES LSL standard and the question of the desirability of a portable national scheme should be the subject of a specific separate inquiry inviting contributions from all interested stakeholders.
- The provision of accessible and effective dispute settlement procedures is integral to guaranteeing the safety net. However, the lack of access to an arbitrated, binding decision to settle disputes under the current provisions of the FW Act and the modern award framework undermines the capacity to achieve this.
- The FW Act should empower the FW Commission to arbitrate disputes about any matters arising under awards or the NES, as a last resort. If necessary, such orders can lay down rules for the future conduct of the parties (for a nominated time, or indefinitely) in order to avoid further disputation.
- Modern awards provide significant flexibility to employers to structure their business. They do not regulate trading hours or impose restrictive work practices: they provide a safety net for workers that is adapted to industry needs. Further workplace flexibility is achieved through collective bargaining on a better off overall basis. Calls by industry for further flexibility in the safety net are ambit claims of dubious merit.
- Collective agreements are a well-established path for workers who seek better conditions and for employers who seek greater flexibility and who are content with the notion that their workers are worth more than the bare minimum.
- There is no evidence that the requirement for agreements to meet the better off overall test is an impediment on agreement making. The fact that the better off overall test does not permit safety net conditions to be traded for non-monetary compensation does not mean that it inhibits flexibility in the workplace.
- Permitting the better off overall test to take account of non-monetary compensation would lead to uncertainty, exploitation and would undermine the safety net.

Collective Bargaining:

- If proper effect is to be given the beneficial objects and purposes of our industrial relations system, there is simply no role for the State to use laws as a device impose a limitation or ideological judgement on the merits of that which workers might seek to pursue to protect and advance their interests through collective bargaining. Any legitimate limitations must come from elsewhere, such as income tax laws or laws prohibiting discrimination.

- A less restricted scope to bargaining content would make the system less complex and would continue the path of reform toward more meaningful multi employer bargaining, including supply chain bargaining which at least indirectly covered labour hire workers who are economically dependent servants and agents of an entity with which they have no “employment relationship” for any “matter” to “pertain to”.
- The operation of the GFB provisions of the FW Act has been positive but not uniformly so, particularly in the area of first agreement negotiations involving workers with limited bargaining power. To combat this, the underlying principle that should permeate the GFB framework is that the parties to collective bargaining must come to the table with the intention of attaining a mutually satisfactory enterprise agreement.
- There are some concerns that the good faith bargaining obligation concerning “disclosure of relevant information” save where it is “confidential or commercially sensitive”, is not working effectively. If one accepts that workers have a material interest in such matters that would affect their decision making in negotiating their conditions, it can hardly be considered “good faith bargaining” to condone non-disclosure of those matters. There is force in the suggestion that workers’ and their representatives would be more appropriately informed by a materiality test adapted to their circumstances that was not so easily avoided.
- The degree of prescription and regulation concerning the availability of protected industrial action is excessive and has drawn criticism on the basis of its inconsistency with our international obligations. The moves to further restrict the right to strike should be seen in the context of just how limited the right already is in Australia. The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their social and economic interests. The erosion of that right runs directly contrary to the purposes of the industrial relations system. Strike ballots, if they are to remain, should serve no purpose other than a democratic one.
- The framework of dispute resolution in the context of a system of collective bargaining must primarily be guided by pragmatism and common sense, albeit within the confines of what our international obligations permit. The arbitration pendulum has, at a practical level, swung too far in the direction of non-intervention since the introduction of enterprise bargaining in the early 1990’s. This is manifested in two features of the legal architecture of the FW Act:
 - ‘Interest’ arbitration of collective bargaining disputes is practically unattainable, unless one party (as in the case of Qantas in 2011) is able to inflict massive damage on the economy, or a significant part of it; and
 - The question of whether the FW Commission is able to arbitrate on a dispute arising from the operation of an enterprise agreement is a largely matter for bargaining itself, leading in practice, to many major corporations imposing an effective veto on access to arbitration during the term of agreements.
- Whilst there should not be ready recourse to the compulsory arbitration of collective bargaining disputes, a recalibration of the tests contained in the FW Act is required to

provide more flexibility to the FW Commission to interpose itself in the bargaining environment in appropriate situations, having regard to:

- The maturity of the bargaining relationship and, in particular, whether the bargaining involves an actual or virtual first agreement.
 - The extent to which the parties have adhered to their good faith obligations;
 - The damage that a continuing industrial dispute is causing to the relationships at the workplace.
 - Whether there is any reasonable expectation that the dispute will be solved by further negotiation.
- We support the expansion of the Good Faith Bargaining requirements to Greenfield Agreements, and the availability of assistance from the FW Commission to resolve greenfield bargaining disputes. That assistance however should be merits based in the same manner consistent with that we have proposed for agreement making generally. That is, arbitration is a last resort in a continuum of assistance. In arbitrating the merits of greenfield arrangements, the FW Commission should have regard to the conditions applicable on projects of similar scale or nature and the agreements should be of limited duration so that conditions adapted to the operation in practice can be negotiated in the usual way.
 - There are a number of barriers to fair and efficient agreement making in the public sector. These include the separation between the decision making entity and the bargaining entity, the difficulty of obtaining meaningful assistance or determination from the FW Commission and the strategies employed by the public sector to exploit the limitations in the system to achieve delay. Reform of the nature identified for private sector bargaining will assist, although consideration could also be given to public sector specific provisions which have been utilised in the past and are supported by international instruments.
 - The lack of any accepted measure of public sector productivity is a complication to achieving bargaining outcomes, however the larger challenge is the view taken by the public sector that productivity in bargaining is achieved only by cutting pay and conditions.
 - The regulation by the FW Act of State public sectors is entirely unsatisfactory owing to difficulties in characterising employers as either “constitutional corporations” or caught by a referral of power. The distinction is significant because it impacts on the matters which may be included in a collective agreement, the action that might be taken in support of reaching such an agreement and the enforceability of that agreement. There also concerns about the applicability of minimum standards to some public sector workers. The Victorian Government can act to ameliorate some of these difficulties, and should do so.
 - Legislation in NSW which applies to its public sector workers prohibits unions from achieving pay increases above those set by Government policy, prescribes the manner in which all Awards are to be determined by reference to Government policy and to limits the matters upon which Awards can bestow enforceable entitlements upon employees. This is not acceptable and must be repealed.

- Collective agreements that are made under the FW Act do not permit the bargaining parties to have recourse to their bargaining rights in order to advance new claims, until the nominal expiry date of the existing agreement has passed. In other respects, agreements do enable workplaces to continue to evolve during their nominal term. The question of how much change is to be permitted and what checks and balances exist on the change process are of considerable importance in ensuring the “bargain” remains a fair one.
- Whilst the model provisions for consultation and change are a starting point, more needs to be done to better involve employees in the change processes at their workplaces.
- A compulsory arbitration clause in collective agreements is an essential part of a properly functioning collective bargaining system. Arbitration as a final step process allows for employee grievances over the application of the agreement to be dealt with relatively quickly, cheaply and by persons who have an understanding of industrial issues. The refusal of certain employers to accept arbitration as a mandatory clause in enterprise agreements amounts to workers having to accept the proposition of ‘do as we say, not what you think the agreement means’.

Individual Arrangements:

- The common law contract of employment does not provide a meaningful safety net for employees. In modern Australia, the common law does not see itself as fulfilling that role – it relies on the legislature.
- The industrial relations system has adopted “cut off points” for the application of its safety net based on using incomes and occupations as a proxy to make assumptions about workers’ bargaining power and the consequent need for protection. Individual statutory arrangements pay no regard to those cut off points, and have been crafted to result in the removal of rights and protections that would otherwise be in place. In that respect, they leave workers worse off than would be the case under common law contracts.
- Individual statutory arrangements are at odds with the fact that the industrial relations system is based on an acceptance that a labour market underpinned by freedom of contract produces unacceptable outcomes for workers.
- In the absence of an iron clad and enforceable guarantee that the safety net in all respects remains in place and is improved upon, there is no incentive for employees to freely and genuinely agree to an individual statutory arrangement. If experience is anything to go by, these guarantees would make such arrangements highly unattractive to the types of employers who historically have shown the greatest enthusiasm for them.

Employment Protections:

- Decisions as important as that to terminate someone's employment should be subject to valid reasons and reasonable standards. If the decision to terminate does not objectively meet these criteria, then the employee should have an accessible and effective remedy. The FW Act substantially achieves this, but it is far from optimal:
 - There needs to be an avenue for employees to argue that they have been unfairly selected for a redundancy;
 - Administrative processes are inflexible and in the rare cases where matters proceed to arbitration there are often delays, particularly for workers in regional Australia.
 - There restrictions on access to the system based on qualifying periods of employment and the nature of the employment or size of the employer are in some respects arbitrary or unfair.
 - Caps on the compensation payable to employees are unwarranted and it cannot be assumed that payments would blow out if the cap were lifted, due to other checks and balances in the system.
- Efficiencies and reduced costs and complexities in the small number of UD matters that proceed to final determination could be realised if the FW Commission were able, with the consent of both parties or by its own motion, to conclude matters by way of a less formal "arbitration conference".
- The increasing legalism of the UD system has the effect of increasing the costs upon represented applicants (or their organisations) and also results in a serious imbalance in situations where only one party is represented. The FW Commission should strictly enforce the presumption against legal representation in matters before the FW Commission generally, but in UD proceedings in particular.
- The purpose of the General Protections of the FW Act is to protect persons with certain attributes, or engaged in certain conduct covered by the FW Act, from 'adverse action' engaged in or initiated by another person. The intended effect of the general protections is beneficial and protective. They are designed to further and promote certain internationally recognised norms including, *inter alia*, the protection of persons engaged in lawful industrial activity.
- The current state of the law based on recent general protections cases however is such that the protections have been effectively read-down by the Courts and are at risk of being undermined in a critical area. Legislative amendment may be the only means of reinstating the essentially beneficial and protective operation of the general protections provisions of the FW Act. Such an amendment might positively describe the relevant test of characterisation as an objective test, or may alternately preclude a purely subjective approach to ascertaining the reasons for adverse action.
- The Unlawful Termination provisions contain a deficiency which insufficiently protects the rights and interests of workers in receipt of workers' compensation. This deficiency was given effect to by a regulation which effectively overruled a the view of the Courts that

reasoned that international law roots of the protection were consistent with the protection of injured workers irrespective of the cause. This anomaly should be rectified.

- It is premature to conduct a thorough review of the FW Commission's anti-bullying jurisdiction. Preliminary indications are that the FW Commission is focussing on achieving conciliated outcomes rather than dispensing orders that require workplace bullying to stop. There is also some suggestion of some delay and a need for better resourcing.

Accessing Workplaces:

- Unions have an institutional compliance function in the industrial relations system. The restriction on right of entry for compliance purposes affecting non-members erodes their capacity to carry out that function. There is an economic efficiency in having unions identify and rectify these matters without the necessity for court proceedings or the intervention of public authorities such as the Fair Work Ombudsman.
- Because the FW Act confines entry to investigate a suspected contravention only for a member who performs work on that premises, it is not possible to exercise those investigative rights for members who have left their employment (either by choice or otherwise). This should be remedied.
- There is no warrant for prohibiting bargaining parties from agreeing upon the terms of access and representation clauses in a collective agreement. Obstacles to such consensual arrangements should be removed.
- The current requirement to give notice of entry for the purpose of discussions during employees' meal or other breaks should be removed as should the notice requirement for suspected contraventions, the latter of which is inappropriate in the context of investigations and significantly undermines the proper enforcement of employee entitlements. The limitation on the inspection of records relating to currently employed members should likewise be rescinded.
- One recurring complaint from employers about the current entry regime is that it has resulted in a major increase in the frequency of union workplace visits. Whether or not this is the case, what is clear is that in some cases the approach of the employers themselves has contributed to an increase in the number of entry notices, if not entries, to Australian workplaces. Employers have actively resisted a coordinated and efficient approach to workplace access which would limit the frequency of these visits.
- On the other side of the ledger, a significant amount of interaction in the workplace between employers and trade union employee representatives occurs by mutual agreement and without incident or disruption. Where entry and representation arrangements can be agreed by the industrial parties the law should facilitate and not impede those arrangements.
- The 'one size fits all' approach to workplace access disputes is unnecessarily restrictive and inconsistent with achieving reasonable and flexible arrangements that suits the

needs of Australian workplaces. The FW Commission should be empowered to make orders varying the circumstances under which access can occur, particularly where doing so would have the effect of settling a live industrial dispute.

Institutions:

- The FWO's compliance and enforcement policy indicates it applies a sensible triage and management process to the inquiries it receives, save perhaps in relation superannuation matters which it perplexingly refers to the ATO notwithstanding that agency's poor track record of action on such matters.
- The FWO's development of a mediation service may be a symptom of the gaps in the functions of the FW Commission or a poor awareness about its existing functions and the lack of accessibility to the Court system.
- A glaring issue of inefficiency and waste is the fact that there are two separate and separately funded, statutory agencies enforcing one set of industrial laws – the FWO and the FWBC. The decision by the FWBC not to secure and enforce employee entitlements but to abdicate that responsibility to the FWO makes the case for disbanding the FWBC and allowing the FWO to function as the sole federal labour inspectorate all the more compelling.
- The FW Commission is functioning highly effectively subject to three concerns: the Award review process (see Chapter 9), the processing of Right of Entry matters (see Chapter 6) and the inflexibility and delay in the processing of unfair dismissal matters (see Chapter 18).
- As alluded to in Chapters 11-16 & 18 & 21 in particular, there is room for the FW Commission's jurisdiction to be modified and broadened in order for the industrial relations system to provide more effective pathways to resolving rights and interest based disputes. Further, as raised in Chapter 8, reforms to the minimum wage setting framework should be pursued to more closely align that function with the distributional purpose of the industrial relations system.
- There are numerous statutory provisions which give special rights to a Minister or a regulatory authority to participate in industrial contests to the exclusion of the discretionary considerations that might otherwise be applicable. These provisions, detailed in Chapter 22, involve unwarranted state interference in industrial relationships, and should be repealed.
- The institutional role of unions in the industrial relations system is multifaceted and is critical. Unions are fundamental to the two vehicles by that the system relies on to give effect to its central purposes: the setting of minimum standards and collectivism.

1

First Principles: The Purpose of Industrial Relations Regulation.

Some central elements of the first federal industrial relations system had become inevitable in the constitutional debate that carried the motion (albeit by a majority of only 3 votes¹) that the Commonwealth Parliament shall have the power to make laws with respect to conciliation and arbitration of industrial disputes extending beyond the limits of one State. The fact that at least two of the States (NSW and South Australia) had already established their own industrial arbitration mechanisms in advance of the Commonwealth legislation was also undoubtedly an influence. These developments occurred against the backdrop of a decade characterised by substantial social divisions, economic depression, lockouts and strikes². It was a period where “freedom of contract” had been fighting collective representation, and winning. The decision taken in the constitutional debates marked a turning point.

When Australia’s first federal industrial relations laws were introduced, they were the product of a compromise that reflected a broad social consensus. The laws were devised by a minority Protectionist Party government held in power with the support of the Australian Labor Party and were implemented by a Protectionist-Free Trade alliance. Some matters of detail (such as union preference and the coverage of the state public services, foreigners engaged in coastal shipping and rail workers) were hotly contested, but the essential architecture of the system was not.

Whilst a Labor-Liberal coalition government might today seem a heretical proposition to both partisan political actors and the community at large, this important footnote in history serves to demonstrate that at its most fundamental level, the basic objectives of industrial regulation were settled well before the ink had dried on the C&A Act. Our proposition in this introductory chapter is that notwithstanding recent cracks (which the instigators of present inquiry are intent upon agitating), this broad consensus is intact and must remain so.

The “political football” contest concerning industrial relations has seen various losses and gains to labour and capital over its 110 year season. Most of the colour and movement however can be attributed to two key periods (which had significant variations within them). The first period covers the ALP-ACTU Wages and Incomes Accord while the second period covers the period of enterprise bargaining, supplemented by the award system. Moves towards the modernisation of Australian workplaces which were already under way in this first period—exemplified by award restructuring and productivity bargaining—were overtaken by the political momentum of a shift to enterprise bargaining³. This second period represented a move towards decentralised wage setting. It was inaugurated in the early 1990s when the Keating government formalised enterprise bargaining and was expanded further by the Howard government in 1996 when

¹ Rowse, T., “Elusive Middle Ground”, in Issacs, J. & Macintyre, S., *The New Province for Law & Order*, Cambridge University Press, 2004.

² *Ibid.*

³ Ron Callus 2005, ‘The Re-regulation of Australian Industrial Relations: The Role of the Hancock Inquiry’, in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press.

individual agreements were formalised. More dramatic changes took place 2005 under WorkChoices, when the 'no-disadvantage test' was removed from individual bargaining. Finally, under the Rudd-Gillard governments, the FW Act largely dismantled WorkChoices and inaugurated an agenda of award modernisation. As Borland notes, with regard to the changes during the 2000s: '[they were] primarily oriented to changing the relative bargaining power of employers and employees, rather than to enhancing overall economic performance'.⁴ Today, the residue of all these changes is still evident: enterprise bargaining is entrenched, but with an important role still filled by the award system. Managerial prerogative is in the ascendant, but organised labour continues to show resilience—notably during the fight against Work Choices⁵—and remains fundamental to both enterprise bargaining, the evolution of the award system, and the maintenance of the minimum wage. In the day-to-day relations on the shop floor, unions also remain significant, despite lower levels of union density in some sectors.

Whilst the labour movement has seen in aggregate more losses than gains over both periods, those losses have not been as a result of a re-think of the central pillars on which the system has been built. Rather, numerous commenters have aptly described industrial relations policy reform as a pendulum – apt because a pendulum can only swing within pre-defined limits. On the only occasion in recent history where the pendulum was transformed to a wrecking ball swung toward those central pillars, the result was significant public opposition, concerted activism from diverse wings of civil society and a change of government that unseated a Prime Minister.

Ascertaining the central objects of industrial relations laws involves a great deal more than resort to the relevant sections of an item of legislation that purport to state what those objects are. The drafting of such sections has gradually transformed from a mechanical summary of the basic architecture or institutional features of legislation (as was the case with the C&A Act) to broader policy statements that are somewhat obscured by ambiguous political catchphrases designed to ensure each of the loudest lobbyists can be persuaded they have been serviced by the Government of the day⁶. A much surer guide to the objects of legislation is to look at what it actually does, with the generally safe assumption that what it does do is done intentionally.

The brief account in Table 1 of what *Conciliation and Arbitration* system did and what the *Fair Work* system does is sufficient to demonstrate the historical consistency between the then and now. A more fulsome exposition of the major evolving features of modern industrial relations laws is enclosed in Appendix 1.

⁴ Jeff Borland 2012, 'Industrial Relations Reform: Chasing a Pot of Gold at the End of the Rainbow?', in: *The Australian Economic Review* Vol. 45. No. 3, pp. 269–89, p. 270.

⁵ 'In the electoral battle over WorkChoices, the ACTU set the terms of the debate. Had the Liberals succeeded in framing the debate, much of the unions'—and Labor's—campaign might have been blunted'. (Murray Goot and Ian Watson 2012, 'WorkChoices: An electoral issue and its social, political and attitudinal cleavages', in: *Australia: Identity, Fear and Governance in the 21st Century*, Australian National University, Canberra: ANU E Press, p. 158)

⁶ That the last observation is neither exaggerated or overly cynical may be confirmed by others who will no doubt participate in this inquiry with whom the authors of this submission have sat across from in the confidential meetings were such phrases were, for want of a better expression, negotiated.

Table 1: Features of the Conciliation & Arbitration and Fair Work Systems

Feature	Conciliation & Arbitration	Fair Work
Provide for Awards to be created and maintained	C&A Act ss.19-40 C&A Act s. 38(f)-(g) also provided for awards or parts thereof to apply throughout an industry	TCPA Act, Schedule 5 FW Act, Part 2-3
Provide for Minimum Wages to be fixed and maintained	C&A Act s. 40(a) Excise Tariff Act 1906 s.2(b)-(d)	FW Act, Part 2-6 & s. 156(3) & 157(2)
Provide for Collective Agreements to be made	C&A Act s. 24 & Part VI	FW Act Part 2-4
Provide a framework for the resolution of industrial disputes	C&A Act ss. 23-25, 34-35	FW Act s. 236-246
Provide for the compulsory arbitration of industrial disputes.	C&A Act s. 24(2)-28	FW Act Part 3-3 (Divisions 6-7) & Part 2-5
Protect freedom of Association prevent discrimination	C&A Act ss.9-10	FW Act Part 3-1
Regulate Industrial Action & Lockouts	C&A act s. 6-8	FW Act Part 3-3
Regulate Industrial Organisations	C&A Act. s.47, 55-72, Schedule B	RO Act

This historical consistency demonstrated above accords with the account given of the objects and purposes of industrial relations laws by leading and respected academics in the area. Owens, Riley and Murray⁷ posit seven purposes of the law of work:

- The protection of workers;
- Redistributive justice;
- Fostering social cohesion;
- Social citizenship;
- Social inclusion and participation;

⁷ Owens, R., Riley, J. & Murray, J. The law of Work, Oxford University Press. 2011.

- The protection of human rights; and
- Fostering competition.

Their analysis of each of these purposes tends to suggest that they are subsets of two overriding and interlinked objectives: A protective objective and a redistributive objective.

Protection

The articulation of the protective purpose of industrial relations laws has been constant and is often attributed to Sir Otto Kahn-Freund's seminal text *Labour and the Law*:

“The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship”⁸

The fundamental rejection of freedom of contract as the sole determinant of the content of the labour-capital relationship has been evidenced in all iterations of federal industrial laws, including *WorkChoices* (albeit to a lesser degree)⁹. This rejection is founded on the premise that the bargaining power between a worker and their employer is inherently unequal. A worker's labour is inseparable from them as a human being – it is not a commodity. The price paid for labour thus dictates the quality of the worker's life. The protective purpose aims to address the bargaining inequality and the potential for exploitation. It does this through:

- Providing a framework of rights that allows labour to act collectively in its bargains with capital;
- Directly establishing minimum inalienable standards or rights from which each worker may benefit; and
- Providing the infrastructure for minimum standards to be progressed in line with economic development.

Owens *et al* describe the following as desirable outputs of the protective purpose:

- *Fostering Social Cohesion*: There is a wider social goal that all workers are treated fairly not simply in their relations with their employers but in the position relative to other workers. Minimum standards and rights provide such fairness and equality.
- *Social Citizenship*: The protective purposes of labour law reinforce and extend the normative values of fairness and equality that underlie civilised society into the workplace, therefore reinforcing the social utility of work.
- *Human Rights*: The protective purposes of labour law reinforce the responsibilities of States under human rights law. For example, the rights to freedom of association, just and favourable conditions of work, equal pay, to join and form a trade union and to “just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity”, all of which are expressed in the Universal Declaration on Human Rights

⁸ Kahn-Freund, O., *Labour and the Law*, Stevens & Sons, 1972, at p. 8.

⁹ Certain minimum standards maintained legal superiority over common law contracts even under this regime, and the absence of a “no-disadvantage test” when making statutory instruments was somewhat addressed shortly after the Work Choices legislation was introduced.

are reflected to varying extents in our federal industrial relations laws, including through statutory causes of action.

Redistribution

The re-distributive purposes of industrial relations laws are the baldly economic expressions of its protective purposes. Labour and capital are in perpetual contest for the income generated by their productive endeavour. Capital seeks profit growth, labour seeks wages growth. Labour gains regulatory assistance to ensure a more equitable distribution of income between these factors of production. The remaining two purposes of industrial relations laws referred to by Owens *et al* are connected with this purpose.

Social Inclusion and participation: Because work is such an important determinant of how citizens are integrated into society, the availability of work and the pay and conditions attached to work are relevant considerations any redistributive framework. As we point out in later chapters, the relationship between employment and minimum conditions set through the framework is a complex one and certainly not as reducible as the phrase “social inclusion and participation” might suggest.

Fostering competition: Owens *et al* emphasise the modern pre-occupation in industrial relations law of providing business with “flexibility” to compete. They observe that the supposed benefits of competitive flexibility firstly assume an acceptance of freedom of contract and secondly rely on trickle down economics for their redistributive impact. From this observation they suggest this runs counter to some of the orthodox and longstanding purposes of industrial law. We would tend to agree on the issue of flexibility. However, we accept that fostering competition is a legitimate element in the redistributive function of the law insofar as reducing the scope for competition on wages and ensuring workers get a fair share of the benefits of increased productivity, industrial laws incentivise competition on the basis of innovation rather than on labour costs.

Extent versus extinction

The dual purposes of protection and redistribution are firmly associated with the political goals of 20th century economic and social reform to redistribute wealth through the labour market and empower labour and its institutions¹⁰.

Respected authors including *Creighton & Stewart, Howe, Johnstone* and *Arup* have observed that these purposes and goals have, since the 1970s or at least the 1990s, ceased to be expressed as predominantly in industrial relations laws, but none claim those purposes have been abandoned altogether or assert that they should be¹¹.

¹⁰ Mitchell, R., & Arup, C. in Labour Law and Labour Market Regulation, Federation Press, 2006, at p 10.

¹¹ *Creighton, B., & Stewart, A. Labour Law*, Federation Press, 2005, at 5-10; Mitchell & Arup *Op. Cit.*, Howe, B., Johnstone, R & Mitchell, R. “Constituting and Regulating the Labour Market for Social and Economic Purposes”, in Arup, Mitchell & Ors, Labour Law and Labour Market Regulation, Federation Press, 2006, at p 16.

The neo-liberal agenda that stands against the objectives of protection and redistribution is often described as “de-regulation”, which implies a return to a “natural order of things”¹² where market forces and private decision making are considered superior. The “superiority” of that model in absolute terms was tested against public interest grounds and failed more than 100 years ago. Among the cluttered field of lobbyists representing the interests of capital, only the HR Nicholls society has called for industrial relations laws to be abolished and only the Australian Mines and Metals Association had pursued a whole of industry exemption from the regulatory scheme (and even that model had some, albeit limited, safeguards to it).

What has been observed over time is that the “de-regulation” agenda has been accommodated by incremental reductions in the effectiveness with which our industrial relations law serve their primary objectives. This incremental reduction in effectiveness is the product of two causes:

- Deliberate concessions by governments to the interests of capital (sometimes by more regulation rather than “de-regulation”); and
- Inaction (or insufficient action) by governments in response to changes in the nature and organisation of work and the behaviour and organisation of capital.

Both of the causes have been aided by the deliberate shift in the constitutional basis of industrial law from the Conciliation and Arbitration power to the Corporations power. The latter provides the vehicle for the government to directly regulate what labour and capital must and *must not* do, even in the absence of any dispute. But the power has not been utilised in the current law to its fullest extent - by focussing on the relationship between a corporation and *its employees*, the framing of the current law necessarily disempowers organised labour that is not in a traditional relationship with a single employer. If one pauses to consider what might have been possible had the courts and the AIRC been left with given even only minor prompting from a benevolent legislature to continue to develop and evolve the law as to what could constitute an “industrial dispute”, a different result seems likely.

In the remainder of our submission, while responding to the PC issues papers as thoroughly as our time and resources have permitted, we direct particular attention to the effectiveness with which industrial relations law is currently meeting its objectives of protection and re-distribution.

¹² Howe *et al*, *Op Cit*

2

The International Context

Australia's industrial laws have been shaped by international influences in two respects. Firstly, there are common principles in international conventions which are reflected within our laws. Secondly, other countries' implementations of those principles have at times shaped our local laws. In our submission:

- there is more to be done by Australia to bring its laws into conformity with the principles it purports to concur with;
- there are further international obligations that it is appropriate for Australia to assume;
- Free trade agreements ought to advance rather than retard our progress toward implementing our international obligations;
- there are elements of the models of collective bargaining in international jurisdictions that give better effect to the principles Australia purports to concur with.

International Conventions and Industrial Relations laws

We note that under section 8(j) of the *Productivity Commission Act 1998*, the PC is bound to “have regard to the need for Australia to meet its international obligations and commitments”¹³ (emphasis added). We concur that the need for Australia to do so is non-negotiable.

International conventions (including conventions of the ILO) do not automatically apply in Australia. The classical statement of the legal position on ratification of international conventions is the judgement of Mason CJ and McHugh J in *Kioa v. West* (1985) 159 CLR 550 at 570 where they stated:

“Ratification (of a convention) as an executive act has no active legal effect upon domestic law; the rights and obligations in (international conventions) are not incorporated into Australian Law unless and until specific legislation is passed implementing the provisions”

Essentially this means the ratification of a convention, of and by itself, has little or no effect on Australian domestic law. The provisions of a Convention only become part of Australian domestic law if they are incorporated by specific legislation implementing the provisions of a convention.

The conceptual foundations of many parts of the FW Act follow the labour standards established in international labour conventions (such as a minimum wage apparatus, a provision for gender pay equity and the general protections aimed at freedom of association). However, the FW Act does not expressly state an intention to implement conventions ratified by Australia.

¹³ Section 8(j)

This was not always the case - the connection between the Federal workplace relations statutes and the international conventions has been variable. Since 1996 the connection has become increasingly remote.

For example, the IR Act (as amended by the *Industrial Relations Reform Act 1993*) provided:

170PA. (1) The object of this Division is to give effect, in particular situations, to Australia's international obligation to provide for a right to strike. This obligation arises under:

(a) Article 8 of the International Covenant on Economic, Social and Cultural Rights (a copy of the English text of the Preamble, and Parts II and III, of the Covenant is set out in Schedule 8); and

(b) the Freedom of Association and Protection of the Right to Organise Convention, 1948 (a copy of the English text of the Preamble, and Parts I and II, of the Convention is set out in Schedule 15); and

(c) the Right to Organise and Collective Bargaining Convention, 1949 (a copy of the English text of the Preamble, and Articles 1 to 6, of the Convention is set out in Schedule 16); and

(d) the Constitution of the International Labour Organisation; and

(e) customary international law relating to freedom of association and the right to strike.

In considering the above general provisions and the specific provisions which followed them, the High Court made the following observations concerning the right to strike as contained in the *International Covenant on Economic, Social and Cultural Rights*:

“...the right to strike, subject to the possibility of common law remedies, might be reasonably seen as no right at all, so too might the existence of the right be doubted where its exercise might lead to the loss of employment or punitive action by the employer against the employee.”¹⁴

“...the absence of criminal penalties does not equate with the provision of a right to strike. In our view, it was reasonably open to the Parliament to conclude that even the existence of common law remedies against strikers and strike organisers is inconsistent with the provision of the right to strike.”¹⁵

The IR Act as amended by the *Industrial Relations Reform Act 1993* was indeed the high point in forging connections between international and domestic law. That Act had:

- a constitutional footprint that included the foreign affairs power. It had as one of its objects “providing the means for ensuring that labour standards meet Australia’s international obligations” (s3(b)(ii)).
- The text of many parts of that Act were expressed “to implement” ILO conventions. For example, the minimum wage apparatus (Division 1 Part VIA) was expressed to implement the Minimum Wage Fixing Convention 1970 (26), the equal pay for work of equal value provisions in Division 2 Part VIA sought to implement the *Equal Remuneration Convention 1951*(100) and the unfair dismissal provisions in Division 3 of Part VIA were designed to implement the *Convention on the Termination of Employment Convention 1982* (158).

¹⁴ *Victoria v. The Commonwealth, Op. Cit.*, at [232]

¹⁵ *Victoria v. The Commonwealth, Op. Cit.*, at [228]

Since the WR Act the Federal Parliament has ceased using the implementation of international conventions through the foreign affairs power as the constitutional foundation of the federal statutory labour law.

The FW Act has as its constitutional basis the Corporations power (s51(20) and the referral power (s51(37)). It does not rely on the foreign affairs power (s51(29)). The objects of the Fair Work Act 2007 at s3 (f) has Australia's international obligations as a sort of afterthought or footnote to s3(f) to provide “..Workplace relations that are fair...flexible...those promote economic growth and “*take into account Australia's international labour obligations*” (emphasis added).

The “footnote” character of ILO conventions to the operation of FWA is illustrated by the fact that it refers to the ILO Conventions only twice:

- Section 722 refers to the notification and consultation requirements of an employer to registered organisations of employees in s787. The FW Commission “must not make” such an order unless it “will give effect to the requirements of Article 13” of the Termination of Employment convention (158). The reference to the Convention is not to “implement” it but as a condition precedent to making the relevant order; and
- Part 6-3 Division 2. This is the only Division in the FWA that seeks to implement conventions. The Division deals “extension of entitlements to unpaid maternity leave and related entitlements”. That Division has as one of its objects: to “give effect to” the ILO *Convention on Equal Opportunity and Equal Treatment for Men and Women workers with Family Responsibilities* (no 156) (s743 (a)) and the *Workers with Family Responsibilities Recommendation* (R135)(s743(b)).

As can be seen, the “world did not end” when our domestic courts were required to reconcile the terms of an international convention and domestic labour law legislation which expressly stated an intent to implement it. That model of legislative drafting has much to recommend it, not the least being transparency, and the FW Commission should consider itself duty bound by its charter to recommend that the FW Act adopt this model.

Ratified ILO Conventions

Industrial legislation should not only state its intention to implement international obligations, it should actually do so. Throughout this submission we draw attention to parts of the FW Act that do not meet those obligations where relevant. However, a more fulsome account than the time allowed for this submission has permitted is contained in comments to the ILO as part of its regular survey and reporting cycle, as well as our support for particular complaints. We assume these materials are available to the PC however we can provide copies should this assumption be mistaken.

Australia has ratified 58 of the Conventions of the ILO (41 of which remain in force). This includes seven of the eight fundamental conventions: the *Forced Labour Convention 1930* (29), the *Freedom of Association and Protection of the Right to Organise Convention 1948*(87), the *Right to organise and collective bargain convention 1949*(87), the *Equal Remuneration Convention 1951*(100), *Abolition of Forced Labour Convention 1957*(105), *Discrimination (Employment and Occupation) Convention 1957*(111) and the *Worst Forms of Child Labour Convention 1999*(182). The Australia has not ratified the *Minimum Age Convention 1973* (138)

Practical effects of ratification – the Maritime Labour Convention 2000

International Labour Standards can, if properly enforced be a useful method of lifting the minimum standards of employment for workers both domestically and abroad. By way of example, the *Maritime Labour Convention of 2000* (the MLC) provides a near globally recognisable set of minimum employment conditions for seafarers- many of whom face employment conditions that can only be described as primitive and were the subject of public scrutiny in the groundbreaking 1992 *Australian Parliamentary Inquiry: “Ships of Shame: inquiry into Ship Safety.”* That Inquiry found:

International pressure must be applied to flag states that do not carry out their international responsibilities. If they ratify conventions then they must perform the duties of those conventions. More frequent, consistent and more stringent port state inspections will raise the expectation of substandard ship operators that their vessels will be detected and detained.

Today, the enforcement of the MLC is undertaken by a combination of ship inspectors conducted by staff and affiliates of the International Transport Federation as well as a compliance role that is undertaken by the Australian Maritime Safety Authority. So while there are still poor standards in many areas of the shipping industry, the creation and enforcement of minimum standards in this critical area of the global economy is welcomed and should be expanded further into more areas of international trade and commerce.

Unratified ILO Conventions

The impact of the increasing divergence of Australian statutory labour law from international legal norms is compounded by the fact that there are a series of conventions which Australia has not ratified and should ratify in order to give proper recognition to the objects of industrial relations laws as discussed in our introductory chapter.

Australia has not ratified the *Collective Bargaining Convention 1981(154)* or the *Collective Bargaining Recommendation 1981*. The *Collective Bargaining Convention* requires the member states to take measures to promote collective bargaining (see Item 5). The recommendation requires that “measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible in any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or regional or national levels.

The regulatory framework of enterprise bargaining in the FW Act and the prohibition on pattern bargaining fix the locus of bargaining at the enterprise level. This is not consistent with international norms.

Australia has also not ratified any conventions that specifically deal with public sector workers. *The Labour Relations (Public Service) Convention 1971* for example recognises the unique difficulties experienced by public sector workers in collective bargaining with sovereign governments. This convention precedes on the basis that public sector workers require a

multiplicity of methods to deal with disputes over terms and conditions. Article 5 of the Convention states:

“The settlement of disputes in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between parties through independent and impartial machinery, such as mediation, conciliation and arbitration established in such a manner as to ensure confidence of the parties involved”

We have provided commentary to the ILO concerning Australia’s compliance with unratified conventions as part of its regular survey and reporting cycle. Again, we assume these materials are available to the PC however we can provide copies should this assumption be mistaken.

Collective Bargaining in other systems

There are many international examples of collective bargaining frameworks that operate at a level beyond a single business or a single workplace. For example¹⁶:

- In Germany, bargaining usually takes place at an Industry level and generally there are different agreement reached for different regions. There are different structures for reaching consensus on arrangements with individual business, being matters not dealt with in the regional industry agreement. As at 2011, in the regions formally comprising West Germany, 61% of employees are covered by collective agreements of which 54% are industry level agreements. In the former East Germany, these figures are 49% and 37% respectively¹⁷. The Federal Labour Court in Germany has recognised that strikes for the purposes of concluding collective agreements are constitutionally protected¹⁸.
- In Denmark, approximately 80% of workers are covered by collective bargaining¹⁹. There are three layers of agreements – national framework agreements, industry level agreements (dealing with some pay and conditions while also setting a framework for single company negotiations) as well at the single employer level. The right to strike is supported by the Danish labour Court and domestic legislation, and includes taking sympathy action²⁰, although the right may be restricted by a collective agreement.
- In Belgium, national negotiations set the minimum wage as addressing broad matters such as training, employment programs and childcare. Industry and company level negotiations also occur, however each industry agreement requires workers to be better off than the national agreement, and each company level agreement similarly requires improvements over the industry agreement.²¹ Negotiations at all levels are supported by

¹⁶ See further Warneck, W. “Strike Rules in the EU27 and beyond: A comparative overview”. ETUI-REHS, Brussels. [LINK](#).

¹⁷ Ellguth & Kohaut (2012), as cited in the European Trade Union Institute guide to collective bargaining in Germany. [LINK](#).

¹⁸ KlaB, Rolz, Rabe & Reitemeyer in Stewart & Bell (eds), “The Right to Strike: a comparative perspective”, Institute of Employment Rights, England. [LINK](#).

¹⁹ Due & Madsen (2010), as cited in the European Trade Union Institute guide to collective bargaining in Denmark. [LINK](#).

²⁰ Government of Denmark “29th National Report on the implementation of the European Social Charter”, 2010. [LINK](#).

²¹ European Trade Union Institute guide to collective bargaining in Belgium. [LINK](#).

a right to strike via a monositic legal system that generally gives precedence to international obligations over domestic law²².

- In the Netherlands, the National Minimum Wage is set outside of the collective bargaining process. Most agreements are negotiated at the industry level and some are framework agreements which set the parameters of company level bargaining. Industry level agreements that cover a majority of an industry can be administratively proclaimed to cover the whole of that industry.²³ As with Belgium, the monositic legal system has seen the right to strike domestically drawn from international obligations, and in particular Article 6(4) of the European Social Charter which supports strikes taken in support of collective negotiations.²⁴

The above is not raised to suggest that Australia should shift in all respects to a model of industrial relations based on one of these examples. It merely serves to demonstrate that other advanced economies have managed to accommodate some framework and practice that extends beyond “enterprise” collective bargaining supported by collective action rights – in some cases to directly comply with their international obligations.

Free Trade Agreements

The ACTU and the union movement internationally are extremely wary of purportedly “free trade” agreements that can have the effect of undercutting domestic employment norms and standards with little capacity to challenge them in readily accessible Courts and Tribunals. The Free Trade Agreements with China and South Korea have attracted controversy in this regard, particularly when they are used in tandem with loosening of visa arrangements.²⁵

Furthermore, free trade agreements have also come under scrutiny for paying scant if any regard to Labour standards, while paying significant attention to the removal of national tariffs and the protection of intellectual property rights. This is a skewed position that will do little to reduce poverty or increase safety at work. These latter outcomes are far more important to people working or not than mere “Free Trade”. At the other end of the spectrum the ability of Australian business to “close up here and to set up over there” off shore, continues to be permitted without significant Government intervention. Expansive modifications to the explicit limitations to the geographical application of the FW Act²⁶ would be a sensible area of concentrated reform for this Inquiry to recommend in order that Australia’s employment legislation keeps pace with the increasing scale and forces of globalisation. At the very least, the risk that recently completed free trade agreements with China and Korea may cut across the international labour standard regime should move the PC to recommend the Australian Government commission an

²² Abelshausen, Claessens, Francken & Mondelaers in Stewart & Bell (eds), “The Right to Strike: a comparative perspective”, Institute of Employment Rights, England. [LINK](#).

²³ European Trade Union Institute guide to collective bargaining in the Netherlands [LINK](#).

²⁴ Rook, Rodenhuis, Kortooms and Blanke, in in Stewart & Bell (eds), “The Right to Strike: a comparative perspective”, Institute of Employment Rights, England. [LINK](#).

²⁵ See for instance: Rosewarne, Stuart. (20 January 2015). The Conversation. “Free trade agreements driving labour market reform by stealth”. <http://theconversation.com/free-trade-agreements-driving-labour-market-reform-by-stealth-36124>

²⁶ Part 3, Division 1-3, Chapter 1 of the Act

independent review to examine the impact of Free Trade Agreements on Australian labour standards.

The ACTU advocates for *Principles for Labour Chapters in Trade Agreements* We provide these at Appendix 2.

3

Competition Policy

The matters the PC has sought be addressed in relation to Competition Policy substantially overlap with matters canvassed as part of the *Harper Review*. Despite the criticism that we level at the Draft Report of the *Harper Review*, even those authors concurred that “as a general principle” labour markets “are not in all respects comparable to product or services markets”²⁷.

The recognition of that fact is reflected in the protective purpose of labour laws which, as described in our introductory chapter, has centred upon providing minimum standards and collective organising rights in an effort to make labour markets less inequitable and to recognise the fact that labour is not a commodity.

Those that suggest that worker collectivism needs to be limited in the manner prescribed by the *Competition and Consumer Act* (or further) fail to appreciate that capital itself is in inherently collective in nature. This misapprehension (or world view) may also be at least partly responsible for the failure of our industrial laws to provide an adequate framework for multiple employer bargaining and its related failure to permit bargaining outcomes with the locus of economic control to flow through to reliant parties in the labour supply chain.

In our view, neither the Secondary Boycott provisions²⁸ or Trading Restriction provisions²⁹ of the *Competition and Consumer Act* should be retained.

Secondary Boycotts

The ILO has, in reports concerning Australia’s compliance with Convention No. 87, has repeatedly requested the Australian Government to review the Secondary Boycott Provisions “...with a view to bringing them into full conformity with the Convention”³⁰. It is simply disingenuous to bring any argument that the Secondary Boycott Provisions comply with Australia’s International Obligations. The response to this unarguable proposition by most Australian policy makers, most recently the *Harper Review*, has been to ignore it and instead refer to some policy basis routed in history as an independent justification for the law as it stands today.

Most, including the *Harper Review*, choose to attribute the secondary boycott provisions to the Swanston Committee Report of 1976. Doing so is re-writing history. The Swanson Committee was concerned with secondary boycotts among other things, but what it actually recommended be done about them is strikingly similar to what we would recommend, although for different reasons. What is telling about the Swanson Committee is that they identified that that industrial

²⁷ At page 241

²⁸ Used here to refer to section 45-45DB

²⁹ Used here to refer to section 45E-45EA

³⁰ Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Office Geneva, 2012, ISBN 978-92-2-124488-2. At page 60.

relations laws as they stood at the time (and indeed in the relevant respect remain so today), were not capable of providing a framework for resolving disputes involving secondary boycotts:

“10.17 In the usual case, secondary boycotts do not involve a dispute between an employer and employees which could be brought by either party before the Australian Conciliation and Arbitration Commission under the Conciliation and Arbitration Act. In any event the employer may not choose to bring the matter before the relevant body, even if he wished to do so, for fear of widening the "dispute" and having his whole operations shut down. Moreover, without any collusion at all with his employees, he may himself find his own position in sympathy with his employees because their actions relieve him from the pressures of his customers for him to make concessions to them on price. Thus it is quite unrealistic to expect that the employer will, as a matter of course, bring secondary boycotts before the body.

10.18 But the trader at whom the employees' actions are aimed is deprived of his ability or his liberty to trade in such manner as he sees fit, and the community suffers, without anyone (the trader himself or consumers) being able to raise the matter in a forum impartial as between all the persons involved or affected. There are some common law actions in tort which might, in theory, be available but these are in most cases dead-letters in practice.

10.19 In these circumstances we recommend that the law provide an effective avenue of recourse for the trader directly affected, by allowing him access to an independent deliberative body. That some procedures for solving the matter should be available was something on which submissions of interested parties were virtually unanimous.”³¹

We agree that an independent body should be available to resolve Secondary Boycott disputes and we believe that the appropriate body is the FW Commission. The capacity of the FW Commission to resolve such disputes should be considered as the natural consequence of allowing our industrial relations laws to move beyond meaningfully facilitating collective agreement making only between employees of single employer about an artificially constrained series of matters.

Where we depart from the Swanson Committee is in its misunderstanding of the nature and scope of the interests protected by our international obligations, a matter which we explored in some detail in our reply submission to the *Harper Review*³².

The true origin of the Secondary Boycott provisions was legislative reform that deviated from what the Committee had recommended to it, by creating an enforceable legal right to penalties, injunctions and compensation in a Court (and a Court alone), a right which could be pursued not only by the affected trader, but also at the instigation of the Trade Practices Commission, the Attorney General, or any other person³³. Far from being a “free market” exercise, these reforms paved the way for the government, contrary to its international obligations, to be an agitator and market participant to contain the sphere of activity of organised labour.

³¹ *Trade Practices Review Committee 1976*, Report to the Minister for Business and Consumer Affairs.

³² We assume that submission is available to the Commission however we can supply a copy directly if desired.

³³ Combined effect of section 45D, 77, 80 & 82 of the *Trade Practices Act 1974* as amended by the *Trade Practices Amendment Act 1977*

Trading restrictions in industrial agreements

The origin of the trading restrictions provisions of the *Competition and Consumer Act* was also a desire by the government of the day (i.e. 1980) making choices to limit the sphere of activity of organised labour, out of a perception that the secondary boycott provisions that had been introduced in 1977 did not go far enough.

The position then taken by the government was an ideological one and was in response to a specific national crisis: Union members had prevented a fuel delivery contracts from being fulfilled, a boycott campaign that targeted a non-union employer. The result was widespread fuel shortages in the Eastern States. The dispute was resolved by a member of the C&A Commission (acting on a questionable basis jurisdictionally) and resulted in fuel supplies being restored, including to the contractor against whom the boycott campaign had been targeted. Whilst the precise terms of the resolution are unknown (save that the contractor concerned discontinued his secondary boycott proceedings against the union), it seems inconceivable that all parties walked away from the discussions without having agreed to make some compromises. This result – a negotiated compromise – was one that the government of the day was not prepared to accept. It therefore legislated such that it became unlawful for a business to make a contract, arrangement or understanding with a union that prevented or hindered the continued supply or acquisition of goods and services or made such continued supply or acquisition subject to conditions.

To date, the trading restrictions provisions have not resulted in enterprise agreements, or negotiations for enterprise agreements, being met with a sanction. This fortuitous outcome has been more the result of technical considerations as a court is not a suitable body to pick a winner in the rather obvious policy collision at play between the underpinning objectives of industrial relations laws to facilitate collective bargaining, and the competing agenda to constrain the scope of collective bargaining in a manner that segments workers' lawful collective power into less effective silos.

An exemption without exception

Australia is not the only country where there has been some contention between competition policy and industrial relations policy. In our view, the latter should prevail and note this regard that the European Court of Justice has reached the same conclusion (topically, on the issue of sectoral collective agreements concerning compulsory contributions to particular pension fund):

It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by

virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

The next question is therefore whether the nature and purpose of the agreement at issue in the main proceedings justify its exclusion from the scope of Article 85(1) of the Treaty.

First, like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers.

Second, as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

Consequently, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.”³⁴

The *Competition and Consumer Act* presently contains a limited exemption from its provisions for “..any act done in relation to, or the making of a contract or arrangement of the entering into of an understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to the remuneration, conditions of employment, hours of work or working conditions of employees”.³⁵ This exemption is limited because of the exception it does not apply to the secondary boycott provisions or the trading restrictions provisions. The exception is tacit recognition that both the secondary boycott provisions and the trading restrictions provisions engage with the conditions of employment of employees – were this not the case the exception would be entirely unnecessary from a drafting point of view. We are firmly of the view that the exemption should be without exception and in fact should be broadened in the manner it was broadened in 1974, in response to Australia ratifying CO87 the previous year.

³⁴ *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] EUECJ C-67/96 at [59]-[64]

³⁵ At section 51(2)(a)

4

Labour Market Trends in the 21st Century: Australia and beyond.

Modern industrial relations policy makers often try to maximise both economic efficiency and fairness, an impossible task. This is not to say that there is a zero-sum game here—the flawed logic of Okun’s ‘efficiency equity trade-off’—but rather to say that compromises are always the order of the day in the real world. As the latter discussion will show, the achievement of greater flexibility in the labour market—providing employers with increased economic efficiencies—has been bought at considerable cost to the workforce, particularly those workers engaged in non-standard employment (NSE). Getting the balance right ultimately involves sticking to first principles while also setting rules to judge economic outcomes on the basis of both their efficiency and their fairness.

The single employer workplace has been the traditional locus of concern for industrial relations, and yet the modern labour market must grapple with problems that transcend single workplaces. Workers engaged in non-standard employment often span multiple employers over short periods of time and/or work side by side with workers in a single workplace employed by a different entity and on different conditions. There are other groups who may be formally covered by industrial relations regulations, but who in reality slip through the cracks all the time, such as the self-employed, dependent contractors, foreign workers on 457 visas and international students with working rights.

The workplace is also not the primary site for some of the major labour market issues in the 21st century which revolve around life cycle transitions. These include problems of youth unemployment, long-term unemployment, workers with young family responsibilities and others charged with caring for aged parents or relatives. Many of the 20th century assumptions about education and work have fallen apart in the 21st century: increased higher education participation has not seen a boom in enhanced productivity, but has left the labour market with high levels of overqualified workers. Large numbers of highly educated people in their twenties are still employed as casuals in retail or hospitality, or working for free on internships. Numbers of senior executives without significant levels of higher education have skewed income distribution deciles through receiving enormous salaries bearing no relationship with beneficial workplace outcomes.³⁶ Pathways into permanent full-time employment for unskilled youth disappeared in the 1980s and 1990s; pathways into such jobs for skilled youth in the 21st century are now beginning to shrink as the growth in full-time employment stalls and as older highly educated workers stay longer in the workforce. Concepts of transitional labour markets have helped researchers think about the right kinds of policies to grapple with these problems, but there is scant evidence that policy makers have grappled with them. As for industrial

³⁶ Picketty,

relations policy, that lags a long way behind when it comes to addressing issues of life cycle transitions.³⁷ Finally, if many problems cannot be solved at the level of the workplace, are there other locations—such as industry-based solutions—which are more appropriate? Portability of superannuation and long service leave in the building industry, long service leave in the building, community services, security and cleaning industry in the ACT³⁸ and the long service leave scheme in QLD in the contract cleaning industry covering trainees, casual, part-time or full-time employees operating as a sole trader subcontractor and employees employed by labour hire companies³⁹ come to mind as examples of policy innovations which aim to transcend the workplace while group training schemes are another example of a multi-employer solution.

The traditional 20th century notion of the worker—embodied in male full-time permanent employment—no longer rings true in the 21st century as a universal touchstone for industrial relations regulation.⁴⁰ Not only must it be updated to register the gender dimension, but the various forms of non-standard employment must also be accommodated. In a similar fashion, the 19th century notion of the employer—the ‘firm’ so routinely analysed in labour economics—is also obsolete in the 21st century as a definitive archetype. Many multinational companies now buy and sell within their own divisions; contract out their labour supply to related and unrelated companies; manage complex supply chains spanning multiple continents; lend and borrow from themselves for taxation purposes; and relocate not only their production, but their head offices to different countries at different times. If the industrial relations framework of the 20th century does not adjust to encompass these new realities, then the world of work in the 21st century will eventually slip beyond the grasp of policy makers. Further labour market deregulation, with a view to coping with globalisation, is likely to miss the boat altogether, disproportionately advantage capital and could only be accepted if first principles were abandoned. Solutions to the challenges posed by globalisation require industrial relations reforms to stay true to first principles, however other solutions lie outside the labour market and its industrial relations arrangements.

A flexible labour market?

Should labour markets be flexible? This has been the mantra of the advocates of neoliberalism for several decades, crystallised in the OECD’s *Jobs Study* reports in the mid 1990s.⁴¹ Several of the PC questions in Issues Paper 1 suggest that labour market flexibility should be an outcome of the industrial relations system.

Leaving aside the more polemical aspects of flexibility it is clear that the labour market needs to be *responsive* to the business cycle. During booms, there are risks of inflation if the rate at which

³⁷ For transitional labour markets, see G. Schmid 1998, *Transitional Labour Markets: A New European Employment Strategy*, Discussion Paper FS I, Berlin, pp. 98–206; Gunter Schmid 2002, ‘Transitional labour markets and the European social model: towards a new employment contract’, in: *The Dynamics of Full Employment: Social Integration Through Transitional Labour Markets*, ed. by Gunter Schmid and Bernard Gazier, Cheltenham: Edward Elgar.

³⁸ <http://www.actleave.act.gov.au/index.html>

³⁹

[http://www.qleave.qld.gov.au/webdb/wsmanager.nsf/\(web\)/D044B07AC0B4EE194A2577AC00193D47](http://www.qleave.qld.gov.au/webdb/wsmanager.nsf/(web)/D044B07AC0B4EE194A2577AC00193D47)

⁴⁰ Ian Watson et al. 2003, *Fragmented Futures: New Challenges in Working Life*, Sydney: Federation Press, Ch.2

⁴¹ OECD 1994, *The OECD Jobs Study: Facts Analysis Strategies*, Paris: Organisation for Economic Cooperation and Development; OECD 1995, *The OECD Jobs Study: Investment, Productivity and Employment*, Paris: Organisation for Economic Cooperation and Development.

wage increase become excessive, and during recessions there are risks of long-term damage to households if unemployment persists. Both these risks can be minimised if the labour market can effectively adapt to the business cycle. We explore this responsiveness by looking at both hours and wages, the two staples of industrial relations. We show that they both provided employers with considerable flexibility over the 2000s, but that this came at considerable cost to their employees.

In addition, any casual observation of productivity performance by type of productivity shows that the productivity challenges we face are largely not related to labour market flexibility, but deficiencies in more 'core' drivers of productivity; management and to a lesser extent worker skills; workplace organisation, worker voice, innovation and capital and technological investment. This is evidenced by ABS data⁴² on productivity, which shows that while labour productivity has recorded strong average annual growth of 1.6% in the last 5 years, capital productivity has on average fallen by 2.8% while multifactor productivity has essentially remained flat recording average annual growth of -0.3%. For this reason, we view a lagging labour productivity growth motivation for the current inquiry to be disingenuous and misguided, a theme we return to below.

Hours

The core question around hours for industrial relations policy is the predicament that the efficiency outcomes for employers can come at the expense of fairness for employees. This is highlighted by looking at two extremes. On the one hand, we have seen the evolution of a system of just-in-time labour, where employers have sought to avoid commitments to permanent full-time employment in favour of buying labour inputs in small chunks. On the other hand, we have seen the evolution of systems where labour is bought in very large chunks: 12 hour shifts or longer have become common in many industries, while fly-in-fly out arrangements in industries like mining have jettisoned any notion of the standard working week. Both of these developments have produced adverse outcomes for many workers, while bringing considerable efficiencies to employers.

At a macro-economic level, the reconfiguration of working hours also means that traditional solutions to problems of fluctuating labour demand across the business cycle have fallen apart. One of the disturbing features of the Australian labour market during the 1990s was the response to the recession of 1991. For most of that period the labour market endured long periods of 'jobless growth', with the unemployment rate failing to fall below 7 per cent until the end of that decade. Good levels of GDP growth did not lead to the employment outcomes which policy-makers would have expected.

This is not to say that macro-economic responses to problems of falling labour demand will not work. Australia's initial macro-economic response to the Global Financial Crisis (GFC) had an immediate impact. The fiscal stimulus of the Labor government during 2009–2010 assisted with a dramatic improvement in the unemployment situation, which had risen from a low of 4.1 per cent in 2008 to reach 5.8 per cent by 2009. Arresting the rise in the unemployment rate, and then reversing it, were remarkable accomplishments when set in their global context. As Borland observed:

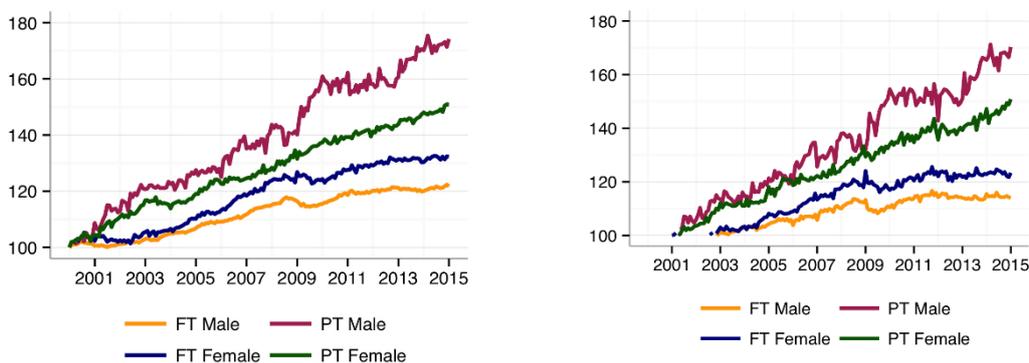
⁴² ABS catalogue 5204.0 Table 13.

“The strength of the Chinese economy, successful macroeconomic policy management and the Australian financial sector’s lack of exposure to toxic securities sheltered the Australian labour market from the forces that buffeted US and European labour markets.”⁴³

The successful weathering of the storm was testament to the timeliness of these fiscal stimulatory measures (“Go early, go hard, go households”, as Treasury put it).⁴⁴ However, the return of fiscal austerity so soon afterwards saw this revival stall, and the unemployment rate had returned to 5.8 per cent by 2013 and full-time employment growth began to plateau.

In terms of the industrial relations system, flexibility around hours appears to have played an important role in avoiding large employment losses. Faced with massive uncertainty in the wake of the collapse of Lehman Brothers, and a tottering banking system, employers faced a dilemma. They had just weathered several years of a tight labour market, with high vacancy rates and sectoral skills shortages, and many were loathe to begin large-scale retrenchments. Instead, many opted for shortening the working hours of their existing employees or engaging new workers on a part-time basis. This strategy is evident in both the employment and hours data shown in Figure 1. It was a strategy facilitated by the industrial relations system, with both enterprise agreements and the award system sufficiently flexible to accommodate this situation.

Figure 1: Growth in employment (left) and hours worked (right), Australia 2000 to 2015



⁴³ Jeff Borland 2011, ‘The Australian Labour Market in the 2000s: The Quiet Decade’, in: *The Australian Economy in the 2000s*, ed. by Hugo Gerard and Jonathan Kearns, Proceedings of a Conference, 15–16 August 2011, Sydney: Reserve Bank of Australia, pp. 167–68.

⁴⁴ While the mining industry sought to claim credit for Australia weathering the storm, Treasury analysis suggested otherwise. As Ken Henry explained to a Senate Estimates hearing:

“I have heard it said on a number of occasions, in fact I have lost count of the number of times I have heard people say, including senior commentators, that the mining industry saved Australia from recession or, even in less extreme versions of the statement, that the mining industry contributed strongly to Australia avoiding a recession. These statements are not supported by the facts I would have to say. In the first six months of 2009, in the immediate aftermath of the shock waves occasioned by the collapse of Lehman Brothers, the Australian mining industry shed 15.2 per cent of its employees. Had every industry in Australia behaved in the same way, our unemployment rate would have increased from 4.6 per cent to 19 per cent in six months. Mining investment collapsed; mining output collapsed. So the Australian mining industry had quite a deep recession while the Australian economy did not have a recession. Suggestions that the Australian mining industry saved the Australian economy from recession are curious, to say the least”.

(Ken Henry 2010, ‘Evidence before Senate Economics Legislation Committee, Estimates’, in: Hansard Vol. 27 May 2010, E17)

(Y-axis shows data indexed to 2000)

Borland has observed that this hours adjustment to downturns also took place during the early 2000s, in the wake of the ‘tech wreck’,⁴⁵ and he suggested that this represented a major departure from the recessions of the 1980s and 1990s.⁴⁶ Borland also pointed towards an interesting hours dimension in his discussion of the Phillips curve, which graphs the annual rate of growth in the consumer price index (CPI) against the unemployment rate. Looking at the period from 1978 to 2011, Borland first concluded that after the latter part of the 1990s the link between unemployment and inflation had weakened. In other words, the overall relationship between inflation and labour demand pressures had declined during the last 15 years. Borland then proceeded with an alternative approach, using a broader measure of labour underutilisation⁴⁷ as a proxy for labour demand rather than just the unemployment rate. He also included the rate of underemployment as an explanatory variable and found that it had a significant negative effect on inflation. This led him to conclude:

“The analysis of the Phillips curve therefore casts doubt on the suitability of the rate of unemployment as a proxy for demand pressures in the labour market. The increasing importance of hours adjustment in downturns, and hence the greater share of the cyclical response in labour underutilisation accounted for by underemployment, indicates that a broader measure of labour underutilisation may be appropriate.”⁴⁸

These insights are supported by examining the patterns in unemployment and underemployment over time. The growth in unemployment rates for both men and women have been sensitive to economic cycles, as one would expect, and the patterns have been similar for both men and women (Figure 2). Unemployment declined from 1994 onward, though men enjoyed a larger improvement in the period leading up to the GFC. In the case of *underemployment*, the situation was quite different. It stayed high right through the period from 1994 through to about 2006, with the male rate spiking during the tech wreck of 2001 and the female rate spiking much later. The most dramatic changes, however, were during the GFC, when both male and female underemployment rates soared, particularly the male rates. While there was some improvement in the immediate aftermath, after 2011 both male and female underemployment became to climb again. For both men and women they remained, in 2013, at levels comparable to what prevailed during the GFC.

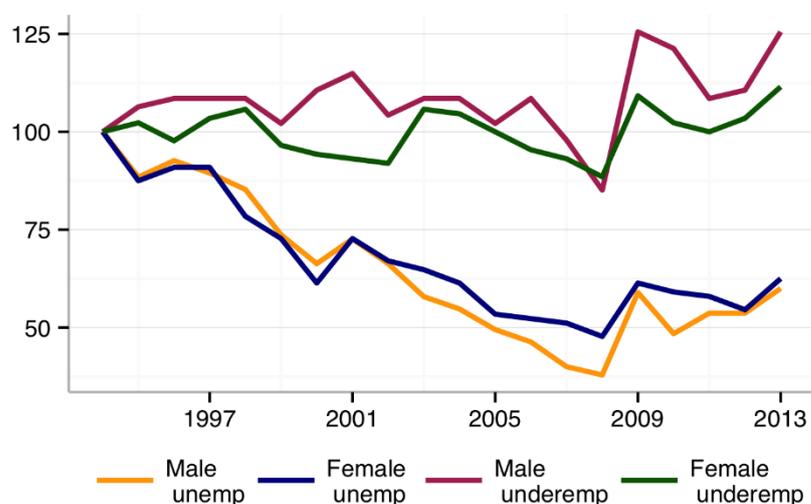
⁴⁵ Jeff Borland 2012, ‘Industrial Relations Reform: Chasing a Pot of Gold at the End of the Rainbow?’, in: *The Australian Economic Review* Vol. 45. No. 3, pp. 269–89, pp. 275–276.

⁴⁶ Jeff Borland 2011, ‘The Australian Labour Market in the 2000s: The Quiet Decade’, in: *The Australian Economy in the 2000s*, ed. by Hugo Gerard and Jonathan Kearns, Proceedings of Conference, 15–16 August 2011, Sydney: Reserve Bank of Australia, p. 210

⁴⁷ The labour underutilisation measure includes both unemployment and underemployment.

⁴⁸ Jeff Borland 2011, ‘The Australian Labour Market in the 2000s: The Quiet Decade’, in: *The Australian Economy in the 2000s*, ed. by Hugo Gerard and Jonathan Kearns, Proceedings of a Conference, 15–16 August 2011, Sydney: Reserve Bank of Australia, p. 207

Figure 2: Underemployment and unemployment rates, Australia 1994 to 2013



Rates are indexed to 100 for 1994. Original series from ABS, Extended Labour Force Underutilisation Rate, Cat. No. 6105

In absolute terms while unemployment rates have much improved since the early 1990s, the situation for underemployment is worse. In 2013 the male unemployment rate remained at about 60 per cent of the rate that prevailed in 1994, and female unemployment remained at 63 per cent. On the other hand, male underemployment in 2013 was now 25 per cent higher than what prevailed in 1994 and female underemployment was 12 per cent higher.

These results, and particularly the experience of the GFC, suggest that there is a new dispensation at work in the labour market. Cyclical responses to demand are increasingly handled through variations in hours worked, rather than bodies on the shop floor. The widespread use of ‘just in time’ labour—through casuals and labour hire—and the ability of employers to reduce existing hours of work are both important elements of this new dispensation. Clearly, when it comes to the question of flexibility, these adjustment mechanisms are largely given free rein by the current industrial relations system. This has come at a cost to many workers who find themselves engaged in these forms of insecure employment.

Underemployment

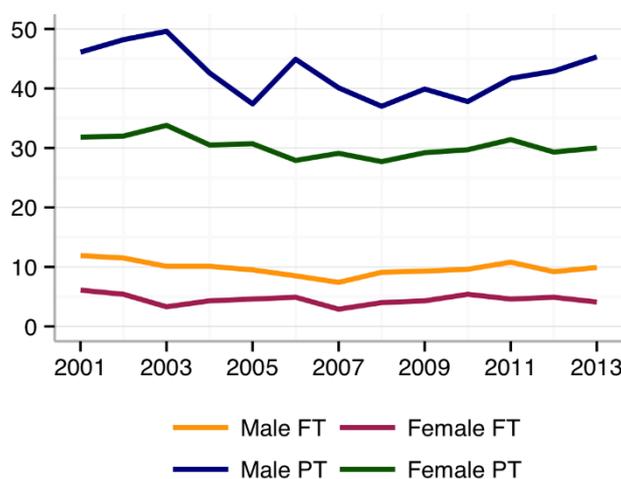
It is important to highlight the problematic aspect of this flexibility and to emphasise the need for various employment protections. First, economic recovery may not lead to substantial increases in full-time employment and the 2010s may repeat the experience of ‘jobless growth’ but in a new form. Secondly, this large increase in underemployment has serious implications for household living standards: it meant that considerable numbers of workers were not gaining sufficient hours of work to meet their financial needs. This problem is evident in the data on preferred hours for employees (Table 2).

As reported in the HILDA data, part-time workers are particularly vulnerable to the problems of inadequate hours. When asked for their preferred hours of work, 10 per cent of male full-time employees in 2013 indicated they wanted more hours; the figure for female full-time employees was just 4 per cent (). Among the part-time workforce, on the other hand, the figures were exceedingly high: 45 per cent of male part-timers in 2013 indicated they wanted more hours and 30 per cent of female part-timers wanted more work. At one stage in the early 2000s the male figure reached 50 per cent and the female figure reached 34 per cent.

These percentages changed over the period from 2001 to 2013 (Figure 3). For full-time employees there was a steady decline until 2007, followed by a rise through to 2010, before plateauing. More dramatic were the changes for part-time employees. Among male part-time employees there were steep declines through to 2008, followed by a steady rise after 2008. The figures for female part-time employment were more stable. Some of the variability for male part-timers reflects sampling variability (because of their smaller sample size) but is also consistent with the increasing use of part-time labour over this period. The high percentages for part-timers, both male and female, does suggest that despite increased employer utilisation of part-time employment, the hours on offer do not provide part-time employees with sufficient hours of work.

How many more hours would employees who are under-employed prefer to work? Fortunately, HILDA allows us to answer that question by comparing their actual hours with their preferred hours and calculating the 'deficit'. In 2013 the deficit among male full-time employees was 10 hours and among female full-time employees it was 9 hours (Table 2). For the part-time workforce, the figures were higher: for male employees it was 13 hours and for female employees it was 11 hours. Nevertheless, for all categories the figures were quite high: between 9 and 13 hours. In other words, for some workers unable to work their preferred hours they faced a shortfall in employment of about one and a half days per week.

Figure 3: Employees preferring more hours of work, by sex and hours status, Australia 2001 to 2013



Y axis shows percentage of employees who preferred to work more hours.

Source: HILDA Release 13.

Table 2: Employee preferring more hours and number of extra hours, Australia, 2013

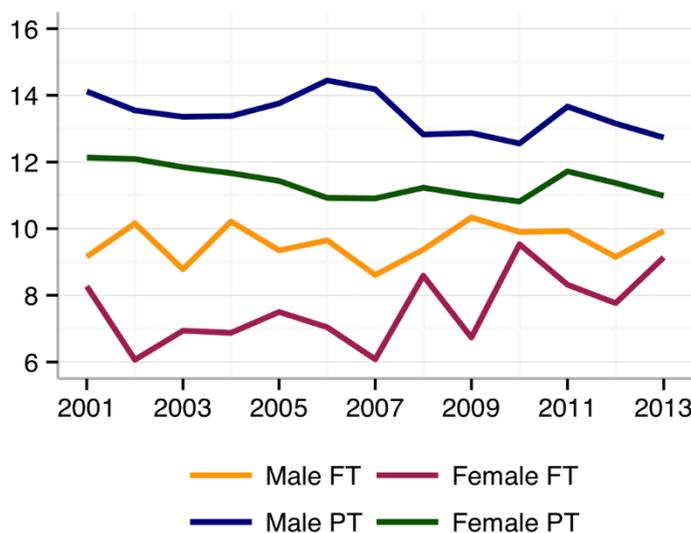
	Male		Female	
	Full-time	Part-time	Full-time	Part-time
Percentage preferring more hours	9.9	45.3	4.1	30.0
Extra hours preferred	9.9	12.7	9.1	11.0

Extra hours is shortfall in actual hours and preferred hours for those employees who preferred to work more hours. Source: HILDA Release 13.

We can also track these hours over the period from 2001 to 2013 (Figure 4). What these figures suggest is that both male and female part-time employees experienced a gradual decline in their hours deficits over the period, something consistent with employers utilising more part-time hours. Some of the volatility shown is due to sampling variability, but some is also due to the impact of the GFC. At the same time, both male and female full-time employees saw their hours deficit rise over the period, particularly in the post GFC period. Again this would be consistent with employers making greater use of part-time labour.⁴⁹

⁴⁹ In all the data from HILDA it is important to keep in mind that the sample was 'refreshed' in 2011 with a new intake. This allowed the survey to 'rebalance' the composition of the sample, since over time the attrition from such longitudinal surveys sees certain categories of people leave more often, such as younger people, people in rental accommodation and those in more marginal labour market situations. The use of cross-sectional weights throughout this analysis compensates for some of the unrepresentative aspects of the sample over time, but this refreshing of the sample is an important corrective and needs to be kept in mind if sudden spikes in small subgroups are evident in 2011.

Figure 4: Deficit in hours for employees preferring more hours of work, by sex and hours status, Australia 2001 to 2013



Y axis shows the average deficit (shortfall) between actual hours and preferred hours for those employees who preferred to work more hours. Figures weighted and based on trimmed mean (5%). Source: HILDA Release 13.

Non-standard employment

While hours flexibility can be achieved by permanent employees choosing to work shorter or longer hours to accommodate the needs of their employers—particularly during economic crises—the longer term picture in Australia is that hours flexibility has also been achieved through casualisation and other forms of non-standard employment. The largest increases in the former were during the 1980s and 1990s⁵⁰, after which the overall growth plateaued. Important new developments included the increasing extension of casual employment to full-time employees rather than just part-timers, and the spread of casual jobs into industries which had previously had only low levels of casualisation.⁵¹

Non-standard employment can be viewed as a broad category, including casual employees, those on fixed term contracts and labour hire employees.⁵² There are two distinctive features to these various modes of employment. First, they provide hours flexibility for employers, whether that be on a daily, weekly or monthly basis, since the employer is able to buy ‘small chunks’ of labour inputs in ways which suit their business operations, which may be seasonal, or fluctuate during the day, week or month. Secondly, the employer opts out of taking full responsibility for the labour employed in this way. They gain ‘access to labour without obligation’ in the words of

⁵⁰ ACTU analysis of ABS data indicates that the proportion of Australian employees engaged in casual work grew from 15.8% in 1984 to around 27.7% in 2004, before declining slightly: ACTU, *Lives on hold: Unlocking the Potential of Australia’s workforce* (2012).

⁵¹ ACIRRT 1999, *Australia at Work: Just Managing*, Sydney: Prentice Hall; Ian Watson et al. 2003, *Fragmented Futures: New Challenges in Working Life*, Sydney: Federation Press.

⁵² In all of the data which follows, those on fixed-term contracts and those employed under labour hire include both full-time and part-time. The labour hire category also includes both casual and permanent employees of the labour hire company. For this reason, the other categories are reduced accordingly.

George Gonos.⁵³

Changes in the *shares* held by various forms of non-standard employment over the 2000s (i.e. after the initial growth in those forms was observed) are shown in Table 3 which presents the percentage of employees in various employment categories in 2013 compared with percentage in 2001.

By 2013 full-time permanent employment was the norm for about two-thirds of men but only two-fifths of women. In both cases, the 2013 figures represented a slight decline over the period. The most notable increases had taken place in part-time permanent shares for both men and women. Casual employment shares saw a slight decline among both sexes. Part-time casual and fixed-term employment differed by sex: for men these retained their share, while for women the part-time casual share had fallen and the fixed term share had risen. Finally, among both men and women the labour hire share had fallen.

Table 3: Employees by employment category, Australia 2001 & 2013 (%)

Category	Male		Female		Persons	
	2001	2013	2001	2013	2001	2013
Full-time permanent	66.8	65.6	42.5	41.5	55.3	53.9
Part-time permanent	3.3	5.1	17.8	23.0	10.2	13.8
Full-time casual	6.1	6.3	3.6	3.5	4.9	4.9
Part-time casual	11.7	11.7	24.1	20.0	17.6	15.7
Fixed term	8.2	8.2	8.4	10.0	8.3	9.1
Labour hire	4.0	3.1	3.5	2.0	3.8	2.6

Shares held by each category of employee. Source: HILDA Release 13.

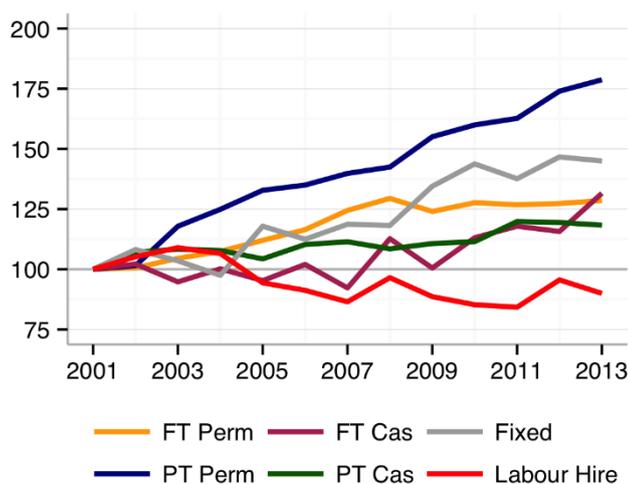
These changes are also shown as rates of growth across the period in Figure 5 and Figure 6 and these data suggest that the business cycle, and particularly the GFC, played an important role in how employers made use of these different forms of employment. Since these figures show *rates of growth* based on absolute levels, they tell a different story to that shown by the employment shares. This is because changes from a small base (as with part-time permanent employment) appear more important than their numbers warrant. Hence it is important to keep Table 3 in mind in assessing these growth rates. Nevertheless, by examining rates of growth over the full

⁵³ George Gonos 1997, 'The Contest over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms', in: *Law and Society Review* Vol. 31. No. 1, pp. 81–110.

period from 2001 to 2013 insights are gained into the links between the hours adjustment analysis suggested earlier and the link to employers' pursuit of flexibility.

Figure 5 suggests that from 2008 onwards growth in full-time permanent employment was flat (as we would expect from the earlier discussion). On the other hand, growth in part-time permanent employment was very strong throughout the period, reflecting the use of shorter hours as discussed earlier. However, worth noting are the changes in part-time casual employment, which grew after the recovery from the GFC, but flattened after 2011. By contrast, full-time casual employment grew more strongly from 2007 onwards and labour hire declined over the period. Finally, fixed term employment mirrored permanent part-time employment, showing strong growth over the GFC, though declining in its wake. The greater variations in labour hire and fixed term employment partly reflects sampling variability, but it also reflects some sensitivity to the business cycle. Employers were adjusting labour demand on both an hourly basis and a 'commitment' basis. Faced with great uncertainty at the time of the GFC, and in its aftermath, employers behaved in a risk-averse fashion. One of the key consequences was stalled full-time permanent employment growth and an increased reliance on various forms of non-standard employment.

Figure 5: Growth rates in employee numbers, by employee category, Australia 2001 to 2011



Indexed to 2001. FT = full-time; PT = part-time; Perm = permanent; Cas = casual; Fixed = fixed term employee. Source: HILDA

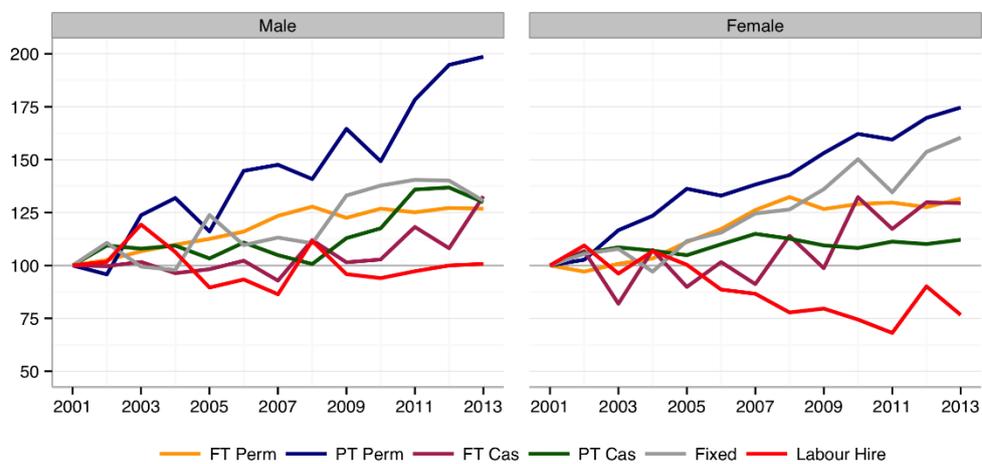
Release 13.

The gender dimension of this story was particularly illuminating (Figure 6). The relative growth in permanent part-time employment among men was striking, particularly after the GFC, as was the use of fixed term employment in the lead-up to the GFC. Labour hire among men had not diminished over the period—despite some peaks and troughs—while the greatest growth in full-time casual employment was in the aftermath of the GFC. Part-time casual employment, on the other hand, grew strongly from 2009 onward but began to fall after 2011.

By way of contrast, among women permanent part-time rose steadily throughout the period, but less steeply than among the men. The same was true for fixed term employment (though with

some volatility). The fact that both full-time permanent and part-time casual employment followed similar trajectories after 2007 is informative. The latter is a very stable employment destination for women—particularly in retail and hospitality—and has given rise to the oxymoron, the ‘permanent casual’.⁵⁴ That is, for many women in part-time casual jobs there is an ongoing expectation of employment and this situation reflects a long history of this form of part-time work being common in those industries. By contrast, full-time casual jobs were less common and their growth after 2008 resembled the situation for men. Finally, the secular decline in labour hire seen in Figure 5 above was largely driven by women’s situation, and may well reflect the decline of clerical agency work as further office automation and the use of the internet grew steadily over the 2000s. It is important to keep the industry aspect of these in mind, since labour hire among men is more common in construction, a quite cyclical industry.

Figure 6: Growth rates in employees numbers, by employee category and sex, Australia 2001 to 2011

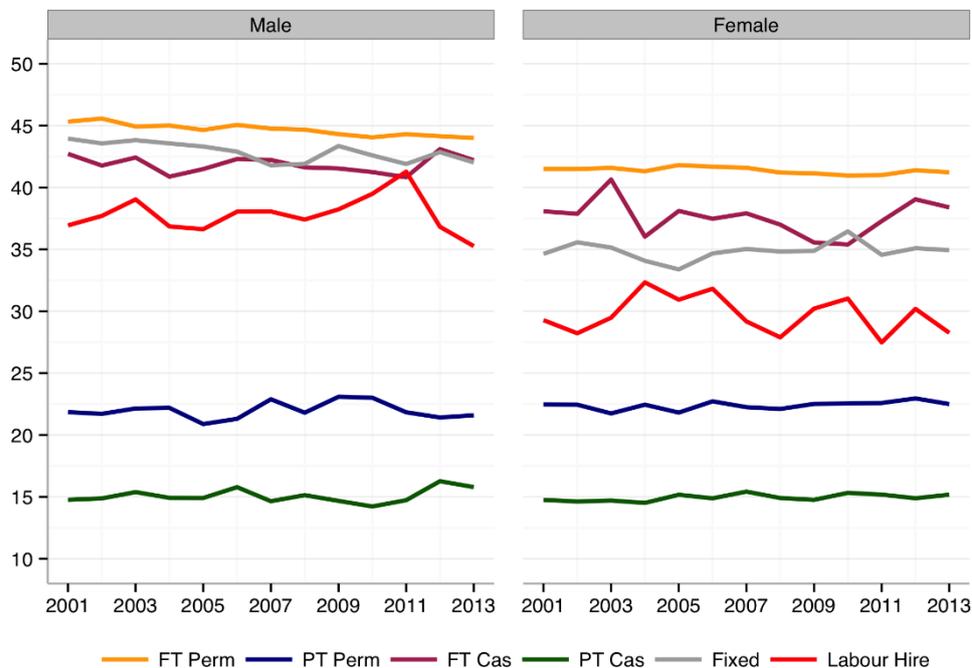


Indexed to 2001. FT = full-time; PT = part-time; Perm = permanent; Cas = casual; Fixed = fixed term employee. Source: HILDA Release

13.

⁵⁴ Rosemary J. Owens 2001, ‘The ‘Long-term or Permanent Casual’—An Oxymoron or a ‘well enough understood Australianism’ in the law?’, in: Australian Bulletin of Labour Vol. 27. No. 2, pp. 118–136.

Figure 7: Average weekly hours, by hours, employee category and sex, Australia 2001 to 2011



Averages use trimmed means (5%). FT = full-time; PT = part-time; Perm = permanent; Cas = casual; Fixed = fixed term employee.

Source: HILDA Release 13.

The final part of this story involves looking at the variation in hours worked over this period. Figure 7 shows that female hours of employment among full-time permanents, part-time permanents and part-time casuals were reasonably stable, compared with their male counterparts. Among the later, not only was there a decline in hours for full-time permanents over the period, but there was more volatility for men working as part-time permanents and part-time casuals. The most volatile hours, however, were experienced by labour hire workers and by full-time casuals, though part of this volatility reflects sampling variability (given the smaller sample size for these categories). Nevertheless, it is also clear that these categories of worker come closest to the ‘disposable worker’ model which is at the heart of the ‘just-in-time’ workforce which has cemented itself so firmly with the Australian labour market over the last twenty five years.

It is clear from these data that employers have gained a very flexible workforce over the last twenty five years. The industrial relations changes of the early 1990s, particularly the movement to enterprise bargaining, played a crucial role in this evolution. In an analysis of acirrt’s ADAM database of enterprise agreements, Watson and his colleagues showed that over the period from 1992 to 2002 an average of 82 per cent of registered enterprise agreements dealt with the issue of working hours. In the early 1990s this percentage was in the high 90s and by 2002 it still featured in over 80 per cent of agreements. By way of contrast, little more than half of agreements dealt with training issues and just over 40 per cent deal with occupational health

and safety.⁵⁵

Flexibility for whom?

What did 'flexibility' mean for workers during the 1990s? Many have argued it translated into increased work intensification, long and unpredictable hours and a deterioration in their work-life balance. On the other hand, some have argued that flexibility is a two-way affair, and that workers also gain flexibility. They point to the use made of casual employment by students, actors and artists as examples of the desirability of non-standard jobs like these. Women with family responsibilities are also often included in this list, but the argument here is less convincing since their desire for flexibility generally concerns specific hours during the week, rather than intermittent employment. Their needs for flexibility could be met within the framework of permanent part-time work⁵⁶, and indeed findings discussed in Chapter 11 suggest there is a greater demand for flexible part time work among women.

What is the situation in practice? When it comes to flexible start and finish times, only about half of women workers have an entitlement to flexible start and finish times and this differs little by hours of work or mode of engagement (Table 4). When it comes to those workers with parental responsibilities, the picture is no better. Indeed, the particular categories of employment which are most flexible for employers are actually least flexible for their employees.

⁵⁵ Ian Watson et al. 2003, *Fragmented Futures: New Challenges in Working Life*, Sydney: Federation Press, p. 85

⁵⁶ 25. B. Pocock 2001, *Having a life: work, family, fairness and community in 2000*, Adelaide: Centre for Labour Research, University of Adelaide; B. Pocock, B. Van Wanrooy et al. 2001, *Fifty Families: What Unreasonable Hours are Doing to Australians, Their Families and Their Communities*, Melbourne: ACTU; Barbara Pocock, Rosslyn Prosser and Ken Bridge 2004, 'Only A Casual ...': How Casual Work affects Employees, Households and Communities in Australia, Labour Studies Report, University of Adelaide; Cameron Allan, Michael O'Donnell and David Peetz 1999, 'More tasks, less secure, working harder: three dimensions of labour utilisation', in: *The Journal of Industrial Relations* Vol. 41. No. 4, pp. 519–535; D. Peetz, K. Townsend et al. 2003, 'Extended Hours: Causes, Effects and Responses', in: *Reflections and New Directions*, AIRAANZ Conference Proceedings, volume 1 Refereed Papers, ed. by J. Teicher, P. Holland and S. Turberville, Melbourne: Association of Industrial Relations Academics of Australia and New Zealand.

Table 4: Entitlement to flexible start and finish times, Australia 2013 (%)

Category	Male	Female	Male	Female
			parent	parent
Full-time permanent	60	57	61	54
Part-time permanent	57	48	78	50
Full-time casual	49	48	48	46
Part-time casual	54	55	46	52
Fixed term	56	52	49	46

Percentage in each category who were entitled to flexible start and finish times in their employment. Parental status based on those with responsibilities for any children aged 17 or less. Source: HILDA Release 13.

Earlier studies using HILDA data which looked at job satisfaction for non-standard employees suggested that casuals were happy with their lot: the overall job satisfaction scores for women casuals and those on fixed term contracts were no worse than those for permanents.⁵⁷ Among men, however, the scores were lower. When it came to satisfaction around job security, both casuals and those on fixed-term contracts scored much lower, particularly the men. Watson criticised this reliance on subjective assessments of overall job satisfaction as a poor substitute for looking at the actual quality of the jobs, particularly the remuneration which was considerably worse among the casual workforce, leading Watson to characterise casuals as ‘contented workers in inferior jobs’.⁵⁸

It is, nevertheless, worth looking at subjective appraisals across a range of aspects of a job since the variations themselves can be informative. In Figure 8 we look at notions of fair pay, use of skills, worrying about the future longevity of the job, and concern about the worker’s incumbency in the job. The latter two are aspects of job insecurity, the first focussed on whether the job will continue to exist and the second on whether the worker will keep their job. All of these scores ranged from 1 (strongly disagree) to 7 (strongly agree), and for all except the worry item higher scores are more positive outcomes. The most striking feature of the payment item was the overall clustering of the scores in a narrow band and their overall stability over the period. Only part-time casuals stood out, and they were slightly more satisfied than the rest. These satisfaction levels reflect the remuneration for the job, not the situation as far as living standards

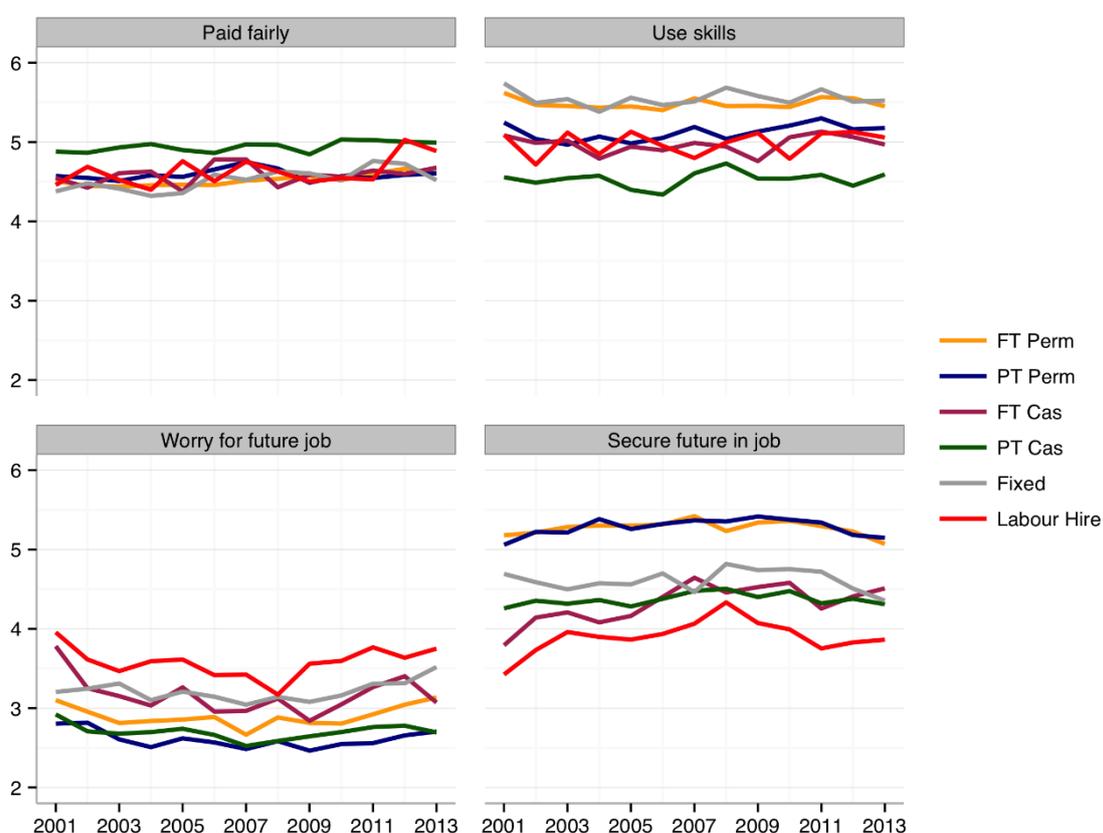
⁵⁷ Mark Wooden and Diana Warren 2004, ‘Non-standard Employment and Job Satisfaction: Evidence from the HILDA Survey’, in: *Journal of Industrial Relations* Vol. 46. No. 3, pp. 275–297.

⁵⁸ Ian Watson 2005, ‘Contented Workers in Inferior Jobs: Re-assessing Casual Employment in Australia’, in: *Journal of Industrial Relations* Vol. 47. No. 4, pp. 371–392

go. As the earlier discussion on preferred hours showed, many of these workers would be facing high cost of living pressures despite the fairness in their pay.

When it came to the job making use of the worker’s skills, both full-time permanents and fixed term employees scored highly, while part-time casuals scored lowest. Again, this aspect of the job was fairly stable over the period, as one would expect. When it came to worrying about the future of the job, labour hire workers, full-time casuals and fixed term employees were the most concerned, and these scores declined in the lead-up to the GFC before climbing again in the aftermath. The part-time casuals and part-time permanents shared similar profiles, confirming the earlier observation about the ‘permanent casual’ oxymoron. Interestingly, permanent full-time workers were more concerned about the future of their jobs at the end of the period than were the part-timers.

Figure 8: Various attributes of jobs, by employee category, Australia 2001 to 2013



Y axis shows average scores on agreement scales (1 = strongly disagree and 7 = strongly agree) using trimmed means (5%).

Paid fairly = 'I get paid fairly for the things I do in my job'

Use skills = 'I use many of my skills and abilities in my current job'

Worry for future job = 'I worry about the future of my job'

Secure future in job = 'I have a secure future in my job'

Source: HILDA Release 13.

Finally, job security as it is generally understood—that is, whether a worker will keep their job—showed distinct profiles for the employment categories. Permanent employees— both full-time and part-time —scored much higher throughout the period, though their scores began to drop in the period after the GFC. The least secure workers were the labour hire, and casual workers, both full-time and part-time. The gaps between the most secure and the most insecure workers were

substantial, as much as 1.5 points on this 7 point scale. The scores for job security for full-time casuals and labour hire workers rose strongly during the first part of the period, but declined in the period after the GFC. The part-time casuals again showed a more distinctive profile with very little variation across the period.⁵⁹

These findings emphasise a number of important points about non-standard employment. The variations in pay among different employment categories, and the notions of fairness attached to this, are not problematic in the abstract (although as we explain in Chapter 7, a more holistic view paints a different picture). This is largely due to the way the industrial relations system deals with this situation, providing pro-rata conditions for permanent part-timers and various loadings and penalty rates for casuals. On the other hand, the lack of opportunity by part-time casuals to use their skills reflects both the nature of these jobs—generally routine low skilled jobs—and the likelihood that overqualified workers are employed here (see below for more discussion on over-employment). While most employees felt confident that their jobs would continue, whether they would hold those jobs was a different matter. Particularly for non-standard employees the levels of job security were much lower than among the permanent workforce. Finally, in terms of the business cycle, there does indeed seem to be a pattern of greater insecurity present after the GFC, something evident in other data around more constrained spending and increased concerns with household debt. Clearly, the GFC was a wake-up call for many households. At the same time, the more risk-averse behaviour of employers—in not engaging more full-time permanent employees—has probably been observed by their staff and translated into scepticism about their own futures.

Bridges or traps?

The other justification for the widespread use of non-standard employment has been the argument that it provides a stepping stone for entering the labour market. In the same way that some economists have suggested that low pay is less of a problem if it is transitory,⁶⁰ so too has casual work been seen as a stepping stone into permanent employment. The logic of this argument is that a casual job is preferable to unemployment. In their study of this issue Buddelmeyer and Wooden found that among men, workers were 'better off accepting casual work rather than remaining unemployed'. For women, on the other hand, 'we find that unemployment has the edge over casual employment when it comes to enhancing the probability of permanent employment 1 year onwards'.⁶¹ Using similar data, but with different modelling approaches others have argued that casual employment is more of a trap than a bridge.⁶² In his modelling of the transitions for casuals across various labour market states, Watson considered a range of factors, including demographic, locality and job attributes and concluded:

⁵⁹ Again, some of the fluctuations for full-time casuals and labour hire reflect sampling variability while some reflects the distinctive change which occurred with the GFC.

⁶⁰ 29. Sue Richardson 2005, 'Are Low Wage Jobs for Life', in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press.

⁶¹ Hielke Buddelmeyer and Mark Wooden 2011, 'Transitions Out of Casual Employment: The Australian Experience', in: *Industrial Relations* Vol. 50. No. 1, pp. 109–130, p. 128

⁶² Riccardo Welters and William Mitchell 2009, *Locked-in casual employment*, Working Paper No. 09-03, University of Newcastle, Australia: Centre of Full Employment and Equity; Ian Watson 2013, 'Bridges or traps? Casualisation and labour market transitions in Australia', in: *Journal of Industrial Relations* Vol. 55. No. 1, pp. 6–37.

“In terms of the bridge / trap debate, the unconditional probabilities [ie. raw probabilities] ... suggest that the conclusion drawn depends on how one evaluates the labour market outcomes. The bridge metaphor weighs up permanent outcomes against the avoidance of joblessness: more casuals end up in permanent jobs than jobless. By contrast, the trap metaphor emphasises the patterns of continuing casualisation and intermittent joblessness experienced by most casual workers. In looking at the conditional probabilities [ie. those based on modelling various factors] ... it is clear that the characteristics of casual jobs, in themselves, are a major factor in perpetuating this kind of work. It seems reasonable to conclude that casual jobs do indeed operate as labour market traps, and they are actually crafted to do so.”⁶³

In other words, achieving the kind of flexible labour market which employers have sought over the last 30 years has come at a cost of intermittent employment for many of those workers engaged as casuals. Both in the patterns of underemployment discussed earlier and in these difficult labour market transitions one can see clearly that many casual workers have had to bear the costs of employer flexibility.

What do these findings about labour market transitions and cost-shifting mean for sound industrial relations policy? The ‘bridge proponents’ operate from within the framework of methodological individualism, where solutions for particular individuals are seen as social solutions. They lack an understanding of the labour market as a wage structure⁶⁴ in which the locations, not the incumbents, should be the basis for sound industrial relations policy. In other words, while attempts to improve the circumstances of disadvantaged individuals should not be avoided, they should not come at the expense of the structure itself. This is the domain where industrial relations policy has always been strong, since it favours institutional arrangements which are generally neutral. By contrast, social security interventions into the labour market are rarely neutral but entail judgements—often moral in nature—about particular groups of individuals. A familiar refrain from some economists—that most low wage workers live in middle income households—is premised on the assumption that these individuals don’t need adequate pay.⁶⁵ Leaving aside the question that a great many low paid workers do in fact depend crucially on their wages, this line of reasoning is specious. Its end point would be the proposition that certain jobs in the economy are only available to certain groups of people, namely those in a household with a second income. While the Australian industrial relations system began with the concept a male breadwinner, by the late 1980s this archaic conception of the worker was gone and most progressive industrial relations policies were aimed at eliminating the residues of gender discrimination within the labour market. Another variation on this theme has been the recent attack on Sunday penalty rates which has used the argument that many of these jobs are held by students who are living at home, and therefore they don’t need the extra money which the current loadings provide.

Policy directives based on assumptions of “individuals” choosing casual, fixed term contract, “flexible”, labour hire engagements fail to recognise sectoral differences within and across

⁶³ Ian Watson 2013, ‘Bridges or traps? Casualisation and labour market transitions in Australia’, in: *Journal of Industrial Relations* Vol. 55. No. 1, pp. 6–37, p. 23.

⁶⁴ James K. Galbraith 1998, *Created Unequal: The Crisis in American Pay*, Chicago: University of Chicago Press.

⁶⁵ Andrew Leigh 2007, ‘Does Raising the Minimum Wage Help the Poor’, in: *The Economic Record* Vol. 83. No. 263, pp. 432–445.

industries. Rather than being based on choice many “non-standard” forms of employment are all that is on offer.⁶⁶ Rather than being short term “holiday jobs” or part-time flexible jobs allowing women to meet their caring duties, many non-standard jobs are full time and ongoing.⁶⁷

The cornerstone of good industrial relations policy should be that all potential workers should be entitled to a job with decent pay and conditions. Tolerating sub-standard jobs for some categories of people—such as ‘second earners’ or ‘students living at home’—returns policy to the Victorian era where sweatshops were common and child labour widespread. There has traditionally been an exception made to this neutrality in the form of junior rates and disability employment services. These exceptions are generally catered for within the current industrial relations framework, with discounts intended to take account of productivity differences based on the particular circumstances or age of the individual. However, leaving aside arguments about precisely where the boundaries and tapers within those discount mechanisms lie, this concession to the characteristics of the individual is based on accepted community standards that are morally neutral and which concern genuine productivity differences.

Wages

Returning to this analysis of the business cycle, the flexibility of the industrial relations system was also evident during the boom. Between 2002 and 2008 the economy grew strongly, buoyed by the construction phase of mining exports, particularly in Queensland and Western Australia, and strong residential property construction and sales, particularly in Sydney and Melbourne. Unlike previous booms there was no wages ‘breakout’, nor any large increases in inflation. There are a number of reasons why price inflation has been largely eliminated from the Australian economy since the early 1990s: the recession of 1991 ‘purged’ the inflationary pressures of the late 1980s while global competition since then has kept the prices of tradeable goods in check. (Asset inflation, particularly in residential property, has been a different matter and housing affordability has become a major social problem.) At the same time, one of the mechanisms which could feed into inflationary pressures—wage cost spikes—has been controlled by the industrial relations system.

Historically, Australia has moved between different phases in its wage setting arrangements—ranging between centralised and decentralised at different times—but a common feature prior to the 1990s was the ‘transmission belt’ phenomenon, whereby high wage bargaining outcomes in one sector percolated through the labour market via a system of award flow-ons.⁶⁸ Thus over-award payments, reflecting boom conditions in one sector, could influence wage outcomes in other sectors of the economy, irrespective of the profitability of enterprises in the weaker sectors. With the spread of enterprise bargaining since the mid 1990s this phenomenon has

⁶⁶ Independent Inquiry Into Insecure Work; Lives on Hold Report; see for example 38,56, 62 Case studies, p.24,

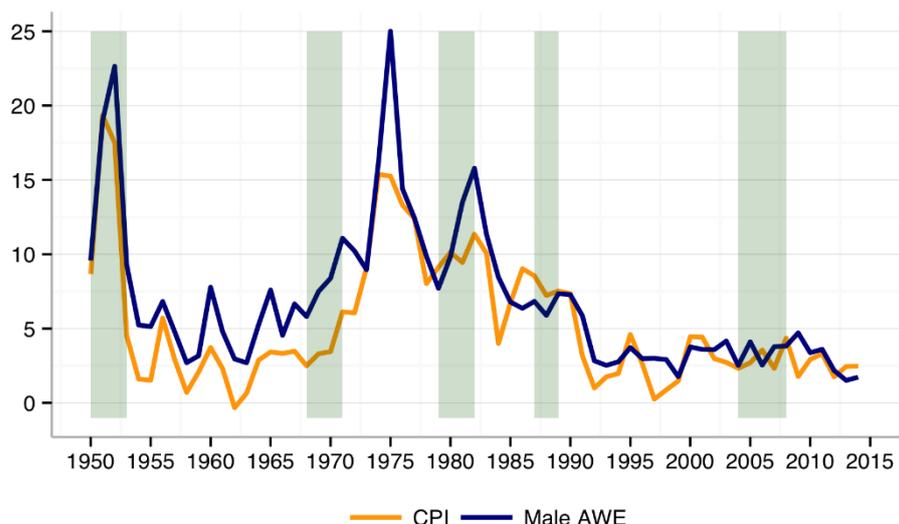
⁶⁷ AIRC, Print T4991;

https://www.fwc.gov.au/documents/decisionssigned/html/T4991.htm#P865_125927 paragraphs 31, 58: AI Group submission: Casual employment in the metal and manufacturing industry covered regular and systematic relationships. Casual employees were often retained over a longer periods

⁶⁸ For a useful overview of the wages system prior to enterprise bargaining, and the role of the Metal Industries Award in establishing a ‘community benchmark’, see Bray’s analysis. (J. Rob Bray 2013, *Reflections on the Evolution of the Minimum Wage in Australia: Options for the Future*, SPI Working Paper 01/2013, ANU: Crawford School of Public Policy, 6:7) He notes how the Metal Industry Award became the basis for the Federal Minimum Wage, supplanting the National Wage Case approach.

disappeared, and high wage outcomes have now been ‘quarantined’ within those enterprises, or sectors, where profitability has made them affordable. Figure 9 shows this long-term view and illustrates Borland’s observation that in the mid-to-late 1990s Australia shifted to a ‘lower-inflation environment where wage growth seems less sensitive to demand conditions’.⁶⁹

Figure 9: Wages and inflation, Australia 1950 to 2014



Shaded areas show periods of economic boom. The y-axis shows annual percentage changes. Male AWE is male full-time average weekly ordinary time earnings. Data spliced from several ABS series: ABS 6302001; Reserve Bank of Australia Historical Spreadsheets, 4-17; ABS640101

The ability of the economy to grow in a fashion which is sustainable, particularly without excessive price inflation, does not necessarily require a decentralised wage setting system, such as enterprise bargaining. After all, similar outcomes were achieved in the 1980s under the ACTU-ALP Wages and Income Accord, a highly centralised system. Rather, there are many dimensions of economic life which fall outside the reach of the industrial relations system, particularly employment and investment. Both of these showed better performance under the Accord in the late 1980s than they did under enterprise bargaining during the 1990s. When it comes to issues of income distribution, the industrial relations system remains centre stage and one of the achievements of the last twenty years has been the maintenance of real living standards for the majority of the working population. This contrasts sharply with the experience of the United

⁶⁹ (Jeff Borland 2012, ‘Industrial Relations Reform: Chasing a Pot of Gold at the End of the Rainbow?’, in: *The Australian Economic Review* Vol. 45. No. 3, pp. 269–89, p. 273). Borland also notes that a number of factors are likely to lie behind this change, but that enterprise bargaining may have played a role: ‘the introduction of enterprise bargaining and reductions in the extent of flow-on between workers in their wage increases could have moderated the inflationary effects of changes to labour demand’. (Jeff Borland 2011, ‘The Australian Labour Market in the 2000s: The Quiet Decade’, in: *The Australian Economy in the 2000s*, ed. by Hugo Gerard and Jonathan Kearns, Proceedings of a Conference, 15–16 August 2011, Sydney: Reserve Bank of Australia, p. 207)

States where even median earnings have declined over the last 30 years.⁷⁰

The problem of inequality

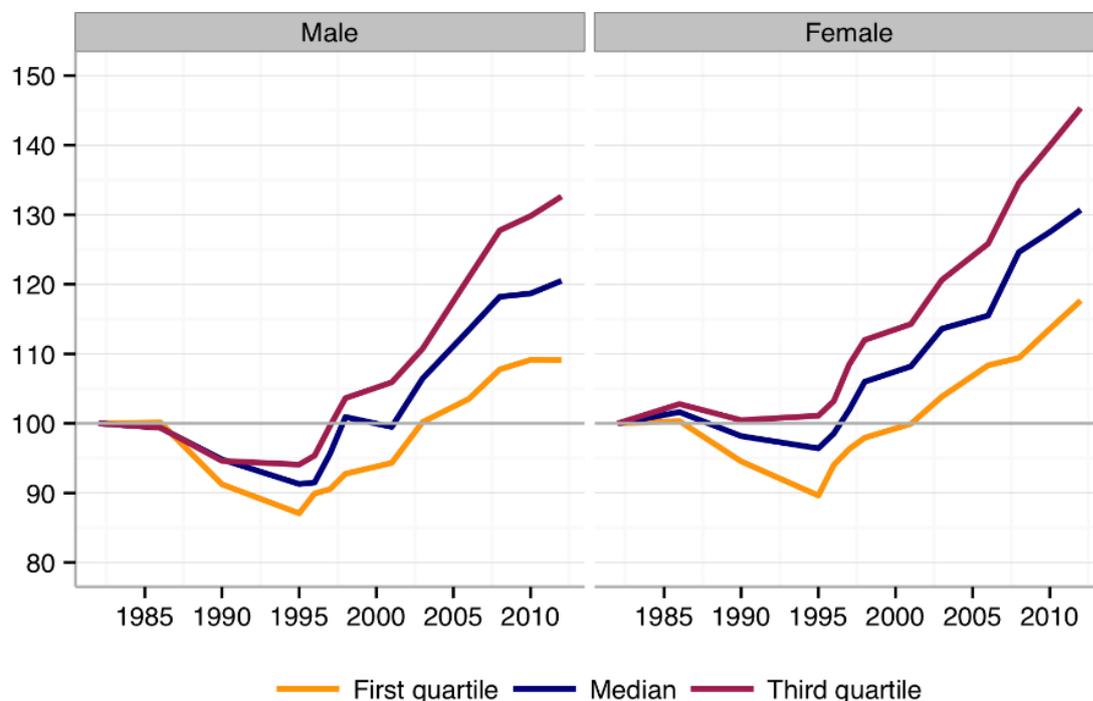
Among the lowest wage earners, however, the story is less salutary. Unlike the United States, Australia has largely escaped the blight of a large working poor population,⁷¹ but the increases in the Federal Minimum Wage has not kept pace with average earnings. In 2003 the ratio of the FMW to average full-time wages (AWOTE) was 48.2 per cent; by 2008 it had dropped to 46.9 per cent; and by 2013 it was just 43.3 per cent.

To place this in context it is worth reviewing the growth in wages inequality over the last 30 years (Figure 10). Looking at employees at the bottom quartile, their real wages declined for most of the 1990s and did not return to the level of the 1980s until just after 2000. The gap between those at the bottom quartile and those on median wages began to diverge sharply during the mid 1990s. There was a brief closing of the gap in the early 2000s (among men) but the overall trajectory has been a steady divergence. The same dispersion has been evident at the top of the labour market with a sharp divergence between the median and the top quartile from about 2006 onward.

⁷⁰ Thomas I. Palley 2012, *From Financial Crisis to Stagnation: The Destruction of Shared Prosperity and the Role of Economics*, New York: Cambridge University Press; James K. Galbraith 1998, *Created Unequal: The Crisis in American Pay*, Chicago: University of Chicago Press

⁷¹ T. Eardley 1998, *Working But Poor? Low Pay and Poverty in Australia*, Discussion Paper No. 91, Social Policy Research Centre, University of NSW

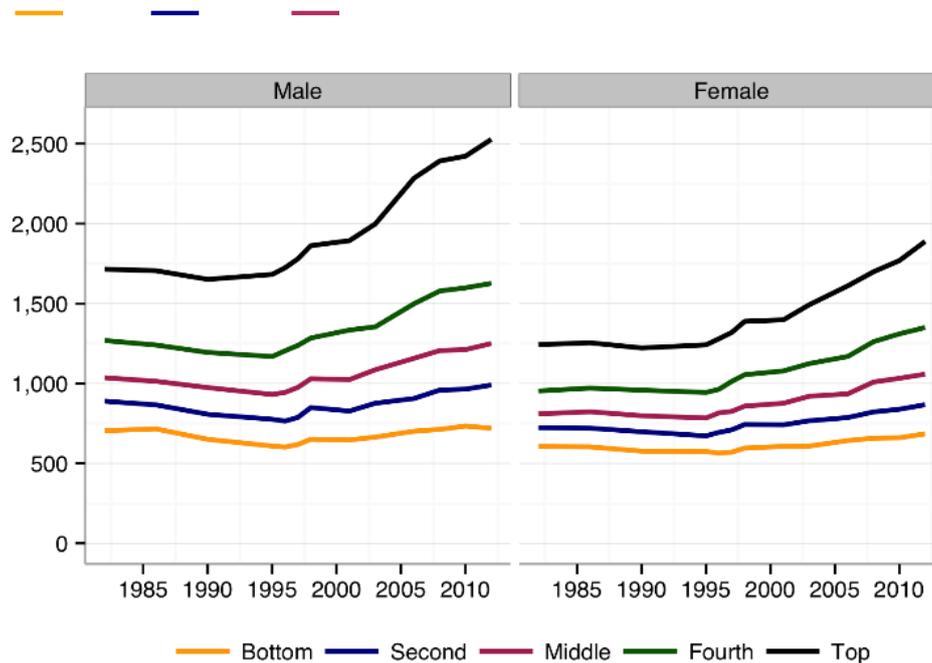
Figure 10: Inter-quartile dispersion in real wages, full-time employees, Australia 1982 to 2012



Wages have been adjusted by the CPI and indexed to 100 in 1982. Source: Unit record data from ABS Income Distribution Surveys from 1982 to 2012.

Figure 11 highlights how much those at the top of the labour market have sprinted ahead and how much stagnation in real earnings has taken place in the bottom half of the distribution. For male employees in the top quintile the growth in real wages from 2003 onwards was quite striking. Among women there was a similar pattern, but much less pronounced. By way of contrast, in the two bottom quintiles—virtually the bottom half of the wages distribution—average real wages remained almost flat for the best part of 20 years before rising in more recent times.

Figure 11: Growth in real wages by quintile, full-time employees, Australia 1981 to 2012



Y axis shows real wages in 2012 dollars, indexed by the CPI. Source: Unit record data from ABS Income Distribution Surveys from 1982 to 2012.

Inequality measures such as these are vulnerable to a range of methodological caveats and the ABS Income Distribution Survey (IDS) data are no different. A number of researchers have raised concerns about using these data for analysing inequality over time, though some of these concerns relate to household income rather than to individual wages.⁷² More serious have been the criticisms of Roger Wilkins, who expressed scepticism at the size of the increases in inequality in the period between 2003 and 2006.⁷³ He pointed towards inconsistencies in ABS definitions and collection methods over time, such as in the treatment of salary sacrificed income and bonuses. Comparison of the HILDA data with the ABS IDS data does suggest that the size of the dispersion in wages is greater in the latter compared to the former, particularly for the male full-time workforce.⁷⁴ The main discrepancies, however, affect interpretations of the top half of the labour market, with the story at the bottom of the labour market largely consistent with the findings shown here.

Another ABS data source throws some light on earnings inequality at the top of the labour

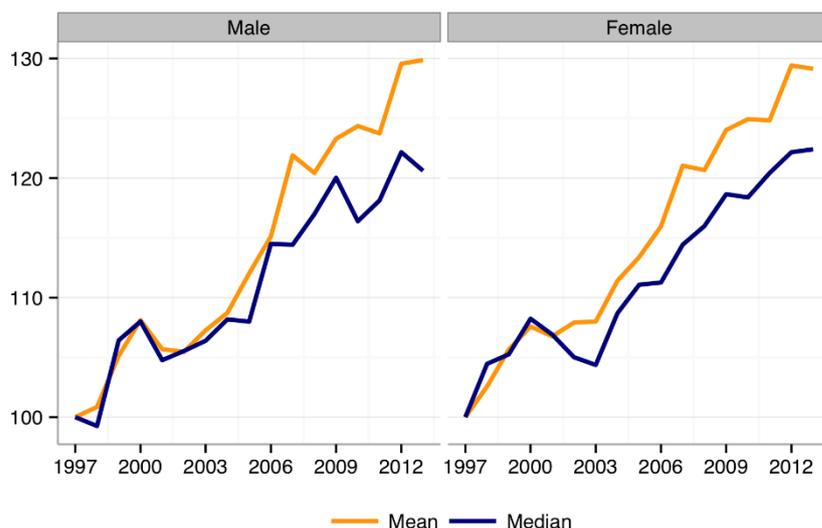
⁷² See, for example, Peter Siminski, Peter Saunders and Bruce Bradbury 2003, 'Reviewing the Intertemporal Consistency of ABS Household Income Data through Comparisons with External Aggregates', in: *Australian Economic Review* Vol. 36. No. 3, pp. 333–49; Peter Saunders 2005, 'Reviewing Recent Trends in Wage Income Inequality in Australia', in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press.

⁷³ Roger Wilkins 2013, *Evaluating the Evidence on Income Inequality in Australia in the 2000s*, Working Paper 26/13, Melbourne University: Melbourne Institute of Applied Economic and Social Research.

⁷⁴ Ian Watson Forthcoming, 'Wage inequality and neoliberalism: the Australian experience', in: *Journal of Industrial Relations*.

market. The survey of *Employee Earnings, Benefits and Trade Union Membership* provides data on both mean weekly earnings and median weekly earnings. Comparing the divergence over time between these two sets of measures provides a useful indication of dispersion at the top of the earnings distribution (since the more extreme skew in the earnings distribution is invariably towards the upper end). Figure 12 shows data for the period from 1997 to 2013 and confirms that from the mid 2000s onwards these two measures began to increasingly diverge. There was some closure in the gap during the GFC, but the divergence resumed after 2011, particularly among male employees. In other words, inequality at the top of the labour market increased from the mid 2000s onwards, closed during the GFC, and grew again from 2011 onwards.

Figure 12: Growth in mean and median real earnings, Australia 1997 to 2013



Source: ABS Employee Earnings, Benefits and Trade Union Membership (6310) time series spreadsheets. Wages data adjusted for the CPI (2014 dollars) and indexed to 100 in 1997.

It is important to keep in mind that the top of the labour market here concerns wage and salary earners, those within the ambit of the industrial relations system. Excluded from this story are those with non-wage income, such as executives, the self-employed and those using trusts, partnerships and similar devices. Income from these sources is largely unregulated; including these sources in an analysis of inequality would most likely see the problem magnified considerably. One of the criticisms levelled at the Accord during the 1980s was that it failed to curb the excesses for those on non-wage incomes, particularly among executives and the self-employed.⁷⁵ It did however, rein in high wage earners, whilst augmenting the incomes of low paid workers with a substantial social wage. The flat-dollar increases associated with some of the decisions compromised long-standing relativities within the wages structure and led to discontent

⁷⁵ Frank Stilwell 1986, *The Accord – and Beyond: The Political Economy of the Labor Government*, Annandale: Pluto Press.

in some quarters. Nevertheless, within the wages system overall, inequality was not a problem during this period. The transition to enterprise bargaining from the mid 1990s onwards changed this, and inequality became an enduring feature of the wages system. The current industrial relations system is also unable to influence outcomes for non-wage incomes, and the taxation system is much less progressive today than it was in the late 1980s (leaving aside issues of tax evasion and avoidance). When it comes to wages income, enterprise bargaining has not been able to curtail wages inequality at either the top or the bottom. It has only been *institutional* arrangements, in the form of award safety net adjustments (that is, the Federal Minimum Wage), which have had any effectiveness in protecting the low paid from falling too much further behind.

Thus while the current largely-decentralised wage setting system provides great flexibility in quarantining high wage growth to the most profitable enterprises and sectors, it retains a built-in bias towards reproducing wage inequality. It is important to acknowledge that these two features go hand-in-hand and that only these institutional arrangements, in the form of awards and the Federal Minimum Wage, that have kept a lid on this momentum towards increased inequality.

Traditional arguments that promoting equity compromises efficiency have been overturned by a number of studies, including those from bodies like the OECD. There is increasing evidence that the best economic outcomes arise in countries where social solidarity is well developed, and the coordination of common interests is well advanced. These outcomes require modest levels of wage and income inequality and the future in Australia does not bode well.⁷⁶

Gender pay inequality

As well as inequality across the earnings distribution another crucially important question concerns gender pay equity. In his overview of wage determination in Australia Keith Hancock observed that male / female pay relativities improved markedly in two periods: in the 1940s when the Women's Employment Board led a sharp increase in pay for women; and in the 1970s, when the two equal pay decisions took effect.⁷⁷ By contrast, during the last decade the gender pay gap has worsened markedly. After improving during the second half of the 1990s and the first part of the 2000s, the period after 2004 witnessed a sharp decline in women's earnings relative to men's (Figure 13).

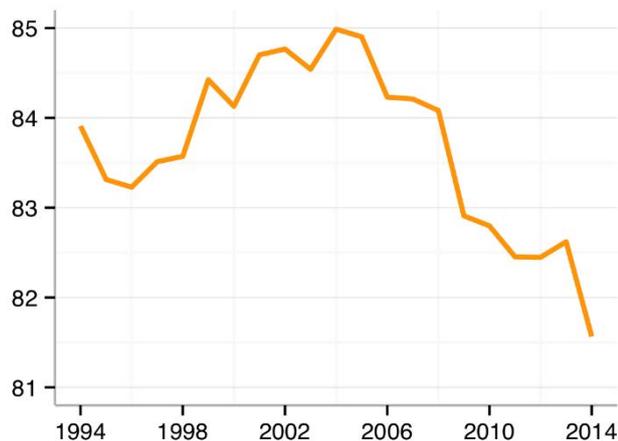
Is this trend likely to continue, or will the gender pay gap start to close again? The answer to this question hinges on a number of factors, two of which are worth noting. First, the gender pay gap differs across the earnings distribution: as a general rule it is narrowest at the bottom and widest

⁷⁶ OECD 2011, *Divided We Stand: Why Inequality Keeps Rising*, Country Brief: Australia 5, Paris: Organisation for Economic Cooperation and Development; R.G. Wilkinson and K. Pickett 2009, *The Spirit Level: Why More Equal Societies Almost Always Do Better*, Allen Lane: London; R. Wilkinson 1996, *Unhealthy Societies: the afflictions of inequality*, London: Routledge.

⁷⁷ (Keith Hancock 2005, 'Wage Determination in the Twentieth Century Australia Economy', in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press, p. 184). There were three equal pay decisions in all, in 1969, 1972 and 1974 (see R. Gregory and R. Duncan 1981, 'Segmented Labour Market Theories and the Australian Experience of Equal Pay for Women', in: *Journal of Post-Keynesian Economics*, pp. 403–28; Jeff Borland 1999a, 'Earnings Inequality in Australia: Changes, Causes and Consequences', in: *The Economic Record* Vol. 75. No. 229, pp. 177–202; Jeff Borland 1999b, 'The Equal Pay Case—Thirty Years On', in: *Australian Economic Review* Vol. 32. No. 3, pp. 265–72).

towards the top.⁷⁸ This has certainly been the case in Australia,⁷⁹ and is exemplified by the large pay gap evident in the managerial labour market.⁸⁰ Consequently, the pattern in overall earnings dispersion discussed above—with earnings growth much greater at the top of the labour market—suggests that the gender pay gap is also likely to widen.

Figure 13: Women's earnings relative to men's, Australia, 1994 to 2014



Y axis shows female full-time, adult, ordinary time earnings as a percentage of male full-time, adult, ordinary time earnings. Source: ABS Average Weekly Earnings, Trend data. 6302. Note that the series changed from quarterly to biannual in 2012.

Secondly, the basis for gender discrimination has changed. Until the 1970s the gender pay gap was deliberately kept wide by ‘institutionalised gender wage discrimination’.⁸¹ In recent years, institutional arrangements have focussed on eliminating gender discrimination in the labour market. Consequently, the remaining gender pay gap reflects not overt gender discrimination, but a range of more subtle mechanisms at work. As Wooden notes with regard to the managerial labour market, ‘the problem is not necessarily one of unequal earnings, but rather of unequal access to promotion’.⁸² The issue is complex, as it also involves issues around work-family balance, with the career penalties attached to child rearing and caring for other dependants (such as aged parents) invariably falling on women. The introduction of paid parental leave may

⁷⁸ Javier Gardeazabal and Arantza Ugidos 2005, ‘Gender Wage Discrimination at Quantiles’, in: *Journal of Population Economics* Vol. 18. No. 1, pp. 165–179.

⁷⁹ Paul W. Miller 2005, ‘The Role of Gender among Low-Paid and High-Paid Workers’, in: *The Australian Economic Review* Vol. 38. No. 4, pp. 405–17; Hiau Joo Kee 2006, ‘Glass Ceiling or Sticky Floor? Exploring the Australian Gender Pay Gap’, in: *The Economic Record* Vol. 82. No. 259, pp. 408–427.

⁸⁰ Ian Watson 2010a, ‘Decomposing the Gender Pay Gap in the Australian Managerial Labour Market’, in: *Australian Journal of Labour Economics* Vol. 13. No. 1, pp. 49–79

⁸¹ Paul W. Miller 1994, ‘Occupational segregation and wages in Australia’, in: *Economics Letters* Vol. 45, pp. 367–371, p. 371.

⁸² Mark Wooden 1999, ‘Gender Pay Equity and Comparable Worth in Australia: A Re-assessment’, in: *The Australian Economic Review* Vol. 32. No. 2, pp. 157–71, p. 167

eventually deal with some of these issues. However, continuing problems with access to and affordability of childcare—given that women are still the majority of primary carers—are likely to see interrupted career paths and confinement to part-time employment remaining the lot of women workers.

Finally, both occupational and industry structures have built-in gender biases, something evident during the long struggle over equal pay for work of comparable worth. This has been recognised in the FW Act which advances the principle of ‘equal remuneration for work of equal or comparable value’ and notes that ‘gender-related undervaluation’ does not require a male comparator or evidence of discrimination. Rather, ‘inferences can be drawn that a particular type of work is likely to be have been undervalued because of gender linked characteristics’. In 2010 the Australian Services Union (ASU) sought a ruling from FWA concerning equal remuneration for work in the Social and Community Services (SACS) Sector. The SACS workers were a largely feminised workforce which had historically been under-remunerated. The ASU drew on earlier cases, such as the NSW pay equity case of 1998, and argued that indicators of undervaluation, rather than male comparators, should be recognised. This made the case different to classic comparable worth cases, which required male comparators. Part of this union argument drew on many of the more subtle bases for gender discrimination in the Australian labour market, such as female concentration, low union density, poor access to training and career paths, a prevalence of small workplaces and large numbers of casuals.⁸³

While the ASU case was ultimately successful in having gender acknowledged as a core element in the lower pay of SACS workers, fixing the problem has been far from simple. Because so much funding for SACS depends on Federal Government allocations, budgetary cuts have limited the extent to which the poor pay in this sector can be improved. This is part of a larger problem for improving the wages for women workers: so many women work in sectors, such as education, health and community services, where the funds available for pay increases come primarily from government. The vertical fiscal imbalance in the Australian Federation—whereby the Commonwealth raises most of the revenue but the States fund most of the services—leaves the situation of pay equity in the Australian labour market largely unresolved while ever austerity policies rule.

Regulating international labour

As is well known, the Australian labour market absorbed large numbers of immigrants from the end of the Second World War onward, and these formed the basis for a major expansion in the manufacturing sector as well as large-scale construction projects.⁸⁴ The distinctive feature of this program of immigration, in contrast to the European experience of ‘guest workers’, was permanent settlement.⁸⁵ In other words, these immigrants became Australian citizens and their

⁸³ This paragraph draws on Siobhan Austen, Therese Jefferson and Alison Preston 2013, ‘Contrasting Economic Analyses of Equal Remuneration: The Social and Community Services (SACS) Case’, in: *Journal of Industrial Relations* Vol. 55. No. 1, pp. 60–79.

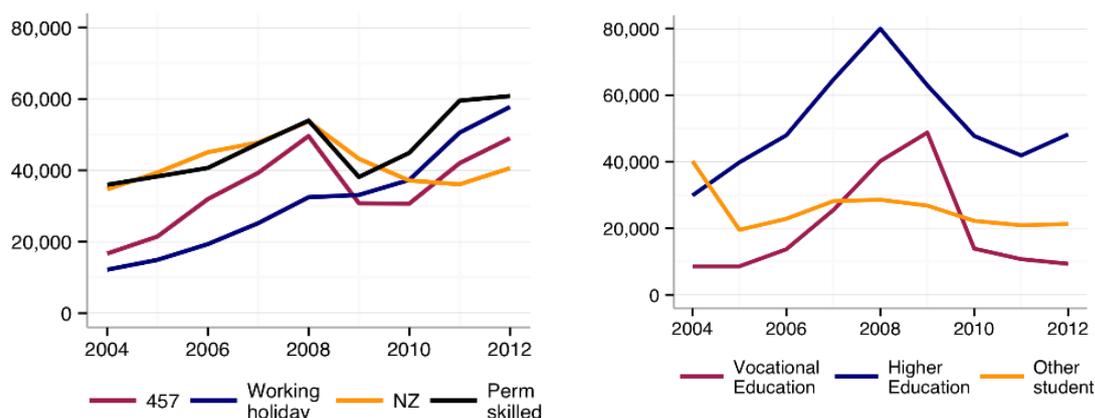
⁸⁴ Jock Collins 1988, *Migrant hands in a distant land: Australia’s post-war immigration*, Leichhardt: Pluto Press

⁸⁵ Stephen Castles and Godula Kosack 1985, *Immigrant workers and class structure in Western Europe*, Second edition, New York: Oxford University Press

families were raised in Australia. As a consequence, the occupational trajectories of second-generation immigrants have shown marked differences to those of their parents: with the scenario of the children of factory workers becoming professionals not being uncommon. In terms of the macro-economy, immigration to Australia since the 1940s has generally been regarded as positive because it increases aggregate demand and it lowers the age profile of labour supply (that is, it brings a younger cohort of workers).

In recent decades this historical pattern has been overturned and the Australian labour market has developed a large component of ‘guest workers’ in the form of visitors on temporary visas with work rights. These have included specific skills-based visas (457s), working holiday visas, and New Zealand citizen visas, with full working rights (though limited social security entitlements). The growth of these categories since the early 2000s has been dramatic: the first two categories each now almost match permanent skilled arrivals in terms of their magnitude (see Figure 14 left panel).

Figure 14: Immigration arrivals with work rights attached



One could also include international student visas within this framework, since these have work rights attached (up to a certain number of hours). The rise in this category has been quite remarkable (Figure 14 right panel), as was the sudden drop when various restrictions were imposed to prevent rorting (the use of these visas as a backdoor into permanent residency).

In their assessment of this phenomenon, Wilkins and Wooden noted that by March 2014 some 883,000 people were on temporary visas with work rights and they observed: ‘If all these people were labour market participants, they would amount to over 7 per cent of the labour force’.⁸⁶ This calculation did not include people on New Zealand visas. In reflecting on these data the authors suggest that this development has ‘improved the operation of the labour market’ because labour supply can now respond quickly to labour demand. While they caution that the employment and wages of Australian workers may be ‘potentially adversely impacted’ by these temporary immigrants, they point to the positive economy-wide effects of immigrants (in the same vein as permanent immigrants). We do not share their optimism.

In terms of future scenarios, the situation of student visas is unclear. Much will depend on the

⁸⁶ Roger Wilkins and Mark Wooden 2014, ‘Two Decades of Change: The Australian Labour Market 1993–2013’, in: *The Australian Economic Review* Vol. 47. No. 4, pp. 417–31, p. 419.

future of changes in the higher education sector. The falling Australian dollar has made educational courses in this country cheaper for international students, but the future level of education fees is uncertain. In the case of 457 and working holiday visas the resumption in growth rates in the wake of the GFC has been solid, suggesting that employers have found this source of labour attractive. Current proposals for weakening 'labour market testing' would likely see this source of labour increase even more sharply.

While most of the 457 immigration intake has involved workers in managerial, professional and technical occupations, unions have experienced and reports have regularly surfaced in the media of the system being used to bring in semi-skilled labour, or skilled blue-collar labour, in situations where exploitation has taken place. There is certainly scope for immigrant labour to restrain wages growth. This can happen at least two ways. Firstly, for much of the time the 457 visa program has operated, it has been perfectly legal for employers to pay their 457 visa workers below genuine market wages. This has allowed employers to recruit labour at minimum cost. Not until changes introduced by the previous Labor Government in 2013 has this situation been properly addressed in the regulatory framework, although the evidence from recent 457 visa monitoring reports by the FWO is that large numbers of 457 visa workers are still not being paid what they are meant to be paid. Secondly, in the case of working holiday visas and international student visas, it is rarely a skills question at all: many of these workers have been employed in low wage sectors, particularly agriculture and hospitality. Media reports in recent years have also highlighted exploitative practices in both these sectors. Workers on temporary visas have always been vulnerable to exploitation: unscrupulous employers know that these workers' knowledge of their workplace rights is often limited and their bargaining position is weakened by their visa status (such as restrictions on the number of hours international students are allowed to work).⁸⁷

The challenges for industrial relations policy posed by foreign labour are twofold: how to protect vulnerable foreign workers from exploitation and how to protect local workers from unfair competition in the labour market. It is also about ensuring employers who do the right thing are not undercut by those employers who exploit and abuse overseas workers. In the case of protection from exploitation, the problem lies not just in regulation but with enforcement. Unions traditionally played an important enforcement role in workplaces, but many of these vulnerable foreign workers are found in non-union workplaces or in various labour market blackspots, particularly in agriculture, construction and hospitality. Moreover, where government regulations impose restrictions on foreigners—such as the limits imposed on international students or refugees—these workers are unlikely to cooperate with officials or agencies charged with maintaining industrial standards. In effect, the lack of coordination between industrial relations policy, education policy and immigration policy makes it more likely that vulnerable foreign workers will collude in their own exploitation by keeping quiet about sub-standard employer practices.

In the 1990s Australia's exposure to international competition took the form of a large increase in the off-shoring of production. The industrial relations systems struggled to deal with this: workers and unions had got on board the enterprise-bargaining bus and had set about making their workplaces more efficient, only to find that competing with Chinese labour was an

⁸⁷ For more on 457 visas see Bob Kinnaird 2006, 'Current Issues in the Skilled Temporary SubClass 457 Visa', in: *People and Place* Vol. 14. No. 2, pp. 49–65; Siew-Ean Khoo et al. 2003, 'Temporary Skilled Migration to Australia: The 457 Visa Sub-Class', in: *People and Place* Vol. 11. No. 4, pp. 27–40.

impossible goal. In the end, employers—often reluctantly—had made the decision to move off-shore and there was nothing the industrial relations system could do about that.

Off-shoring remains a challenge in the 21st century—facilitated now by the extensive reach of the internet—and has reached into more service industries and (potentially) into more skilled occupations. Competition from international labour now takes two forms: this traditional off-shore competition and the newer on-shore competition from temporary immigrants. Industrial relations regulations struggle to deal with both these kinds of competition. Both bring potentially large efficiencies for employers in the short term, but resolving the problem of fairness for employees has not yet been addressed.

Skills formation

Missing from the Wilkins and Wooden analysis of temporary immigration was any recognition of the role that temporary workers play in skills formation. As Fairfax economics editor, Ross Gittins, observed:

“To me the main drawback is not so much that employers may not try hard enough to find local workers to fill jobs, or that the availability of this external supply may limit to some extent the rise in skilled wages, but that it reduces employers’ incentive to go to the bother of training young workers.”⁸⁸

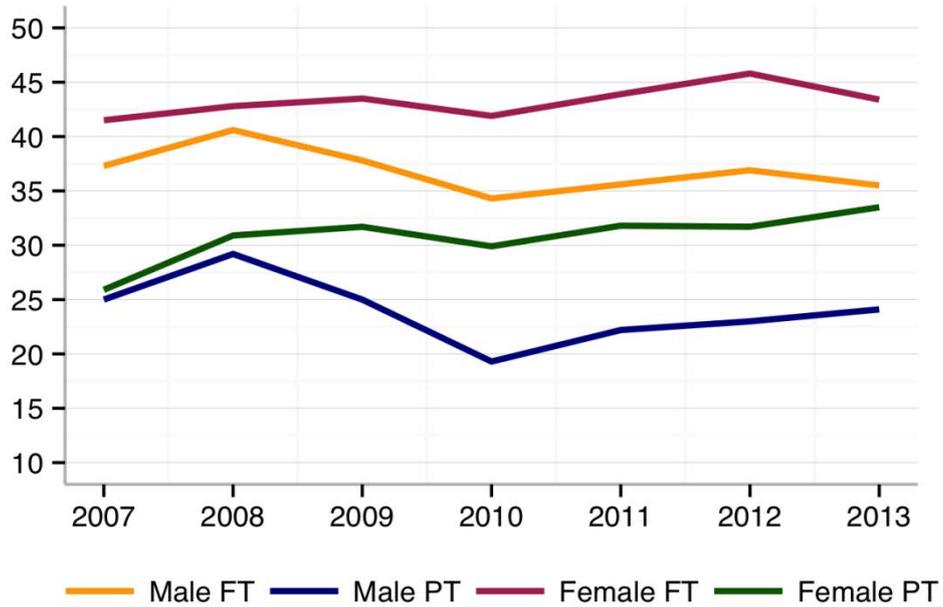
Employer justifications for seeking to weaken labour market testing, and indeed their overall preference for seeking to import skilled workers, are founded on an aversion to undertaking skills formation. The historical infrastructure for skills formation in Australia has been steadily dismantled over the last two decades. On the one hand we have seen a proliferation of training markets and private training colleges, as public training providers have lost funding and resources. On the other hand, many of the large public utilities or enterprises which once provided the core of the skilled blue-collar workforce have been privatised and have radically decreased their training commitment. We will comment on training markets and the problems these engender in the next section. The demise of the large in-house training facilities, particularly in former public utilities like Telecom, Qantas, various Electricity Commissions and Water Boards, has left a serious vacuum when it comes to blue-collar skills formation.

This problem has been around for some time, and was well documented in the early 2000s.⁸⁹ More recent data suggests no improvements have taken place and that the provision of work-related education and training in Australian workplaces remains very modest. A minority of workers undertake any work-related education or training over the course of a year, even when they are employed full-time. For male full-timers the percentage is in the mid 30s while for female full-timers it is in the mid 40s (Figure 15). For the part-time workforce, the figures drop to the low 20s among the men and hover in the low 30s for women. We noted earlier that employers have increasingly turned to part-time employment over the last decade, which suggests we are seeing a net decline in the overall employer training effort. Figure 15 also suggests an overall decline in male participation in training since 2008, among both full-time and part-time employees.

⁸⁸ Ross Gittins 2015, ‘Kiwis show the way as workers keep greying’, in: *Sydney Morning Herald* Vol. 21–22 February 2015, BUS6–BUS7, BUS7.

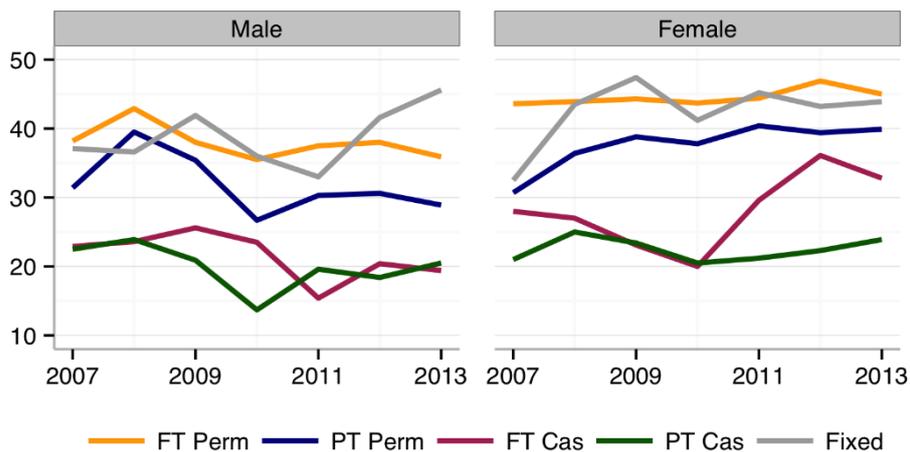
⁸⁹ Ian Watson et al. 2003, *Fragmented Futures: New Challenges in Working Life*, Sydney: Federation Press.

Figure 15: Work-related education or training by hours status, Australia 2007–2013



Y axis is the percentage of employees who undertook training during the previous 12 months. Source: HILDA Release 13.

Figure 16: Work-related education or training by employee category, Australia 2007–2013



Y axis is the percentage of employees who undertook training during the previous 12 months. FT = full-time; PT = part-time; Perm = permanent; Cas = casual; Fixed = fixed term employee. Source: HILDA Release 13.

The lower figures for part-time employees is a pointer to the problems of non-standard employment discussed earlier. We saw that casual employees, in particular, were more likely to

rate lower on the utilisation of their skills, as well as their job security. When it comes to the provision of training and education in the workplace, casuals fare poorly, irrespective of whether they are part-time or full-time. The proportion of casuals accessing training was almost half that of the permanent workforce (though this fluctuated considerably among women). For male casuals, in particular, there was a sharp decline in their access to training after 2009, before a recovery in 2012. A similarly sharp decline took place among male part-time employees. While there is some volatility in the data due to sampling variability, as well as volatility in the actual employment of casuals, the pattern for the period around the GFC is consistent with heightened employer uncertainty about the future and a concern to trim workplace costs. Finally, the higher levels of training among the fixed term employees is consistent with the occupational profile of this group of workers, who tend to be drawn from professional and technical areas, and whose overall profile—apart from their lack of permanency—is quite similar to the permanent workforce.⁹⁰

Skills mismatching

The notion that skills formation should be left to the market is particularly problematic. Training markets have been plagued by poor standards and inefficiencies, with regular media exposés of rorting or sub-standard outcomes. More seriously, the ‘skills crisis’ which Australia has faced over the last 15 years has often been a problem of employer recruitment difficulties, rather than genuine industry-wide skills shortages. At the same time, one of the major problems in the workplace has been educational and skills *mismatching*. Criticisms of an ‘over-educated’ workforce in Australia have been common⁹¹ and this problem is likely to worsen if ‘student demand-driven education’ becomes the norm in higher education and vocational education. Despite the rhetoric of efficient market outcomes, the evidence suggests that major problems are likely to arise in matching educational outcomes with labour market openings.

Problems of mismatching concern not only qualifications but also skills. In a study conducted in 2008, at the peak of the pre-GFC boom, Watson argued that employer association claims of widespread skill shortages were exaggerated. Using data from the skilled vacancy index and from NCVER’s employer surveys for 2005 and 2007, Watson suggested that about one fifth of employers were experiencing difficulty recruiting staff. These difficulties were not the same as ‘skill shortages’, since there can be other reasons for such recruitment difficulties. Using a subset of responses—where employers pinpointed industry skill shortages in their answers—Watson calculated that about 15 per cent of employers faced actual skill shortages. This was an all-industry average, and the mining industry stood out as a glaring anomaly: 34 per cent of employers there faced skills shortages. In the case of the skilled vacancy index, this had largely remained intact from about 2000 onward, with only Western Australian—the home of mining—standing out decisively. As well as skills shortages, Watson also looked at skills gaps, the situation where employees don’t have the required ‘qualifications, experience and/or specialised

⁹⁰ See the discussion of fixed term employees in Ian Watson 2013, ‘Bridges or traps? Cas-ualisation and labour market transitions in Australia’, in: *Journal of Industrial Relations* Vol. 55. No 1., pp 6-37.

⁹¹ See, for example, Mark Cully et al. 2006, *Matching skill development to employment op-portunities in New South Wales*, Independent Pricing and Regulatory Tribunal of NSW; Ingrid Linsley 2005, ‘Causes of Overeducation in the Australian Labour Market’, in: *Australian Journal of Labour Economics* Vol. 8. No. 2, pp. 121–143.

skills to meet a firm's skill needs'. This led to the conclusion that the size of the skills gap in Australia was about 5 per cent. By way of contrast, some 37 per cent of employers regarded their employees as having skill levels above what was required.⁹²

Later research by Mavromaras and colleagues confirmed this research by looking at overskilled workers, those who can do more things than their job requires. They found that 12 per cent of employees in full-time employment were 'severely overskilled' and that 30 per cent were 'moderately overskilled'⁹³. In a follow-up study in 2010 Mavromaras and colleagues found somewhat higher levels of severe overskilling. Table 5, taken from their study, shows the incidence of overskilling by educational qualification which suggested that those with the least formal qualifications were, in fact, the most severely overskilled.⁹⁴ As for the moderately overskilled, this was extensive across all qualification levels.

Table 5: Reported overskilling in employment (%)

	Extent of overskilling (Row %)			Col %
	Well Match-ed	Moderately over-skilled	Severely over-skilled	
All employed	50.99	30.68	18.32	18.69
Year 10 and below	47.39	32.25	20.36	25.79
11–12 Certificates I/II and below	45.19	35.88	18.92	1.73
Certificates III/IV and apprenticeship	62.13	27.88	9.99	21.02
Diploma/degree	62.46	26.33	11.21	32.78
All qualifications	56.06	29.16	14.78	100.00
No. of observations	23,688	12,322	6,245	42,255

Notes: Uses waves 1 to 6 from HILDA.

⁹² Ian Watson 2008, *Skills in use: labour market and workplace trends in skills use in Australia*, Report for NSW Department of Education and Training (Skills Ecosystem Project), pp. 6–9.

⁹³ Kostas Mavromaras, Seamus McGuinness and Yin King Fok 2009, 'Assessing the Incidence and Wage Effects of Overskilling in the Australian Labour Market', in: *The Economic Record* Vol. 85. No. 268, pp. 60–72, p. 63.

⁹⁴ Table from Kostas Mavromaras, Seamus McGuinness and Yin King Fok 2010, *The incidence and wage effects of overskilling among employed VET graduates*, Monograph Series 03/2009, Flinders University: National Centre for Vocational Education Research, p. 14.

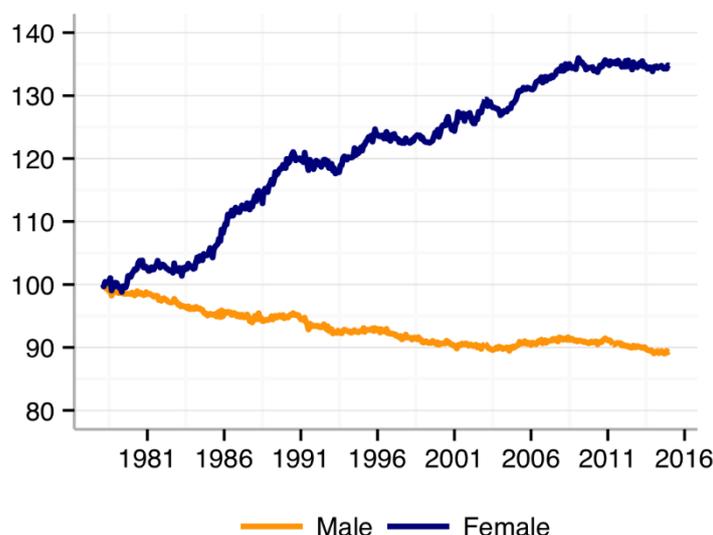
It is clear that any future scenario for skills formation is likely to see a continuation of current practices. In other words, domestic labour market matching for both skills and qualifications are in a parlous state, while international recruitment of skilled labour simply allows many employers to avoid serious commitments to training. The ultimate responsibility for skills formation lies with adequate public training infrastructure and with commitments by large employers to sourcing their skilled labour domestically by increasing their in-house training.

None of these criticisms advanced above imply that immigration is not worthwhile. It assists with economic growth and does meet genuine employer needs for specialised skills. The problem lies in the extremes into which the situation has descended: a collapse in the domestic skills formation system, poor matching of skills and jobs, and a reliance on immigration to side-step solving these problems. Current moves to weaken labour market testing and the further dismantling of public training provision at the state level can only make the situation worse.

Employment

The story of labour supply in Australia is a familiar one: a long-term trend for increased female labour force participation and a steady decline in male labour force participation (Figure 17). Male labour force participation has declined by 11 per cent since 1978 while female labour force participation has increased by 35 per cent (although, as explained in Chapter 11 there is potential to improve the quality and extent of female participation in particular circumstances). As Wilkins and Wooden observed, the age structure of the population contributes to some of this decline in participation rates.⁹⁵

Figure 17: Labour force participation, Australia 1978 to 2015



Seasonally adjusted data, indexed to 100 in 1978. Source: ABS Labour Force Survey, Cat. No. 6202.

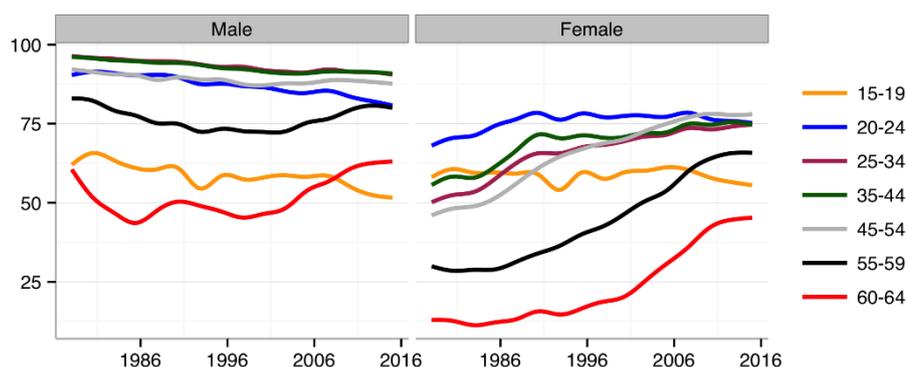
⁹⁵ Roger Wilkins and Mark Wooden 2014, 'Two Decades of Change: The Australian Labour Market 1993–2013', in: *The Australian Economic Review* Vol. 47. No. 4, pp. 417–31, pp. 417–18.

The earlier discussion on hours and employment growth since the GFC emphasised the stagnant full-time employment situation since 2011 for both men and women. It is apparent that labour force participation since 2011 has also entered a stagnant phase.

The story among different age groups over the period from 1978 to 2015 is particularly illuminating (Figure 18). For males in the prime of their working lives (25 years to 54 years) the declines in participation rates were modest, but among younger men (15 to 24 years), there were substantial falls. Among older men (55 to 64 years) there was something of a turnaround from the situation which had prevailed in the 1990s and 1980s, when participation rates fell substantially. After 2000, participation rates for men in this age band grew substantially, with a steeper rise among the older group. Among women, all age groups except those in the 15 to 19 year age group experienced increases in their participation rates, with particularly notable increases from the 1990s onwards in participation by women aged 45 to 64 years. Borland has noted that some of this increase has been due to cohort effects, particularly those associated with higher levels of education among mature-age women.⁹⁶

The changes for teenagers reflect much higher school retention from the 1980s onwards, as governments sought to keep students in school longer and employment opportunities, particularly for point-of-entry jobs, disappeared. The teenage labour market, as a viable destination for full-time employment, virtually disappeared during the 1980s, particularly for young women (with young men still able to access a wider range of apprenticeships). Indeed, were it not for the proliferation of casual, part-time student employment and the decline in participation rates for teenagers shown in Figure 18 would be much greater.⁹⁷

Figure 18: Labour force participation by age and sex, Australia 1978 to 2015



Trend applied to original data. Source: ABS Labour Force Survey detailed tables, Cat. No. 6291.0.55.001, Table 01.

⁹⁶ Jeff Borland 2011, 'The Australian Labour Market in the 2000s: The Quiet Decade', in: *The Australian Economy in the 2000s*, ed. by Hugo Gerard and Jonathan Kearns, Proceedings of a Conference, 15–16 August 2011, Sydney: Reserve Bank of Australia,

⁹⁷ For the collapse of teenage employment see (Ian Watson 1994, "Music While You Work": Teenage Women in the Australian Labour Market, 1947 to 1992', in: *Australian Journal of Social Issues* Vol. 29. No. 4, pp. 377–406; Richard Sweet 1987, *The Youth Labour Market: A Twenty Year Perspective*, Canberra: Curriculum Development Centre).

How likely is it that these trends in labour force participation will continue? Wilkins and Wooden suggest that the increased participation among the older age cohorts will be insufficient to offset the effects of population ageing, leading them to conclude: ‘while rates of participation within the working-age population will increase, the overall rate of labour force participation can be expected to decline further’.⁹⁸ Concerns about participation rates have been a central focus for policymakers in government, particularly in areas such as social security.⁹⁹ The scope for the industrial relations system to influence these outcomes is limited. While new initiatives may influence the relative positions of various groups—such as mature age workers or workers with family responsibilities—the major constraints on the overall level of labour force participation remain tied closely to labour demand. Where there are labour supply issues these are either related to skills issues or problems of geographical mobility, and only the former is amenable to industrial relations innovations.

Unemployment in the 2000s

For much of the 2000s the unemployment rate dropped among both men and women, and by 2008 had reached historically low levels (Figure 19). The male unemployment rate fell faster than the female rate, but after the GFC it also rose faster and further. As discussed earlier, a combination of factors—and particularly the Labor government’s stimulus measures—arrested the rise in unemployment, but this was a relatively short-lived phenomenon. From 2011 onward unemployment began to climb steadily. The growth in GDP which had been sustained by the construction phase of the mining boom began to falter after 2013, and the rapid collapse in commodity prices suggested that the export phase of the mining boom would not be able to compensate. The rapid rise in unemployment rates in both Queensland and Western Australia confirmed this prognosis.

⁹⁸ Roger Wilkins and Mark Wooden 2014, ‘Two Decades of Change: The Australian Labour Market 1993–2013’, in: *The Australian Economic Review* Vol. 47. No. 4, pp. 417–31, p. 418.

⁹⁹ Patrick McClure 2015, *A New System for Better Employment and Social Outcomes*, Report of the Reference Group on Welfare Reform to the Minister for Social Services, Canberra: Department of Social Services.

Figure 19: Unemployment rates (%), Australia 2000 to 2015 (seasonal & trend)

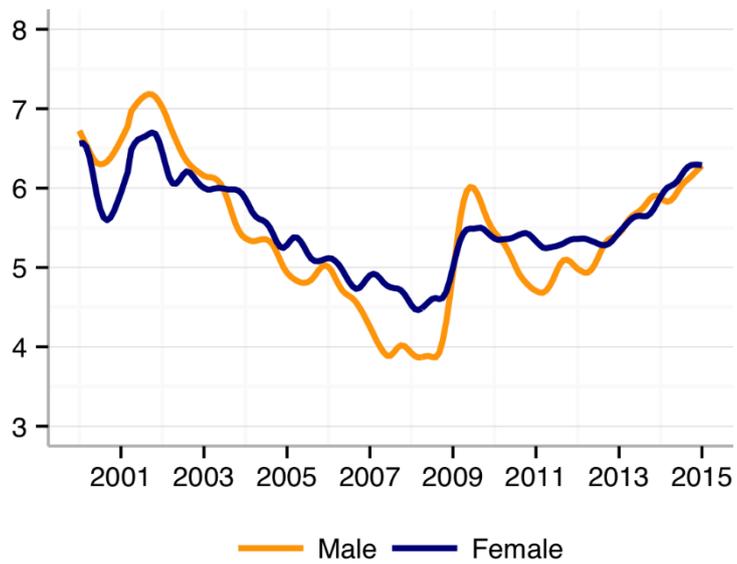
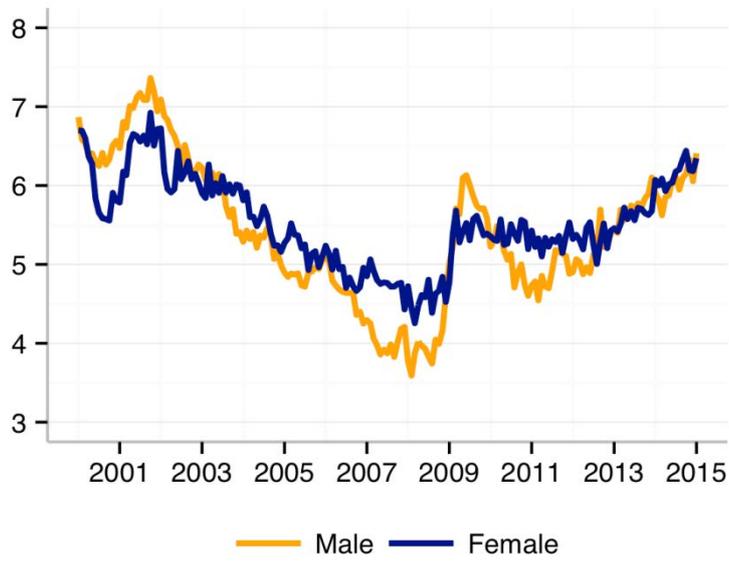
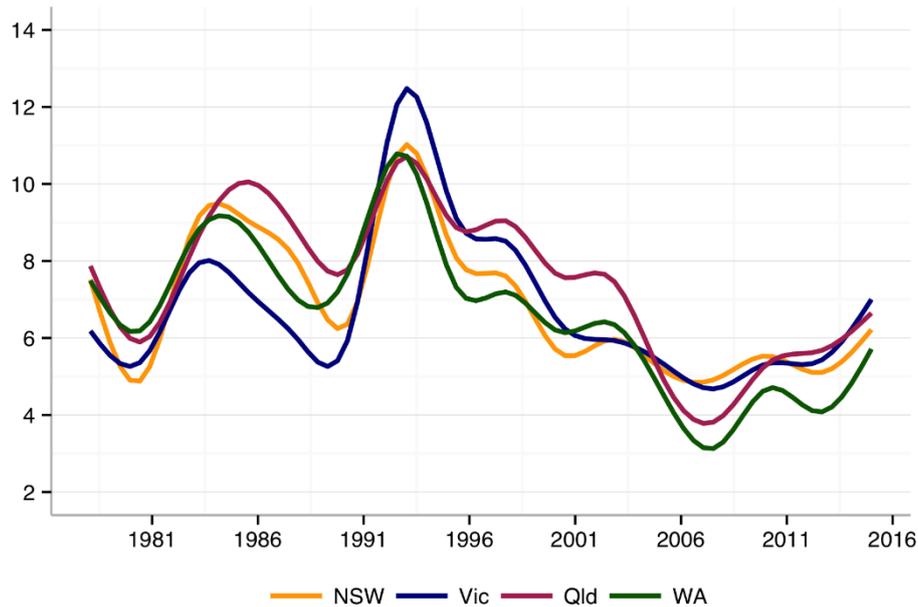


Figure 20: Unemployment rates for selected states, 1981 to 2015



Trended from seasonally adjusted data. Source: ABS ABS 6202004, 6202005, 6202006, 6202008.

Whereas historically both Western Australia and Queensland had generally experienced higher unemployment than NSW and Victoria, by the early 2000s this pattern had reversed (Figure 20). By 2008 unemployment rates in Western Australia had reached an all-time low of just 2.3 per cent, while Queensland dropped to 3.2 per cent. With the GFC, and the subsequent employment falls in the mining sector, unemployment rates in both these states were back to comparable levels with NSW and Victoria by 2015. The prospects for any turn-around in their fortunes are dim. Commodity prices have crashed in recent years, with iron ore dropping from over \$180 per tonne in 2011 to under \$60 per tonne in 2015. Both mine closures and job cuts for the surviving mines have taken place over the last 12 months. At the same time, the drop in world oil prices has dimmed the prospects for the large-scale expansion in Australian natural gas production. As Treasury, the Reserve Bank and numerous economic commentators keep noting, there has been no expanded investment in the non-mining sectors of the economy to compensate for the slow-down in that sector. Only property investment and construction has kept unemployment in check, and this has largely been an area of economic activity restricted to Sydney and Melbourne.

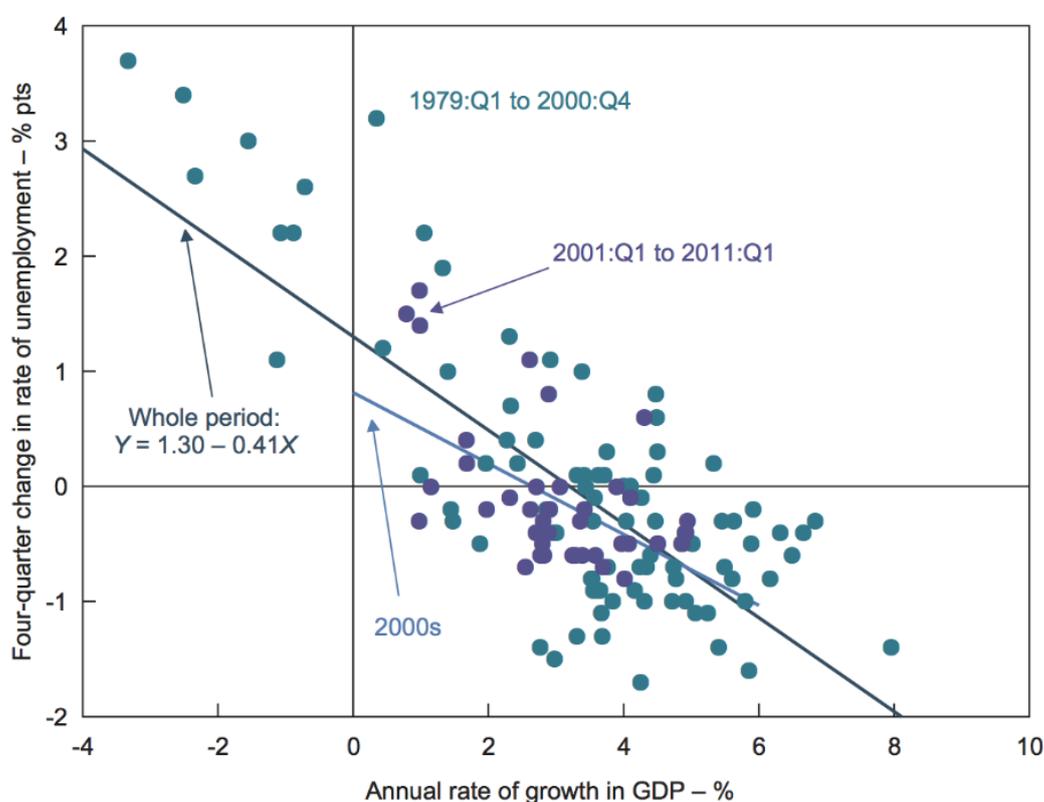
While the watershed of the GFC needs to be kept in mind, it does seem to be the case that in the 2000s a lower level of GDP growth was sufficient to keep unemployment in check. This was a cautious finding by Borland in his discussion of Okun's law.¹⁰⁰ In his graph (Figure 21), which showed the four-quarter change in the rate of unemployment graphed against the annual rate of

¹⁰⁰ Jeff Borland 2011, 'The Australian Labour Market in the 2000s: The Quiet Decade', in: *The Australian Economy in the 2000s*, ed. by Hugo Gerard and Jonathan Kearns, Proceedings of a Conference, 15–16 August 2011, Sydney: Reserve Bank of Australia, Figure 20.

growth in GDP, Borland discerned a change during the 2000s. Whereas the overall linear regression implied that unemployment was stabilised at a rate of 3.2 per cent GDP growth, the regression results for the 2000s suggested that unemployment was now stabilised at a GDP growth rate of 2.7 per cent. Borland concluded that:

This shift is consistent with there being higher rates of employment growth in the 2000s due to favourable labour cost conditions; however, the effect represented by the Okun relation will also reflect the relatively high rate of growth in labour force participation in the 2000s.¹⁰¹

Figure 21: Borland's analysis of Okun's law



Industry employment

Growth in employment at the industry level (Figure 22) confirms the state analysis. The rate of growth in mining was phenomenal, particularly after 2005, while the sudden collapse after 2013 was equally dramatic. It is important to keep employment levels in mind (Table 6) and to note that mining never rose much above one quarter of a million jobs. By contrast, over the period 2000 to 2014 the retail industry added another quarter of a million jobs to rank alongside the industry of health care and social assistance as the behemoths of the Australian economy.

¹⁰¹ Jeff Borland 2011, 'The Australian Labour Market in the 2000s: The Quiet Decade', in: *The Australian Economy in the 2000s*, ed. by Hugo Gerard and Jonathan Kearns, Proceedings of a Conference, 15–16 August 2011, Sydney: Reserve Bank of Australia, p. 191.

Despite its size, retail posted mediocre growth over the period, with the period from 2008 onward essentially flat. This was indicative of the difficult times retailers have faced with subdued domestic consumer demand. More solid growth was evident among professional services and health care and social assistance, industries which share prospects for increasingly strong growth, whilst also contributing significant numbers of jobs. The latter is partly driven by the ageing of the population and most economic commentators expect continued strong growth in this industry.

On the bleak side of the ledger were agriculture and manufacturing, both of which declined over the period, with agriculture losing more than 110,000 jobs and manufacturing losing nearly 160,000. While manufacturing still constitutes a major source of employment—with over 900,000 jobs—its prospects in the next few years are grim, as heavy job losses associated with automotive assembly, components and ship building look likely.

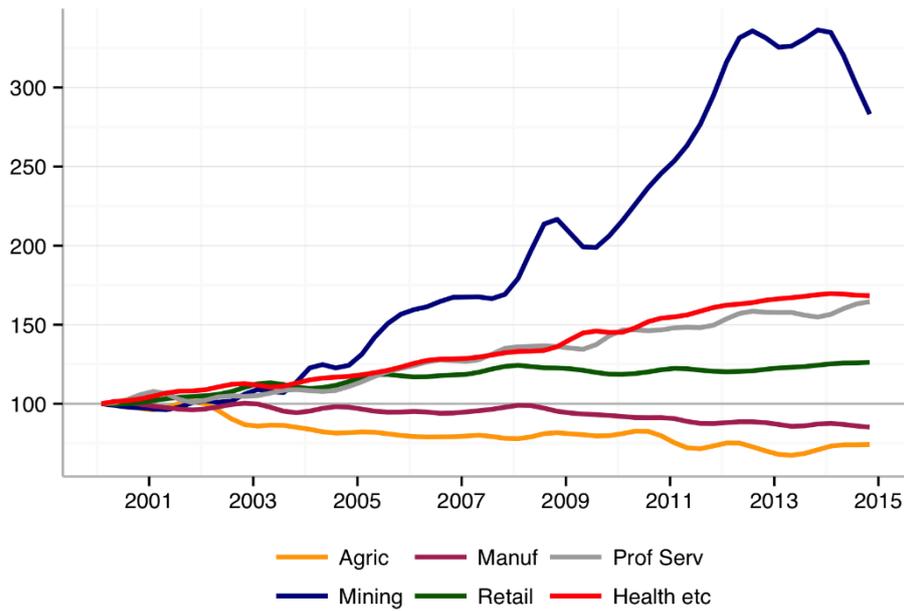
These industry patterns dovetail with the analysis of inequality outlined earlier. As Bob Gregory observed in the 1990s, the disappearing middle in the wages distribution was partly driven by the loss of well paid manufacturing jobs. Gregory suggested that workers who might ordinarily have been employed in jobs in the middle of the wage distribution—such as manufacturing jobs—would have moved into lower paying jobs, ‘bumping off’ the lower skilled workers from the wages ladder.¹⁰²

There is also an occupational component to these industry changes. Despite some debate, there is good evidence for occupational polarisation in the Australian labour market, with strong growth in both the more highly skilled jobs as well as the less skilled. It is clear that the strongly growing industries contain both categories of job—such as the nurses and the cleaners, and the architects and the receptionists—though the more skilled jobs are likely to outnumber the less skilled. On the other hand, the solid presence of retail trade, despite its stagnant growth, maintains large numbers of less skilled jobs in the occupational structure.¹⁰³

¹⁰² R Gregory 1993, ‘Aspects of Australian and U.S. Living Standards: the Disappointing Decades, 1970–1990’, in: *Economic Record* Vol. 69. No. 204, pp. 61–76; R.G. Gregory 1996, ‘Disappearing Middle or Vanishing Bottom? —A reply’, in: *The Economic Record* Vol. 72 No. 218, pp. 294–296; G. Belchamber 1996, ‘Disappearing middle or vanishing bottom? A comment on Gregory’, in: *The Economic Record* Vol. 72. No. 218, pp. 287–293.

¹⁰³ Mark Cully 1999, ‘A More or Less Skilled Workforce? Changes in the Occupational Composition of Employment, 1993 to 1999’, in: *Australian Bulletin of Labour* Vol. 25. No. 2, pp. 98–104; Mark Cully 2002, ‘The Cleaner, The Waiter, the Computer Operator: Job Change, 1986–2001’, in: *Australian Bulletin of Labour* Vol. 28. No. 3, pp. 141–162; Mark Wooden 2000, ‘The Changing Skill Composition of Labour Demand’, in: *Australian Bulletin of Labour* Vol. 26. No. 3, pp. 191–198.

Figure 22: Growth in employment in selected industries, Australia 2000 to 2014



Trend data. Agric = Agriculture, Forestry and Fishing; Manuf = Manufacturing; Prof Serv = Professional, Scientific and Technical Services; Health etc = Health Care and Social Assistance. Source: ABS Labour Force, 6291004.

Table 6: Employment in selected industries, Australia 2000 to 2014

Industry	2000	2014	Change
Agriculture etc	433,746	322,002	-111,745
Mining	80,847	228,901	148,054
Manufacturing	1,069,871	911,467	-158,404
Retail Trade	987,525	1,246,312	258,788
Professional Services	575,418	947,075	371,657
Health etc	821,700	1,383,054	561,354

Trend data. Source: ABS Labour Force, 6291004.

The problems of labour demand

In the earlier discussion it was evident full-time employment growth had stalled after 2011. As we have seen, one reason for this was a slowing in overall labour demand, partly the result of the end of the construction phase of the mining boom. Losses in manufacturing employment continued as an over-valued currency weakened the international competitive position of the sector. Recent falls in the Australian dollar have seen something of a revitalisation of among some large domestic producers such as BlueScope Steel but the overall picture of manufacturing as a source of employment remains bleak.

The persistent failure of the Australian economy to generate sufficient full-time employment remains the Achilles heel of the Australian labour market. This surfaces in a number of ways: problems of long-term unemployment, persistent underemployment, regional 'blackspots', and the collapse of full-time employment among particular sub-groups of the population.

Employment generation is politically sensitive in depressed regions and outer suburbs. The link between employment and wages has also been a source of much animated discussion over the years, both from academic economists and from employer lobby groups¹⁰⁴. A particular target has been the minimum wage, with the argument mounted that the level of the minimum wage is responsible for poor employment outcomes, particularly among the least skilled section of the population. In employer debates around WorkChoices and the FW Act, the so-called 'job-destroying' effects of unfair dismissal laws have also regularly surfaced.

The small business lobby has argued, in particular, that they would employ more people, if unfair dismissal laws were removed. While the time frame to test this proposition is limited, the data which might allow such a task have recently become available in the form of more finely disaggregated labour mobility data. Using such data Borland tested this proposition by looking at the impact of unfair dismissal laws on the youngest age groups—those we might expect to be most affected by such legislation. Examining flows into and out of employment over the period from 1998 to 2011 Borland could discern no effect from either the Work Choices legislation nor the subsequent FW Act and concluded: 'Changes in the rate at which workers flowed out of employment do not seem to be significantly related to the industrial relations system in place'.¹⁰⁵

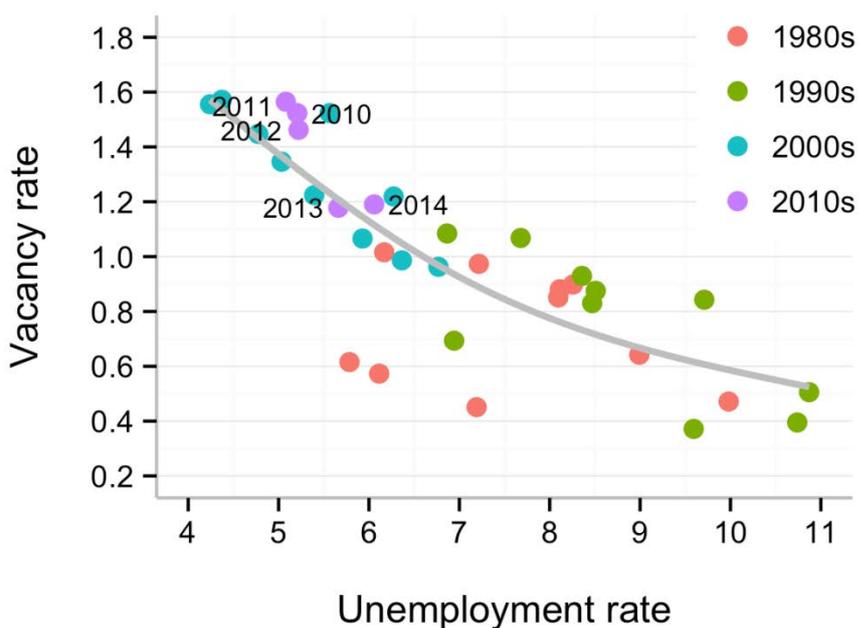
In other words, the grounds for either weakening or strengthening unfair dismissal legislation lie elsewhere than their employment effects. Ultimately, we would argue, the case for strong unfair dismissal legislation revolves around issues of fairness. If there are problems, then their likely solution lies in improving human resource management procedures within small and medium size workplaces, rather than falling back on legislative solutions.

¹⁰⁴ See, for example Ian Watson 1999, *Proposals for Wage Freeze and Tax Credits: Will Sub-sidising Low Wage Jobs Solve Unemployment*, Research Paper No. 29, Department of the Parliamentary Library; Peter Dawkins 1998, 'Solutions to Unemployment and Avoiding the 'Diabolical Trade-off': A Discussion', in: *Unemployment and the Australian Labour Market*, ed. by Guy Debelle and Jeff Borland, ANU, Canberra: Proceedings of a Conference held by RBA and CEPR, June 1998; S. Richardson and A. Harding 1998, 'Low wages and the distribution of family income in Australia.', in: *25th General Conference of International Association for Research in Income and Wealth*, Cambridge, England.

¹⁰⁵ Jeff Borland 2012, 'Industrial Relations Reform: Chasing a Pot of Gold at the End of the Rainbow?', in: *The Australian Economic Review* Vol. 45. No. 3, pp. 269–89, p. 278.

A certain level of unemployment will always be due to structural factors, such as regional geographical difficulties (such as transport), problems of skills formation, low labour force participation among various sub-groups, and so forth. A certain level will be due to frictional factors, such as inefficiencies in job matching systems like the Jobs Network. One way of assessing such differences is the Beveridge curve, which graphs the unemployment rate and the vacancy rate (Figure 23). This backward sloping curve suggests that in recessionary periods—to the right of the graph—unemployment will be high and vacancies low, while in expansionary periods—to the left of the graph—unemployment will be low and vacancies high. The Beveridge curve can help assess the efficiency of job matching in the economy by considering the relative position of these two variables over time. That is, in the long term, outward shifts in the curve suggest problems with growing structural unemployment.

Figure 23: Beveridge curve, Australia 1980 to 2014



Borland provided a Beveridge curve for the period from 1979 to 2011 in his assessment of the decade and he concluded that there was an inward shift 'due to decreases in long-term unemployment in the 2000s' and that there was little evidence for an outward shift due to the mining boom (despite much talk of skill shortages during that period). The increases in vacancy rates during the 2000s appear to signal movements along the same Beveridge curve, leading Borland to conclude that 'the economy as a whole did not worsen appreciably in the 2000s'.¹⁰⁶

¹⁰⁶ Jeff Borland 2011, 'The Australian Labour Market in the 2000s: The Quiet Decade', in: *The Australian Economy in the 2000s*, ed. by Hugo Gerard and Jonathan Kearns, Proceedings of Conference, 15–16 August 2011, Sydney: Reserve Bank of Australia, p. 204.

Adding the additional years through to 2014, and dividing the 2000s from the 2010s, suggests that increases in unemployment in the last 3 years have seen movement back along the Beveridge curve, rather than any outward shift.

While this limited shift suggests structural unemployment has not worsened over the 2000s, it remains the case that over the long-term there does appear to be a problem with structural unemployment in Australia.¹⁰⁷ This problem is particularly evident when we consider employment to population ratios (also called employment rates) for various subgroups. Unlike the unemployment rate, these ratios take account of lower participation rates by some subgroups. The more serious levels of unemployment for such groups are often hidden by withdrawal from the labour market and employment population ratios illuminate this.

In his reflections on Australian labour markets, penned in 2005, Bob Gregory expressed his disappointment with 'the reduction in employment opportunities for the low skilled, the growing geographic and social pockets of the disadvantaged, and the increasingly heavy reliance on the welfare state'.¹⁰⁸ In this respect, he was echoing sentiments expressed a few years earlier by a number of labour market economists who observed the polarisation of the Australian labour market that had taken place during the 1990s:

This social crisis in the midst of a buoyant economy is evident from many signs in Australia's cities, towns and rural areas. These range from manifest inequalities in entry to, and rewards from, economic activity to increasing demand on emergency relief agencies, public hospital casualty wards, crisis centres and services for the homeless ...

To those who focus on aggregate economic indicators talk of a social crisis, especially one driven by trends within the economy, is incomprehensible. After all, for much of the past decade employment and average real earnings have been growing strongly, and unemployment has been falling ... But the disadvantage and distress in many Australian communities is real indeed, and the fact that the crisis has developed through a period of strong economic growth has been one of its most distinctive, and most disturbing, features.¹⁰⁹

For Gregory, one of the most startling aspects of the Australian labour market after the 1970s was the loss of full-time employment for low skilled males and this was particularly perplexing given the overall reduction in wages growth that took place from the late 1970s to the mid 1990s:

After a quarter of a century of real wage growth it seemed inconceivable [in the 1970s] that there would be about two decades of real wage constancy ... the widely held macro view at that time was that only a few years of real wage constancy was needed to return the Australian labour market to full employment ... [but] put simply, despite the large real wage reductions—relative to trend—full-time employment, particularly among unskilled men, has continued to deteriorate ...

¹⁰⁷ Groenewold's 2003 analysis of the Beveridge curve suggested that since the 1970s most of the growth in unemployment in Australia had been due to shifts in the curve, rather than movement along the curve (Nicolaas Groenewold 2003, 'Long-Run Shifts of the Beveridge Curve and the Frictional Unemployment Rate in Australia', in: *Australian Journal of Labour Economics* Vol. 6. No. 1, pp. 65–82).

¹⁰⁸ R Gregory 2005, 'Australian Labour Markets, Economic Policy and My Late Life Crisis', in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press, p. 205.

¹⁰⁹ J. Borland, B. Gregory and P. Sheehan 2001, 'Inequality and economic change', in: *Work Rich: Work Poor: Inequality and economic change in Australia*, ed. by J. Borland, B. Gregory and P. Sheehan, Melbourne: Centre for Strategic Economic Studies, Victoria University, pp. 2–3.

Despite the real wage constancy there were no return to the pre-1975 labour market environment.¹¹⁰

Table 7: Male full-time employment to population ratios, skilled and unskilled by selected age groups

Age group	1981 Census		2001 Census		2011 Census	
	Skilled	Unskilled	Skilled	Unskilled	Skilled	Unskilled
25–34	79.9	75.9	76.6	60.1	75.7	48.2
35–49	86.6	79.1	80.0	62.3	81.3	53.8
50–59	84.8	68.6	72.7	51.9	73.7	49.5
Total 25–59	83.0	75.3	77.4	58.9	77.7	51.0

Definition: Skilled = Bachelor degree or higher; Unskilled = no post-school qualifications. 1981 and 2001 from Gregory (2005). 2011 calculated from Census data provided through TableBuilder Pro.

Gregory illustrated this point with a comparison of full-time employment to population ratios for the two extremes in the skill level spectrum for males aged between 25 and 59 (thereby removing the confounding influences of the education and retirement phases). Gregory used two Census periods—1981 and 2001—and we have supplemented this with data from the 2011 Census. Gregory observed that in 1981 these ratios were marginally higher for the skilled 25–34 years of age cohorts (about 4 percentage points) and considerably higher for those in the 50–59 years of age cohort (about 16 percentage points). However, by 2001 these ratios had changed dramatically. Across all skill groups, and all age cohorts, there had been drops in their employment to population ratios. But where these drops had been mild for the skilled groups—for example, 3.3 percentage points for the 25–34 years of age cohort—for the unskilled men they had been massive: 15.8 percentage points. And this for an age cohort in the prime of their working life. Among the 35–49 years of age cohort the ratio for the unskilled men dropped by 16.8 percentage points and for the 50–59 cohort the drop was 16.7 percentage points. By way of comparison, among skilled men the figures were 6.6 and 12.1 percentage points respectively.

Turning now to the last decade, the results are most sobering. Among all age groups except the youngest, the full-time employment population ratio improved for skilled men. Amongst the lowest age group it dropped by a mere 0.9 percentage points. By contrast, the ratio dropped for all age groups among the unskilled men, and it dropped by considerable amounts. Overall, it dropped by 7.9 percentage points and amongst the youngest age group it dropped by 11.9

76. ¹¹⁰ R Gregory 2005, 'Australian Labour Markets, Economic Policy and My Late Life Crisis', in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press, pp. 210–211.

percentage points to just 48.2 per cent. To put this in perspective, at the time of their lives when young men should be settling down and building their futures, less than half of those without qualifications are in full-time employment.¹¹¹

Other studies in Gregory's large body of work have answered the question: 'Where did the unskilled jobs go?'¹¹² They showed that the loss of manufacturing jobs from the economy, beginning in the 1970s and continuing to this day, has particularly struck hard at this group of workers. The other factors in this scenario have been the repeated waves of retrenchments of blue-collar jobs from public sector employment at state and local government levels, as privatisation or corporatisation has swept through sectors like the railways, electricity, water and sewerage, road construction and public works.

When it comes to new employment opportunities, the conventional wisdom eulogises the growth of high skilled jobs. This is sometimes expressed in terms of a new economy dominated by Robert Reich's 'symbolic analysts'¹¹³, though more sober assessments point to a polarised labour market in which large numbers of low-skilled routine jobs are still part of the occupational mix.¹¹⁴ The key point here, however, is that a great many of these new low-skilled jobs are part-time, and often casual.¹¹⁵ Their emergence has not, therefore, overcome the dilemma posed by Gregory's analysis.

¹¹¹ A criticism which might be levelled at the Gregory approach is that his operationalising of skill is problematic, particularly in the light of the expansion of higher education from the 1980s onwards. Many of the men in 1981 without post-school qualifications, particularly the older men, would most likely have held qualifications were they part of his 2001 cohort. This criticism would, however, have much less force for the 2001 to 2011 comparison, where the 'ability composition' of the two cohorts would be quite similar. Comparing the Census data with HILDA suggests that the former figures are exaggerated. While the figures for the skilled population are similar, those for the unskilled are not. It is likely, however, that initial sample selection into HILDA, and attrition after the first wave, would result in the unskilled non-employed male population being under-represented.

¹¹² R Gregory 1993, 'Aspects of Australian and U.S. Living Standards: the Disappointing Decades, 1970–1990', in: *Economic Record* Vol. 69. No. 204, pp. 61–76.

¹¹³ Robert Reich 1992, *The Work of Nations: Preparing Ourselves for 21st Century Capitalism*, New York: Vintage Books

80. ¹¹⁴ Mark Cully 1999, 'A More or Less Skilled Workforce? Changes in the Occupational Composition of Employment, 1993 to 1999', in: *Australian Bulletin of Labour* Vol. 25. No. 2, pp. 98–104; Mark Cully 2002, 'The Cleaner, The Waiter, the Computer Operator: Job Change, 1986–2001', in: *Australian Bulletin of Labour* Vol. 28. No. 3, pp. 141–162; Mark Wooden 2000, 'The Changing Skill Composition of Labour Demand', in: *Australian Bulletin of Labour* Vol. 26. No. 3, pp. 191–198.

¹¹⁵ P. Sheehan and A. Esposto 2001, 'Technology, skills and earnings inequality: A new approach to understanding the characteristics of jobs', in: *Work Rich: Work Poor: Inequality and economic change in Australia*, ed. by J. Borland, B. Gregory and P. Sheehan, Melbourne: Centre for Strategic Economic Studies, Victoria University.

5

Measuring the Economic Impacts of Industrial Relations Regulation: (1) Macroeconomic effects.

It is not possible to say that changes in the industrial relations framework over recent decades have been the cause of the upswing, downswing and recovery in productivity growth seen over that period¹¹⁶. It may be the case that industrial relations policies affect the productivity of individual workplaces, but their effect on net economic performance is minimal.¹¹⁷ The most important economic solutions lie elsewhere and concern questions of sustainable investment, the regulation of financial systems—highlighted by the ‘near miss’ of the GFC—effective taxation regimes, and the overarching macro-economic task of fostering employment. Our analysis of the labour market during the 21st century in Chapter 4 shows that the GFC marked a watershed, the dividing line between a period of rapid growth and the current period of slow decay. Current economic policy debates, and particularly industrial relations debates, seem quaintly old fashioned in the current climate. Indeed, Governments often seem like generals who persist in fighting the last war, preoccupied with inflation when the world economy is rapidly deflating. On the other hand, multinational corporations are already preparing for the next round. International financial capital has wasted no time exploiting the opportunities for mergers and acquisitions thrown up by the GFC, leaving Australian domestic control over capital weaker than before the crisis. Moreover, around the world governments responded to the GFC with stimulus measures in varying degrees, but they all failed to put in place effective regulatory frameworks to prevent the next GFC.¹¹⁸

The assumptions behind some questions posed by the PC imply that Australia must adjust to international competition on the terms which suit employers, particularly large multinational companies. Yet it is very hard to pinpoint where such adjustments should take place. Wages growth has been flat in recent years, while unit labour costs have declined in secular terms over many years. When it comes to the labour market, the PC appears to maintain a set of stereotypes drawn from neoliberal textbooks in which perfectly competitive labour markets are the nirvana to which policy makers should aspire. They studiously ignore the growing body of evidence which shows that labour markets can never approximate these idealised markets. Real world labour markets are at best characterised as dynamic monopsonies in which many of the ‘frictions’ which prevent adjustment are not perverse incentives or dysfunctional institutions but important parts of the social fabric. Take ‘labour immobility’, for example. People are tied to particular locations

¹¹⁶ MaCallum, R., Moore, M., Edwards, J. *Towards more productive and equitable workplaces*, 2012, at p 71-73

¹¹⁷ David Peetz 2012, ‘Does Industrial Relations Policy Affect Productivity?’, in: *Australian Bulletin of Labour* No. 4, pp. 268–292; Yi-Ping Tseng and Mark Wooden 2001, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Working Paper 8/01, University of Melbourne: Melbourne Institute of Applied Economic and Social Research.

¹¹⁸ McDonnell 2013; Philip Mirowski 2013, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown*, London: Verso; David Peetz and Georgina Murray 2012, ‘The financialization of global corporate ownership’, in: *Financial Elites and Transnational*

not simply because selling their house may be difficult, but because they are tied to family, schooling and community networks which are vital to their social well being. In a similar vein, many households are now dependent on two breadwinners and both need to find new employment opportunities if they seek to move. Other factors which cause reality to deviate from an idealised labour market include but are not limited to; time inconsistent decision making (especially with regard to education and skills), hysteresis, information asymmetries between employers and employees and of course asymmetric bargaining power. These, and other scenarios, make the notion of mobile workers in a self-adjusting labour market that quickly and automatically moves to a welfare maximising equilibrium an unrealistic benchmark for understanding modern labour markets and an unrealistic ideal to aspire to.¹¹⁹

Ultimately, an economy is an historical and social construct, not a natural system, and any understanding of the interconnections between industrial relations and the economy must encompass these institutional arrangements. The neoliberal mindset regards institutions as impediments to the 'natural' outcomes which would otherwise occur under the influence of market forces. What this fails to consider is the Polanyian dimension: that any historical momentum towards self-adjusting markets induces its own counter-movement, and this in turn become embodied in social institutions and, at times, legislative outcomes.¹²⁰ While some of the questions raised by the PC may be the wrong ones to pose, drawn as they are from a neoliberal textbook, they do nevertheless provide a useful opportunity for reflection. They encourage an assessment of the relationship between industrial relations and economic outcomes, a useful exercise at any time but particularly relevant at this current moment of global economic uncertainty.

Enterprise bargaining and economic performance

Industrial relations systems span a spectrum from centralised to decentralised and Australia is no exception, having occupied different locations on that spectrum at different times in the past. Since the early 1990s such movement has taken Australia much further towards the decentralised end, though clearly elements of centralisation—in the form of the FW Commission and the award system—still play a crucial role. When it comes to economic outcomes, the international literature suggests several conclusions. As far as wages dispersion is concerned, decentralised systems induce much greater inequality. Summarising the literature Joe Isaacs observed in 2005: 'On income distribution there appears to be more robust evidence that centralised systems, especially when accompanied by high union density, generally deliver lower wage dispersion'.¹²¹

¹¹⁹ Ian Watson 2011, *Does changing your job leave you better off? A study of labour mobility in Australia, 2002 to 2008*, Research Report, Flinders University: National Centre for Vocational Education Research; Richard Sweet 2010, *The Mobile Worker: Concepts, Issues, Implications*, Flinders University: National Centre for Vocational Education Research; John Buchanan, Sally Wright and Susanna Baldwin 2011, *Understanding and improving mobility: a scoping study*, Research Report, Flinders University: National Centre for Vocational Education Research.

¹²⁰ K. Polanyi 1957, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston: Beacon Press [1944].

¹²¹ Joe Isaac 2005, 'The Deregulation of the Australian Labour Market', in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press, p. 5.

When it came to economic performance, Joe Isaacs suggested that the evidence was less clear-cut. An influential study in the 1980s suggested that the best outcomes were associated with either highly centralised or highly decentralised systems, and those in the middle of the spectrum fared worst, particularly in terms of wage-cost inflation (the ‘hump-shaped hypothesis’ of Calmfors and Driffill).¹²² However, as Isaacs pointed out, more recent studies have suggested that this conclusion is based on a number of assumptions, many of which do not apply in the Australian setting. For example, criticisms of the intermediate position on the spectrum—which is where Australia was sometimes placed—assumed a closed economy. If there is exposure to international competition—as is the case with the Australian economy in the 21st century—then such competition constrains the ability of firms to pass on increased wage costs. When it comes to the more centralised end of the spectrum—such as incomes policies like the Indexation (1975–81) and the Accord (1983–91)—good outcomes at this end also required other elements to be at work, such as economy-wide coordination of wage fixing and an ability to enforce outcomes.¹²³

In concluding his review, Isaacs observed that ‘Econometric studies suggest that the Australian centralised wage-fixing episodes appear to have been successful in maintaining greater wage moderation, price stability and industrial peace’.¹²⁴ The drivers behind the move towards the decentralised end of the spectrum—towards industrial relations deregulation—were not related to economic performance, but to other industrial and political factors.

In a prescient warning in 1990 Frenkel and Peetz suggested that continuing along the path of award restructuring within a centralised framework would yield better outcomes for the economy. Instead the Business Council of Australia’s agenda for enterprise bargaining largely became the basis for the new decentralised system. As Frenkel and Peetz cautioned, the BCA agenda diverted attention away from the many factors which were likely to determine the future competitiveness of Australian firms:

the focus upon industrial relations structures diverts attention from many of the crucial issues that will determine the competitiveness of Australian enterprises: inadequacies in training, research and development, export orientation, product innovation, and time horizons.¹²⁵

In a 2001 study of enterprise bargaining Tseng and Wooden used the ABS business longitudinal study to assess productivity outcomes. They concluded that there was a correlation between firms with registered agreements and increased workplace-level productivity but they concluded

¹²² L. Calmfors and J. Driffill 1988, ‘Bargaining Structure, Corporatism and Macroeconomic Performance’, in: *Economic Policy* Vol. 3. No. 1, pp. 14–61.

¹²³ Isaacs2005b.

¹²⁴ Isaacs2005b.

¹²⁵ Stephen Frenkel and David Peetz 1990, ‘Enterprise bargaining: the BCA’s report on industrial relations reform’, in: *Journal of Industrial Relations* Vol. 32. No. 1, pp. 69–99, p. 97.

that it 'proved impossible to establish a direct causal relationship between the introduction of enterprise agreements and subsequent productivity growth'.¹²⁶

The assessment by Ron Callus of the move to enterprise bargaining suggested that economic performance was not enhanced by a more decentralised system. The complexity of the award system, with many thousands in existence in the early 1990s, was not resolved by the introduction of enterprise bargaining because most Enterprise Bargaining Agreements (EBAs) were written to operate in conjunction with the award. Moreover, where employers had multi-site operations, they ended up with more EBAs, and more complexity! As for the negotiating process, large amounts of management time became absorbed in the various rounds of bargaining, particularly in the development of the early EBAs. When it came to determining wages, there was no blossoming of enterprise-driven and productivity-determined outcomes. Rather, most enterprises simply sought to stay with a narrow band of annual wage increases which matched the norm within their industry sector. Finally, those areas of workplace operations which were most likely to result in productivity gains—such as work organisation, training and performance management, work-life policies—were increasingly relegated to human resource manuals rather than to EBAs. As Callus argued, employers would have gained more by working towards a system of industry-focussed awards rather than going down the path of EBAs.¹²⁷ By extension perhaps the broader point to take from this is that a hybrid model- involving less collective agreements which each cover more entities within an industry or labour supply chain (a model for which we advocate elsewhere in this submission) - is a desirable one.

A 2013 case-study assessment of enterprise bargaining echoed Callus's sentiments:

While the Business Council of Australia pointed to a panoply of advantages, we look at the other side of the argument. Decentralisation may be inefficient at a number of levels. First, there is the procedure of bargaining and the resources, expertise and time that is required. Second, there are the outcomes of bargaining, where despite a more individual focus, in many cases, outcomes demonstrate very little variation across enterprises. Finally, there are the collateral consequences of bargaining: conflict, reduced trust and disruption.¹²⁸

In his assessment of industrial relations and economic performance David Peetz drew the important distinction between individual workplace productivity and broader national outcomes:

There is some evidence that industrial relations policies that enhance fairness enhance economic performance. However ... the effects are conditional ... 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.

That is not the same as saying, though, that if IR policy is altered at the national level, it is going to have a widespread or noticeable impact on productivity. It is what happens at

¹²⁶ Yi-Ping Tseng and Mark Wooden 2001, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Working Paper 8/01, University of Melbourne: Melbourne Institute of Applied Economic and Social Research.

¹²⁷ Ron Callus 2005, 'The Re-regulation of Australian Industrial Relations: The Role of the Hancock Inquiry', in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press.

¹²⁸ Keith Townsend, Adrian Wilkinson and John Burgess 2013, 'Is Enterprise Bargaining Still a Better Way of Working?', in: *Journal of Industrial Relations* Vol. 55. No. 1, pp. 100–117.

the workplace that matters ...

And his overall conclusion echoed that of Jeff Borland's comments on bargaining power:

Many seek a holy grail in employment or industrial relations policy that is going to give a magic boost to the economy. But there is none—certainly not to be found in policies that aim to shift the balance of power in industrial relations one way or the other.¹²⁹

'Competitiveness'

In the 1980s it was clear that exposure of the traded goods sector to international competition entailed domestic producers dealing with import competition and exporters winning new markets. Many of the economic and industrial relations policies of the Hawke Government aimed to facilitate this strategy, particularly those associated with industry policy.¹³⁰ However, as the 1990s unfolded it became clear that competition was as much about capital flows as it was about traded goods or services. With the dominance of financialisation over the last 30 years, traditional assumptions about trade and competition are increasingly obsolete.¹³¹

Thomas Palley, for example, refers to the new global economic architecture, which is not a global marketplace but a global production zone for multi-national corporations. In the case of Australia, for example, what does it mean to talk about James Hardie being internationally competitive? The company is headquartered in Ireland (having moved from the Netherlands) and its major markets and production sites are now in North America. One has to ask where does a nation's 'comparative advantage' fit within this framework.¹³² Companies may now outsource their assembly work to China, their administration to India, and may locate their head office in an overseas tax haven. Where does the notion of nations trading with each other fit into this? In such an economy, production, capital allocation and employment decisions are not determined by decentralised markets but by bureaucracies responding to market and non-market factors. The old assumptions underpinning notions of global competition no longer need apply.

The complexity of modern international trade, particularly in advanced manufacturing, is evident in products like the iPhone. The design and intellectual property resides in California, key components come from Japan, Korea and Germany. Final assembly happens in China, but their share of the manufacturing revenue for this product is extremely small.¹³³ Yet most consumers

¹²⁹ David Peetz 2012, 'Does Industrial Relations Policy Affect Productivity?', in: *Australian Bulletin of Labour* No. 4, pp. 268–292

¹³⁰ John Button 1998, *As It Happened*, Melbourne: Text Publishing.

¹³¹ Thomas I. Palley 2012, *From Financial Crisis to Stagnation: The Destruction of Shared Prosperity and the Role of Economics*, New York: Cambridge University Press; Gérard Duménil and Dominique Lévy 2011, *The Crisis of Neoliberalism*, Cambridge, MA: Harvard University Press; James K. Galbraith 2012, *Inequality and Instability: A Study of the World Economy Just Before the Great Crisis*, New York: Oxford University Press.

¹³² See, for example, (John de Ridder 1986, 'Cumulative Causation Versus Comparative Advantage', in: *Journal of Australian Political Economy* No. 20 [October], pp. 44–48).

¹³³ In 2010, components of the iPhone 3 cost Apple \$172.46, two-thirds of which went to Japan, Germany and South Korea, while only \$6.50 went to Foxconn, the Chinese corporation involved in the final assembly (Sean Starrs 2014, 'The Chimera of Global Convergence', in: *New Left Review* Vol. 87. No. Second series [May-June], pp. 81–96).

think that their iPhones are made in China and that this illustrates how China is on the way to becoming the economic powerhouse of the 21st century.¹³⁴

In this global context where the mobility of capital is unrestricted, industrial relations are largely irrelevant. Multinational corporations have increasingly outsourced their production to locations with the cheapest labour—China initially, then Vietnam or Bangladesh as Chinese labour became more expensive—and then imported the output into their own country for sale through their existing distribution networks. Many of the brand names Australians grew up with are still on the shelves in stores, but no longer carry the ‘Made in Australia’ sticker. There is little that innovations in Australian workplaces can do to accommodate this kind of competition. Taken to its extreme, the race to the bottom is virtually a death spiral, something exemplified in Gina Rinehart’s speech to the Sydney Mining Club in 2012:

The evidence is inarguable that Australia is becoming too expensive and too uncompetitive to do export-oriented business. Africans want to work, and its workers are willing to work for less than \$2 per day. Such statistics make me worry for this country’s future.¹³⁵

Where do traditional IR concepts of ‘high performance’ workplaces, ‘best practice’, and so forth belong within the global economy of the 21st century? It is clear that the last 10 years has been illuminating in this respect. The competitive position of Australian manufacturing was seriously eroded by the high dollar, itself largely a result of the commodities boom. As Roy Green observed: ‘the large scale job losses in manufacturing over the last five years are attributable more to import competition than the labour-displacing technological change which has characterised manufacturing historically’.¹³⁶ The recent drop in the dollar has assisted some manufacturers (such as BlueScope Steel) but the exchange rate of the dollar remains unpredictable and the devaluation against our trade weighted index is far smaller than against the benchmark USD: its fortunes hinge less on the ‘fundamentals’ of the Australian economy and more on international developments (such as US Federal Reserve policy).¹³⁷ Thus while further changes in industrial relations might bring minor improvements in productivity, these kinds of incremental advances in international competitiveness are dwarfed by the currency equation, and by other factors such as taxation policy, development and deployment of new technologies and head-office investment strategies. The historical problems of Australia’s status as a branch-plant economy for

¹³⁴ More sober assessments suggest that the growing size of the Chinese economy does not signal economic dominance vis-a-vis the continuing power of Western and Japanese corporations. Moreover, the domestic problems of the Chinese state—both social and economic—are often overlooked in this hyper-scenario (Ching Kwan Lee 2007, *Against the Law: Labor Protests in China’s Rustbelt and Sunbelt*, Berkeley: University of California Press; Yasheng Huang 2008, *Capitalism with Chinese Characteristics: Entrepreneurship and the State*, Cambridge: Cambridge University Press).

¹³⁵ <http://www.smh.com.au/business/worlds-media-pan-rineharts-2-a-day-african-miner-comments-2.html#ixzz3TT81JLK2>

¹³⁶ Roy Green 2015, ‘Does Manufacturing Have a Future?’, in: *Ockham’s Razor* Vol. ABC Radio National. No. 22 February.

¹³⁷ The Australian dollar’s role in the ‘carry trade’, a form of currency speculation, has seen it fluctuate wildly for reasons unrelated to economic developments in Australia.

multinational capital were not resolved by the reforms of the 1980s, merely postponed, a sentiment reinforced by the impending departure of the automotive giants.

Where the Australian economy does maintain an edge that is largely immune to these developments is in advanced products and services. In the case of manufacturing, new innovations (such as 3D printing and advanced materials) and new fields for investment (such as renewable energy), hold out promise. But these opportunities need supportive policy to be realised, whether renewable energy incentives like the RET or innovation support such as a well resourced CSIRO and agencies like Commercialisation Australia. It is with grave disappointment that we see the current Government move backwards in these areas, which will underpin our manufacturing competitiveness in future, while attempting to reform our IR system, which will have little impact on competitiveness but will severely impact workers' wellbeing.

In the case of services, the future also lies in highly specialised niche markets for advanced knowledge. The history of the relocation of call centres in Australia—first to low wage regional areas like Tasmania, and then increasingly to much lower wage countries like the Philippines and India—highlights the vulnerability of service employment which is not based on advanced knowledge.

Within this framework what kinds of industrial relations arrangements are most suitable? In exploring the concept of 'industrial citizenship' Ron McCallum explored the work of Hugh Collins, whose writings encompassed three key themes: social inclusion, citizenship and competitiveness. In the case of the latter, Collins argued that this could be achieved through 'systems of management and flexible and highly trained employees'. However, 'for the flexibility to operate successfully ... industrial citizen employees require guarantees of fair treatment', embodied in appropriate labour law.¹³⁸ The implications of this are obvious: 'high performance' workplaces and the integrity and fairness of the industrial relations system go hand-in-hand in achieving international competitiveness. The current weaknesses in confronting globalisation lie not on the flexibility side of the ledger, but on the fair treatment side. The 'high performance with fairness' prescription is the polar opposite of the Rinehart prescription.

¹³⁸ Ron McCallum 2005, 'Industrial Citizenship', in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press.

6

Measuring the Economic Impacts of Industrial Relations Regulation: (B) Compliance Costs

The Fair Work Review Panel was unable to establish that the FW Act had increased compliance costs for business. It notes that it was not presented with any persuasive evidence of onerous compliance costs, when compared with earlier legislative frameworks¹³⁹.

To that end, it is unlikely that compliance costs in the industrial relations system have any significant impact on employment rates. Compliance costs are necessary, and in many cases unavoidable. Whilst the instability of legislative reform has in the short term increased compliance costs due to the need to adjust to new or changed regulatory requirements, in the longer term, the national system has reduced the overall compliance costs associated with doing business.

Main Sources of Costs

Transitional Provisions

Many of the complaints raised by employers about compliance costs related to the complexity and confusion that arose due to the transitional nature of some of the aspects of the Fair Work and Forward with Fairness reforms, including the phasing in of the modern awards. For example, some businesses reported to the Panel that they had to refer to the old award, the modern award and the transitional pay rate when seeking to establish the correct wages to pay their staff.

The workplace relations system in Australia has been in a state of transition since the commencement of WorkChoices in 2006. From that time, WorkChoices and each subsequent piece of legislation has included complex rules and regulations to assist with the transition from the old to the new legislation. Whilst these transitional periods have brought with them a level of complexity, they are unavoidable.

This time of transition is now at an end. For example, the transitional provisions in modern awards that may have preserved certain aspects (such as wage entitlements, industry allowances, casual loadings and penalties) of pre-reform modern awards ceased to operate on 31 December 2014. Other transitional provisions that applied to new employers to the federal system (e.g. non trading corporations, sole traders and partnerships in NSW, Queensland, Tasmania and South Australia) have now ceased to have effect as the phasing in of certain wages etc. have completed.

Since the beginning of 2015, the workplace relations framework is arguably now at its most simple. This is evident when you compare the FW Act to other workplace laws, for example to work, health and safety or workers compensation laws. Most employers in Australia can apply

¹³⁹ Review at 4.6.7

nationally relevant workplace laws to their employers¹⁴⁰, meaning that there is a single set of rights and obligations for all their employees (with the exception of some State based industrial jurisdictions that may still apply). The rationalisation and simplification of the award system has also drastically reduced the amount of regulation that once needed to be understood and applied to certain categories of employees. The modern award system has also made it easier for employers to monitor any changes to terms and conditions that have occurred arising from the award review process or other variation applications made by individual parties.

The Review Panel referred to the economic cost-benefit analysis conducted by Access Economics of moving to a single national workplace relations system. The Report found that moving a national workplace relations system would deliver small, but significant net benefits to employers. These savings would notably include payroll savings as a result of simplified terms and conditions for employees under modern awards.

However it should be noted that the award modernisation process, which commenced in 2008 and is largely still ongoing today (and is likely to continue until the end of 2016) has significantly increased both the costs and the need for resources within unions. Peak bodies such as the ACTU bear the significant weight of these proceedings given the breadth of our interest in the modern awards but also due to the increase in 'test case' proceedings. Whilst the rationalisation of modern awards has reduced the administrative burden on business, it has also meant that applications which once would have only affected a particular jurisdiction or sector of an industry, now has flow on effects for larger populations of the workforce. This has meant that this 'test case' litigation is bigger, both in the amount of evidence that is bought before the FW Commission but has also drastically increased the number of interested parties involved in the proceedings. This means that litigation takes longer to proceed and has increased the cost for those involved.

The Commonwealth Government had originally committed to approximately \$2 million dollars to peak bodies to assist them with the burden of these additional costs during this time, however those funds were later retracted.

Litigation

It might be considered trifling whether or not a document is stapled for the purposes of compliance with a provision of the Fair Work Act, however in context of the complexity of industrial relationships during bargaining, such factors, as trivial as they may seem on face value, go the heart of the objectives of the collective bargaining framework under the FW Act.

Where formal hearings are necessary, the FW Commission must perform its functions and exercise their powers in a manner that:

- Is fair and just;
- Is quick, informal and avoids unnecessary technicalities; and
- Promotes harmonious and cooperative workplace relations.¹⁴¹

The Fair Work jurisdiction is designed to be accessible for non-represented applicants and section 596 of the Act restricts the role of solicitors and practitioners during proceedings, who must seek leave to appear.

¹⁴⁰ The Fair Work Act applies to all 'national system employers' which is defined in s.14 of the Act.

¹⁴¹ Section 577 of the Act

Whilst we do not have access to precise figures, in our experience, we would suggest that a number of proceedings are heard with parties choosing to represent themselves. On those occasions, the FW Commission can and does accommodate, and to some degree assist the parties to ensure that the matter is heard on a fair basis. By example, Vice President Hatcher allowed an employer to be represented by counsel however given the imbalance in representation, the matter did not proceed by way of formal hearing, and rather it was dealt with by private conference under s.398 of the FW Act¹⁴².

The Vice President described the process and some of the issues encountered in this way:

“[3] The Star sought and was granted permission to be represented by counsel in the proceedings. I was satisfied that, given the factual complexity of the matter, the representation of The Star by counsel would allow the matter to be dealt with more efficiently, and I considered that this would outweigh any disadvantage that might flow from Mr Gurdil being self-represented. However, given the imbalance in representation, I considered that it would not be appropriate to hold a formal hearing in relation to the matter, and instead the matter was dealt with in a private conference under s.398 of the Fair Work Act 2009 (the Act). Nonetheless, evidence under oath or affirmation was received in the course of the conference, and cross-examination of witnesses was permitted.

[4] Notwithstanding the considerable assistance I received from counsel for The Star in the conduct of the matter, it was inevitable that difficulties would arise from Mr Gurdil being a self-represented lay person. Mr Gurdil was unable to properly test the evidence of The Star's witnesses by way of cross-examination, although he did ask them some questions. He advanced controversial propositions that were not supported by evidence and/or had not been raised with relevant witnesses. He was required to undertake the dual role of witness and advocate without a proper understanding of the difference between evidence and submissions. The conduct of the matter by way of a conference permitted me to take a reasonably interventionist and inquisitorial role so as to ameliorate some of these difficulties, but nonetheless they remained to a significant degree. I have therefore had to take account of Mr Gurdil's understandable difficulty in presenting his case in my assessment of the matter.”

The ability of the system to provide this flexibility demonstrates that the framework, at least in so far as dismissal applications are concerned is working effectively. Self-represented litigants also have the benefit of a number of helpful resources, such as the Fair Work Bench Books, to assist them in preparation for their matters. Of course, as noted by the Vice President, such measures are not capable of overcoming all the difficulties that exist in all legal systems. However further investment in education and information programmes is desirable.

In our view, parties who decide to engage legal representation do so as a matter of preference rather than necessity, as in the case of large employers and associations they would almost all have the internal capacity to be able to represent themselves. As such, the real driver of legal compliance costs is choice and preference and not due to the industrial relations system.

Union costs

There are also compliance costs that unions bear, that business do not. Administering and applying for right of entry permits for all officials has increased the compliance costs for unions.

¹⁴² Ismail Gurdil v The Star Pty Ltd [2013] FWC 6780 at [3].

This has included the provision of education and testing facilities, to enable union officials to satisfy the requirements of the FW Act to obtain their permits. Compliance costs for unions could be reduced by streamlining this application process and for example, the frequency of which they need to be renewed to remain current. At present, there are periods and instances of delay in having permits renewed which are partly a result of the administrative procedure required by the FW Act and partly a result of a strain on the resources of the relevant branch of the FW Commission. The latter could be avoided by a more generous funding allocation. We otherwise discuss the right of entry framework in chapter 21.

There are also prescriptive requirements around protected action ballots which add to compliance costs. We consider these requirements in chapter 14.

Finally, there are also a number of requirements under the RO Act. These are costs which have increased in recent times due to changes in the regulatory environment, however the core of the RO Act is well understood, appropriately deals with transparency and democracy and has been consensually supported for some 15 years. Further changes, opposed by unions, have been brought before the Parliament recently and have been rejected. We understand the union regulation scheme in the RO Act is out of the scope of the present inquiry however if we are mistaken we are able to provide further information on request.

7

Measuring the Economic Impacts of Industrial Relations Regulation: (C) Gaps and Avoidance Incentives.

We noted in our introductory chapter that the combination of concessions to capital and a failure to keep pace with changes in the labour market have resulted in the interests of labour losing ground under the industrial relations framework. This lost ground takes the form of regulatory gaps and concomitant incentives for capital to exploit them. In this chapter, we provide some of examples of these effects, along with some recommendations for rectifying them.

“Independent” Contractors

The common law legal framework surrounding independent contractors is well rehearsed. Employees are engaged under a contract *of* service. An independent contractor is engaged under a contract *for* service. Employees owe common law duties to the employer which derive from the contract of employment, for example the duties of good faith and fidelity. Employees usually cannot work for another employer, particularly a competitor of their employer. Independent contractors and the principal engaging them establish their commercial relationship at arm’s length and any duties or obligations arise from the terms of the contract for service. An independent contractor is not bound to the one principal and can provide services to a range of principals, who can be in the same industry and in competition with one another.

Inherent in this summary of the legal framework is an understanding that independent contractors are free agents in a commercial sense with the same standing as those they provide services for. The framework becomes controversial when the “business” that is the independent contractor is constituted by a single worker, as many are: 8.5% of employed persons as at November 2013 (over 986,000 people) report themselves to be in this category¹⁴³. Where this is the case, the expression “independent contractor” takes on the character of a convenient legal fiction which obscures the immutable bond between a worker and their labour, in order to create a commodity. Without a worker in sight, most law by default recognises no labour, only commerce.

Policy makers and the courts are not entirely blinded by this illusion. A case in point is the collective bargaining authorisation provisions contained in Part VII of the *Competition and Consumer Act*. The ACCC’s guidance material in relation these provisions states:

The Act encourages vigorous competition between businesses by prohibiting various forms of anti-competitive conduct. Generally, the Act requires businesses to act independently of their competitors when making decisions about pricing, other terms and conditions or who to deal with.

¹⁴³ ABS 6539.0 Tables 1 and 11.

However, it is recognised that small businesses face many challenges when negotiating with larger businesses. At times, small businesses may feel that they have little or no bargaining power in their dealings with big business and little influence on terms and conditions, including prices.

It has been recognised that small businesses are often more likely to be heard on terms and conditions if they join with other small businesses to collectively negotiate with a larger business, rather than one-on-one. However, negotiating collectively may breach the Act.

Businesses are able to use the authorisation process to obtain immunity from legal action under the competition provisions of the Act for collective bargaining arrangements that are in the public interest. Alternatively, small businesses can obtain immunity from legal action under the Act for such arrangements by lodging a collective bargaining notification.¹⁴⁴

Whether the regime overseen by the ACCC goes far enough in protecting the interests of independent contractors is a separate issue (and we say it does not) – the point is that the parallels between those contractors and those of employees have been identified. Further evidence of the tacit recognition of contracting as a form of labour comes from the laws that establish the Superannuation Guarantee system, which provide a deeming provision for those purposes of that scheme that “If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of that other party to the contract”¹⁴⁵. The Australian Tax Office, which supervises the scheme, has also issued a Ruling on the topic¹⁴⁶, which includes the following:

“Subsection 12(3) was intended to extend the scope of the SGAA beyond traditional employment relationships to take into account some independent contractors who principally provide their own labour to meet obligations under a contract. The Second Report of the Senate Select Committee on Superannuation, Superannuation Guarantee Bills, noted (at page 146) that subsection 12(3) was ‘designed to include a person who may not be an employee in the normal sense but who is in fact not very distinguishable from an employee.’ However, the operation of subsection 12(3) has, in our view, been restricted by the interpretation which the courts placed on the equivalent expression in paragraph (a) of the definition of ‘salary or wages’ in subsection 221A(1) of the Income Tax Assessment Act 1936 (ITAA 1936) (‘paragraph (a)’)...”

“The ATO view is that some contracts for services will be wholly or principally for the labour of the individual contracted even though the individual is not a common law employee. Therefore, subsection 12(3) must be considered where there is no common law employment relationship or where there is doubt as to the common law status of the individual.

Where the terms of the contract in light of the subsequent conduct of the parties indicates that:

- the individual is remunerated (either wholly or principally) for their personal labour and skills;*
- the individual must perform the contractual work personally (there is no right of delegation); and*

¹⁴⁴ Australian Competition and Consumer Commission, Guide to Collective Bargaining Provisions, 2011.

¹⁴⁵ *Superannuation Guarantee (Administration) Act 1992*, s. 12(3)

¹⁴⁶ SGR 2005/1, <http://law.ato.gov.au/pdf/pbr/sgr2005-001.pdf>

· the individual is not paid to achieve a result (paragraphs 43 to 47 discuss when a contract is one to achieve a result),

the contract is considered to be wholly or principally for the labour of the individual engaged and he or she will be an employee under subsection 12(3)."

These sentiments were echoed in the recent draft report of the Harper Competition Policy Review:

Ordinarily, collective bargaining undertaken by competing businesses would be harmful to competition. However, small businesses dealing with large businesses often face an imbalance in bargaining power. That imbalance can result in commercial outcomes that are inefficient or unfair. Permitting small business to bargain collectively in certain circumstances can redress the imbalance in power and result in more efficient market outcomes. It was for this reason that the notification process was introduced.¹⁴⁷

Further, the *Independent Contractors Act 2006* clearly recognizes the inherent potential for unfairness in bargaining relationships and provides for a court to review and vary contracts on grounds including that the contract is unfair, harsh, unconscionable, unjust, against the public interests or is designed to avoid the provisions of the FW Act or an Award or Agreement made under the FW Act¹⁴⁸. In reviewing contracts under the *Independent Contractors Act*, the court may have regard to numerous factors including the relative strengths of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work.¹⁴⁹

With one exception, independent contractors are excluded from most of the aspects of the FW Act which otherwise apply to employees. For example, independent contractors cannot take protected industrial action in order to increase their terms and conditions of employment, they cannot seek relief from unfair termination of their contract for service, they have no rights to leave such as personal/carer's leave or annual leave and they are not covered by awards. However, once again there is limited recognition that there interests may be compared to those of employees in Division 3 of Part 3-1 of the FW Act.¹⁵⁰ An independent contractor must not suffer adverse action if her or she has a workplace right, has/has not exercised a workplace right, or proposes to/not to exercise a workplace right.¹⁵¹ The limitation is that, unlike employees, independent contractors are not protected from adverse action if they make a complaint or inquiry about the terms of their engagement.¹⁵² This is a key workplace right, the existence of which provides substantial protection for employees who find themselves the subject of adverse action if for example they make a complaint about the non-payment of superannuation, raise issues about safety at work, or inquire about their pay slips.

¹⁴⁷ at p. 249

¹⁴⁸ s. 9

¹⁴⁹ S. 15

¹⁵⁰ Principals also receive some protections. See section 342 for details for both independent contractors and principles.

¹⁵¹ See ss 340 and 342

¹⁵² S 341(1)(c)(ii)

The exception to the general rule relates to outworkers in the Textile, Clothing and Footwear Industries. These workers have received special protection in the relevant award and State and Federal legislation in recognition of their position of vulnerability, proven exploitation and the thorough and effective advocacy of their union on their behalf.

Workers who are incorrectly engaged as independent contractors when in fact they should be employed face a number of significant disadvantages. These are disadvantages that have a direct adverse impact on the worker themselves, but also negatively impact on the economy and social standards.

Particularly for workers who are doing low paid jobs covered by award classifications (e.g. cleaners, cooks, delivery drivers) the impacts of being incorrectly classified are severe. By virtue of the fact that they are not engaged as an employee they prevented from relying on the security of the basic minima required by the industrial relations system, particularly under the FW Act. For example they are not entitled to NES minimums, minimum wages, or award conditions. People who are ostensibly employees are receiving less than they should. Conversely businesses are able to avoid meeting their minimum obligations to workers and more widely to society.

This creates serious issues for the labour market in terms of not only workers, but other employers and principles, who in an effort to compete with those in breach of the law, feel that they must also undercut the minimum protections, perhaps by also engaging workers as independent contractors. There are losses to society in terms of a fair share of tax being paid by business to contribute to areas such as health and education.

In our view, there should be absolutely no ability for any worker to receive less than the national or award minimum wage. Every worker has a right to be provided with all rights, entitlements and protections, afforded under the FW Act, an award, or other industrial or health and safety legislation. If we can agree (as we have for over 100 years in this country) that labour standards are inviolable and should not be able to be contracted out of simply by labelling something that which it is not, there is no rational basis to make distinctions between forms of labour other than a deliberate policy choice to declare some citizens as second class.

When does the law see a worker as an independent contractor?

How a single worker is classified as an employee or independent contractor is of critical importance and has been dealt with at great length by Australian courts. The rationale for the courts looking beyond the façade of the legal construct in such cases is a policy one, captured succinctly in the oft referred passage in *Re: Porter; Re Transport Workers Union of Australia*¹⁵³: , "...the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck." Expressing that rationale within the rigid confines of the common law has however proved problematic.

In *Stevens v Brodribb Sawmilling Company Pty Ltd*¹⁵⁴ the issue of whether a worker was an employee or independent contractor was determined by looking at the totality of the relationship

¹⁵³ 34 IR 179 at p.184

¹⁵⁴ [1986] HCA 1

as well as the key factor of control. *Hollis v Vabu Pty Ltd*¹⁵⁵ moved away somewhat from reliance upon whether a worker was under the control of the person who had hired them and introduced the multi-factor test. This involves considering the totality of the relationship with guidance from multiple factors or indicators. No single factor will be determinative of the relationship. However, a key factor in the test is still ‘control’ – that is does someone else exercise control over the worker or is the worker able to exercise control over their own work?

Application of the test to the same set of facts and circumstances by different people can lead to different results. There is also scope for the various indicia to be manipulated so that a particular or desired outcome is achieved. This demonstrates that the test is not clear cut and can lead to confusion and inefficiency in its application.

An illustrative example is the decision of Justice Bromberg in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 (**On Call**). The case concerned a business that provided interpretation and translation services to clients. The interpreters and translators had previously been deemed to be independent contractors by On Call and this had previously been confirmed by the ATO in 1989. However, the ATO later determined that the interpreters and translators were in fact employees and that they were owed superannuation contributions. Justice Bromberg said:

“However, the absence of a simple and clear definition which explains the distinction between an employee and an independent contractor is problematic. It is troubling that in the circumstances of the bicycle couriers dealt with in *Hollis*, the parties involved needed to travel to the High Court to obtain a clear exposition of the legal status of the couriers.”¹⁵⁶

Table 8 usefully summarises the key factors in the multi-factor test between independent contractors and employees.

Table 8: Indicia and the multi-factor test

Indicia	Independent Contractor	Employee
What are the terms of the contract between the worker and the boss?	Contract specifies it is for service. Says 'independent contractor'.	Contract specifies it is of service. Says 'employment', 'employee' etc.
What was the intention of the parties at the time of making the contract?	Intention was to create an independent contracting relationship, a relationship at arm's length	Intention was to employ the worker, to create an employment relationship, to integrate the worker into the employer's business
How much control does the 'boss' have over the work the worker does?	No specifications about hours of work, perhaps a specification about when the	Set hours to work within, e.g. 38 hours per week, core hours between 9 am and 5

¹⁵⁵ (2001) 207 CLR 21

¹⁵⁶ *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 at [206]

	work will be completed by	pm, sets out times for lunch etc.
Is tax deducted from payments?	No tax is taken out	Tax is taken out of wages paid
Can the worker engage another person to do the tasks of the job?	The worker can sub-contract the work, that is they can get another person to do it, personal performance is not required	The worker must do the work themselves, they cannot get anyone else to do it
Is the worker paid superannuation?	A contractor may not be paid superannuation (unless wholly or principally contract for labour of the person – see ss12(3) SGA Act)	An employee receives superannuation guarantee payments
Does the worker receive paid sick, carer's, annual or long service leave?	A contractor does not receive paid leave. They must administer their own leave	An employee is entitled to paid personal/carer's leave, annual leave, long service leave
Who provides the tools or equipment required for the work?	A contractor provides their own tools and equipment and pays to up keep	An employee uses their employer's tools and equipment and the employer pays for the upkeep
Does the worker have to wear a specific uniform?	A contractor wears their own clothing, they are not required to wear the uniform of an employer	An employee may be required to wear their employer's uniform
Can the worker do work for anyone else?	A contractor can work for any number of principals	An employee can generally only work for the one employer
Does the worker have to comply with any manuals, policies, procedures?	A contractor does not have to comply with policies and procedures of the principal	An employee may have a contractual obligation to comply with all policies and procedures of their employer
How is the worker paid? Lump sum when they finish the work, weekly, hourly, after they submit an invoice?	A contractor usually invoices the principal at the completion of the job and is paid sometime after sending	An employee is paid by the hour and receives payment either weekly, fortnightly or monthly

	the invoice	
Who bears the risk for profit or loss?	A contractor bears their own risks for making a profit or loss	An employee does not bear risk in relation to whether their employer makes a profit or loss
How integrated is the worker into the 'bosses' business?	A contractor is not part of the principal's business	An employee is part of the employer's business
Who pays workers compensation premiums?	A contractor pays their own workers compensation	An employee's employer must be insured for workers compensation which the employee is eligible to access
Who is responsible for maintaining tools and equipment?	A contractor must pay to upkeep their tools and equipment	An employee uses the employer's tools and equipment and the employer pays for their upkeep
What is the arrangement in relation to goodwill created through the work?	A contractor is running their own business and keeps the goodwill they create from doing business	An employee generates goodwill for their employer, not for themselves

This complicated state of affairs rightly begs the question as to whether there might be a more certain or reliable mechanism for the law to give effect to what is, essentially, an effort by the courts to give primacy to substance over form.

Recognise labour as labour

As noted above, many limbs of the law have already moved beyond the legal fiction of “independent contractor” to provide labour like rights to these group of workers on the basis that they have labour like interests. It is the core industrial relations law – the FW Act - that is behind the curve.

Rather than applying the multi-factor test to each situation where there is doubt as to a worker’s true status, we suggest it would be more efficient and would provide more certainty if the ATO’s superannuation eligibility test as contained in Ruling SGR2005/1 was built upon to form a new statutory test to be contained in the FW Act. Whether this would involve a deeming provision or, in the alternative, more substantial changes in terminology (such as to refer to “national system workers” and “national system enterprises”) should be thoroughly considered, however we state our preference for the latter given its harmony with the other changes we recommend in other chapters.

The advantages of this response to independent contracting is more efficient than the multi-factor test or the deliberative processes of the ACCC, there is greater likelihood of consistent

decision making and there is much greater fairness for and between workers. To fully realize this objective, the test as stated by the ATO requires revision such that it achieves its purpose notwithstanding assertions in any contract that “the independent contractor is permitted to subcontract”. If primacy is to be given to substance over form, the focus ought not be the words on the page of the contract but rather whether, in practice, the worker *does* subcontract the work to another person.

The fairness consideration should weigh greatly in favour of workers in that in many cases their labour is the only thing they have to offer an employer or principal. If they are offering up their labour they should receive the benefit of the same protections and rights as others who do so.

Any concept or structure which attempts to classify any labour as a commodity should be resoundingly rejected. This is the case even where doing so erodes what some might describe as “flexibility” in this context. Flexibility that is constituted by gaming or avoidance behavior which undermines the integrity of labour protections is not, in our view, desirable. The law must move from a conditional acceptance of this principle to an absolute one.

Do any aspects of the WR system represent a barrier to independent contractors?

If an independent contractor is a genuine business engaged to deliver a specified product or service in a manner of their own choosing and not remunerated principally for their own labour or skills, the industrial relations system does not present a barrier to their endeavor. What the system does do, insufficiently, is allow labour to take limited steps in bargaining with an individual employer to reduce the incentive for that employer to outsource their jobs to those businesses. This generally takes the form of a commitment that the relevant employer will ensure that the contractor’s labour is engaged on terms and conditions that are no less favourable than those contained in the collective agreement between the employer and its direct employees. These consensual arrangements are unobjectionable, and have the desirable side effect of encouraging would-be contractors to compete on a more innovative basis than labour costs. The discussion in chapter 14 concerning the content of bargaining discusses this matter in more detail.

The real barriers lie in the difficulties faced by genuine small business suppliers (such as newsagent shops dealing with major media outlets) and individual “contract” workers in asserting bargaining power in the labour market. We have suggested above an approach concerning the latter. We note that the barriers faced by the former were discussed in the Draft Report of the Harper Competition Policy Review and recommendations were made for some improvements (a final report is due to be delivered in March).

Were our recommendation regarding individual contract workers not accepted, it would remain necessary for the law to adopt a more coherent policy toward this issue. This could involve the following elements:

- A secondary legislative infrastructure for the notification and authorisation of collective bargaining be housed in the FW Act, administered by the FW Commission and applicable to ABN holders who are natural persons ordinarily remunerated for their skill or labour performing work that would (but for their status as a “contractor”), be covered by an award. The legislative framework would allow workers so authorised to also withdraw

their labour in pursuit of their bargaining claims, consistent with our international obligations;

- The FW Commission should be empowered to resolve the types of claims today made under the *Independent Contractors Act 2006* where the contractor making the claim is one that meets the test we proposed above to be included and applied in the FW Act more broadly. The FW Commission offers reduced costs, flexible formats for dispute resolution and expedited determinations. Further, it is well placed and informed to assess the broad issues of fairness that such analysis requires and is the ideal authority to make comparisons between contracts and the instruments that it makes and approves under the FW Act. We recognise that the role of the FW Commission would, for technical reasons, potentially need to be framed as having a discretion to make an Award or Order to resolve disputes between contracting parties having regard to the criteria referenced in the *Independent Contractors Act*.
- A substantial revision of the present prohibitions on “sham contracting” and to relevant tax law. These matters are considered below.

Are the current provisions in the FW Act sufficient to discourage sham contracting?

Sham contracting is dealt with in Division 6 of Part 3-1 General Protections.

Currently where the multi-indicia test indicates that a worker is actually an employee, while they may have been engaged as an independent contractor, it is necessary to consider whether the sham contracting provisions apply.

Broadly speaking, the sham contracting provisions are concerned with to intentionally or recklessly disguising an employment relationship as an independent contracting arrangement. As set out above, an employer will usually do this to avoid responsibility for employee entitlements such as minimum wages, award provisions and NES entitlements. This relationships to which the provisions are directed can present in different ways, for example:

- It is commonly found that employers will pay ‘all-in’ hourly rates. Under this system the employer simply ignores the various entitlements arising under industrial awards and agreements and pays a loaded all-inclusive or ‘all-up’ hourly rate in lieu of wages and other benefits such as annual leave, public holidays, sick leave, penalty rates and so on. Employers often seek to rely on the use of ‘all-in’ payments as self-serving evidence of the existence of a bona fide contract for services.
- Occasionally there are variations on the theme which can include the payment of some conditions of employment such as superannuation or workers compensation, as well as the hourly rate.
- In other instances the employer may have some of his/her workforce on all-in payments and others as employees receiving wages, conditions and statutory benefits .
- In other instances, there may be multiple complex factors that make a sham contracting arrangement attractive to both parties. For example, some other industries where sham

contracting is prevalent are also industries with a relatively high prevalence of undocumented workers.¹⁵⁷

Under the sham contracting provisions of the FW Act¹⁵⁸ an employer cannot:

- (a) represent a current employment relationship or a proposed employment relationship as an independent contracting arrangement;
- (b) dismiss or threaten to dismiss an employee for the purpose of re-engaging them as an independent contractor; or
- (c) make a knowingly false statement to persuade or influence an employee to become an independent contractor.

A person who has made a representation under section 357 that an employment relationship is a contract for services may be able to rely on subsection 357(2) if he or she can prove that either her or she did not know, or was not reckless as to whether, the relationship was an employment one rather than one of independent contracting. Notably, the provisions do not actually prohibit employers from engaging employees on sham contract arrangements.

We submit that the current provisions in the FW Act are not sufficient to discourage sham contracting, and that solutions must lie not only in the FW Act, but also elsewhere.

Whilst sham contracting has its own unique causes and effects, it needs to be characterised as a subset, or particular manifestation, of the broader long-run shift to more precarious, non-standard forms of work and especially the growing intensity and vertical and horizontal scope of subcontracting that has occurred within the broader economy, but with particular severity in the construction industry. The forces driving sham contracting are often not simply from firms looking to evade workplace employment provisions or dodge tax and superannuation laws. The competitive pressures driving sham contracting are occurring across the economy, and often right from the top of production value chains. However, economic and social regulation should not occur in ways that have the effect of undercutting employment rights and safety, nor should the cost pressures be allowed to justify tax avoidance and evasion.

“Towards more Productive and Equitable Workplaces” suggest that there is a lack of information about the scale of sham contracting. Despite citing Stewart and Roles observations that ‘converting’ employment relationships into contractor-type arrangements is now standard practice at labour law firms, the report uses this supposed information gap to essentially only slightly tighten the existing provisions in the FW Act.

A range of studies demonstrate that while currently sham contracting is not evenly distributed across industries, in some industries such as the construction industry it is significant and problematic. Indeed, the problem of sham contracting has been an issue in the construction industry for many years, and a range of reports have made estimates about its scale and implications. For this reason, we focus our analysis of sham contracting in the construction industry, and provide a detailed case study of that industry at Appendix 3, drawing on existing

¹⁵⁷ See DIAC, Discussion Paper - Review of Employer Sanctions Legislation – Combating Illegal Work in Australia, June 2010, p4; and DIAC, Immigration compliance – at a glance (2009-10 as at 31 March 2010), May 2010.

¹⁵⁸ ss 357 – 359

empirical research to establish that the scale of sham contracting is a serious problem, it permits cost and risk shifting to those who cannot manage those risks, it encourages low road construction governance, it discourages the development of innovation and human capital, it accentuates health and safety problems in the industry and it permits damaging fiscally tax minimisation and evasion.

The case study on sham contracting does three important things:

- it examines the scope of dependant or 'sham' contracting in the Australian construction industry,
- it examines the causes of the growth of this form of employment, and
- it analyses the effects of sham contracting.

Understanding the scope, causes and adverse effects of sham contracting within the context of the construction industry is useful and relevant given that in 2014 the Australian construction industry directly employed 9 per cent of all workers (ABS 2014a: Table 4) and accounted for 8 per cent of GDP (ABS 2014b: Table 5). Construction also remains the most significant area for use of independent contractors as measured by ABS surveys¹⁵⁹.

The case study concludes that the current regulatory framework for dealing with the problem is inadequate, and therefore action is required, including:

- changes to the FW Act to make employers in the broadest sense liable for knowingly or unknowingly setting up sham contracting arrangements, as well as those covering misrepresentations, inducements, and dismissal and re-engagement, associated with sham arrangements.
- changes to the Income Tax Assessment Act to ensure that artificial business structures and sham contracting arrangements are not being encouraged explicitly or by omission. Tax laws should not be easily used to arbitrage between employment categories to undermine the tax base. Instead they should be based on the simple efficient and equitable principle that if two workers are doing the same job under the same conditions, they should be paying the same tax.

The apparent preference for permitting a "sham contracting defence" of misrepresenting a contract of employment only when the firm did not know is insufficient. As the case study bears out, in contracting industries, with a hierarchical system of sub-contracting, the downward pressure from head contractors can be seen to be a direct cause of further levels of sub-contracting, including the need by mid-tier sub-contractors to effectively pass on the risks and costs that the head contractor has shifted, by tendering and re-tendering. A more process and value chain concept of liability needs to be considered to deal with the new realities of employment in production chains and networks, and the ability of those networks to de-link costs/risks and economic returns, in part by unbundling attributes and functions of the employment relation.

¹⁵⁹ ABS 6359.0 – Forms of Employment – November 2013

“Casual” Employment

The growth in casual employment seen in previous decades has occurred with little regulatory oversight. The oversight that has occurred has been characterised by a lack of a unified position as between the common law, industrial tribunals and the legislature over what casual work is or what it should be. The practical result has been that, in large measure, employers decide where the boundaries are at their whim by merely by choosing to describe a worker as casual, with the attendant consequences that these workers accrue no leave or redundancy entitlements (among other things). Through the present review of modern awards, unions in many sectors are attempting to give workers more choice about their form of engagement, however there are more comprehensive policy changes that have been suggested to overcome the difficulties faced by large numbers of the casual workforce.

There is no single accepted definition at common law as to what a casual employee is, rather there a series of recognised features of casual employment that centre upon the informality, uncertainty and irregularity of work. The presence or absence of those features is used by the common law to label, invariably retrospectively, an employment relationship as a casual one. Some of the features used by the courts to identify casual employment were referred to in *Williams McMahon Mining Services*¹⁶⁰:

“...the concept of a casual worker being involved in work which is discontinuous – intermittent or irregular – remains relevant and helpful in understanding the concept today. In *Reed*, Moore J, at IR 425, by reference to those and other well known authorities, observed:

A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual.

I do not consider that these observations by Moore J should be read other than as general observations concerning the concept of casual employment. Certainly, they were not, in my view, intended to be observations about employment on a casual basis under any particularly statutory or regulatory regime. They are a helpful commentary on what the early authorities, such as *Doyle*, have to say on the topic of what casual employment is under the general law today.

This in my view is confirmed by what the Full Federal Court said in *Hamzy v Tricon International Restaurants* [\[2001\] FCA 1589](#); [\(2001\) 115 FCR 78](#) (*Hamzy*), at [38]; namely, that “casual employee” embraces “an employee who works only on demand by the employer” and that “the essence of casualness is the absence of a firm advance commitment as to the duration of the employee’s employment or the days (or hours) the employee will work”.

Similarly, the Western Australian Industrial Appeals Court in *Melrose Farm Pty Ltd t/as Miles Away Tours v Milward* [\[2008\] WASCA 175](#); (2008) 175 IR 455 (Le Miere J with Steytler and Pullin JJ agreeing) whilst acknowledging there is no definitive test, adopted this approach, that “the essence of casual employment is the absence of a firm advance

¹⁶⁰ [2010] FCA 1321

commitment as to the duration of the employee's employment or the days (or hours) the employee will work".¹⁶¹

However, industrial tribunals and legislatures have taken a different, somewhat agnostic path. In response to observed changes in the organisation of work and community expectations, casual employees who had a requisite history of "regular and systematic engagements" were given access by legislation to unfair dismissal rights, notwithstanding that the notion of "regular and systematic engagements" did not sit well with what the common law had identified as casual employment. This led to some interesting and strained commentary from industrial tribunals. For example, in *Ryde-Eastwood Leagues Club Limited v Taylor*¹⁶², a Full Bench of the NSW Industrial Relations Commission said:

"It is apparent that two classes of employee *colloquially described* as "casual" can readily be identified in the organisation of industrial relationships. The first class refers to those employees who are *truly casual* in the sense that there is no continuing relationship between the employer and the employee. The second class is where there is a continuing relationship which amounts to an ongoing or continuing contract of employment; it is this second class of contract which, for the reasons set out earlier by us, is of such a nature as to attract the Commission's jurisdiction..¹⁶³ (emphasis added)

Referring to the above passage, a later Full Bench of that Tribunal said:

"We do not consider that *Ryde Eastwood Leagues Club v Taylor* represents an acceptance (as opposed to a recognition) by the Commission of the notion of the "permanent casual" as a form of employment. The question whether an employee is engaged on a casual basis for the purpose of determining jurisdiction (such as in an unfair dismissal matter) does not disturb the well established jurisprudence surrounding the true nature of casual employment, nor does it represent a review by the Commission of the casual employment model against statutory standards of fairness or reasonableness. Indeed, decisions such as *Ryde Eastwood Leagues Club v Taylor* highlight further the changes we have described in the management of casual employment vis a vis permanent employment.

There was no shortage of evidence in this matter, some of which is extracted earlier, to demonstrate the way in which the features of casual employment have, in many instances, changed from short term and unpredictable to long term and regular. The storeperson engaged by Bonds Industries Pty Limited is a clear illustration: the employee has been engaged for over six years, working a 38 hour week on regular morning shifts, yet was labelled and paid as a casual employee. We do not consider such long term casual engagements to be isolated incidents, but rather reflect the increasing trend."¹⁶⁴

More recently, the FW Commission has indicated that, contrary to the view adopted by its NSW counterpart, the notion of the permanent casual has moved beyond "recognition" to "acceptance", with the result that at safety net level the employer choice as to whether appoint a person as a casual or not is merely the exercise by them of a discretion to opt out of parts of the safety net and elect to pay a casual loading instead. This unfortunate circumstance was ironically said to be in part the result of efforts of the legislature and the organised labour movement to give better rights to persons described, incorrectly based on the law at the time the developments occurred, as "casual workers":

¹⁶¹ At [33]-[36]

¹⁶² [1994] NSWIRCOMM 112

¹⁶³ At [401]-[402]

¹⁶⁴ *Secure Employment Test Case* [2006] NSWIRComm 38 at [233]-[244]

“ All of the modern awards contain a definition of casual employment. Those definitions, notwithstanding some variation in wording, have the same core criteria:

(i) That the employee was “engaged” as a casual - that is, the label of “casual” is applied at the time of time of engagement; and

(ii) That the employee is paid as a casual, and specifically, the employee is paid a casual loading (set at 25% in all of the modern awards, subject to transitional arrangements), which loading is paid as compensation for a range of entitlements that are provided to permanent employees but not to casual employees.

For example, clause 14.1 of the *Manufacturing and Associated Industries and Occupations Award 2010* provides:

14.1 A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of one thirty-eighth of the minimum weekly wage prescribed in clause 24.1(a) for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee’s all purpose rate.

That award excludes casual employees from the entitlement to annual leave, personal leave and the other entitlements for which the casual loading compensates.

Clause 14 of the Construction Modern Award relevantly provides:

14.1 A casual employee is one engaged and paid in accordance with the provisions of this clause.

14.2 A casual employee is entitled to all of the applicable rates and conditions of employment prescribed by this award except annual leave, paid personal/carer’s leave, paid community service leave, notice of termination and redundancy benefits.

14.3 An employer, when engaging a person for casual employment, must inform the employee, in writing, that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, the actual or likely number of hours to be worked, and the relevant rate of pay.

...

14.5 A casual employee must be paid a casual loading of 25% for ordinary hours as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer’s leave, community service leave, notice of termination and redundancy benefits and public holidays not worked.

Again, this approach to the identification of casual employees was not an innovation in the modern awards. Many, if not most, of the pre-reform awards, and certainly the main pre-reform awards, adopted this approach.

None of the modern awards adopt the general law approach to the identification of casual employees. Indeed, a number of modern awards contain ‘casual conversion’ provisions (typically where casual conversion was a feature of the key Federal awards and or NAPSAs replaced by the modern award) that allow for an employee who is engaged and paid as a casual, but who works systematic and regular hours for a sufficient period, to seek conversion to permanent full time or part time employment. For example, the Construction Modern Award contains such a provision, clause 14.8, which includes the following:

14.8 Casual conversion to full-time or part-time employment

(a) A casual employee, other than an **irregular casual employee**, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

(b) For the purposes of clause 14.8(a), an **irregular casual employee** is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

...

(h) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

...

Such 'casual conversion' provisions were not uncommon in pre-reform Federal award and presuppose that the general law approach to identifying casuals does not apply in the Federal award context and that a provision such as this is required if an employee who is engaged and paid as a casual is to be treated as anything other than a casual for the purposes of a modern award.

....

The FW Act defines the expression "long term casual employee" in s.12 to mean

long term casual employee: a national system employee of a national system employer is a ***long term casual employee*** at a particular time if, at that time:

(a) the employee is a casual employee; and

(b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

This very definition suggests that legislature did not intend the expression "casual employee" to call up the general law approach. If the criterion in (b) is satisfied then the employee would likely not be a "casual employee" under the general law approach but the definition presupposes that an employee who satisfies the criterion in (b) can still be a "casual employee" within the meaning of (a).

Moreover, that definition is used in only two places in the FW Act:

(i) in s.65(2)(b) in relation to the right to request flexible working arrangements to long term casual employees (casuals being otherwise excluded); and

(ii) in s.67(2)(a) in relation to parental leave.

In each case, the definition is used to extend those rights to long term casual employees, being rights to which casual employees are otherwise expressly excluded.

.....

In summary, the FW Act provides for the regulation of terms and conditions of employment of national system employees through an *interrelated* system of the National Employment Standards, modern awards, enterprise agreements (and, in some cases, workplace determinations or minimum wage orders). Having regard to the objects and purpose of the legislation, it is obvious that the legislature intended that those components should interact consistently and harmoniously. We conclude that on the proper construction of the FW Act the reference to “casual employee” in s.123(3)(c) and the rest of the NES - and, indeed, elsewhere in the FW Act - is a reference to an employee who is a casual employee for the purposes of the Federal industrial instrument that *applies* to the employee, according to the hierarchy laid down in the FW Act (and, if applicable, the Transitional Act). That is, the legislature intended that a “casual employee” for the purposes of the NES would be consistent with the categorisation of an employee as a “casual employee” under an enterprise agreement made under Part 2-4 of the FW Act (or under an “agreement based transitional instrument” such as a workplace agreement or certified agreement made under the WR Act) that applies to the employee or, if no such agreement applies, then consistent with the categorisation of an employee as a “casual employee” within the modern award that applies to the employee. Subject to any terms to the contrary, a reference to a “casual employee” in an enterprise agreement (or agreement based transitional instrument) will have a meaning consistent with the meaning in the underpinning modern award (or pre-reform award/NAPSA).”¹⁶⁵

The present position is consistent with the capacity of awards to contain conversion clauses and, as above, these are what unions are currently pursuing. However, there remains a level of discomfort that the system could be operating unfairly to “casuals” who seek more hours or more regular work and security on the one hand, and to other “casuals” who seek the certainty of job security to reflect the reality of their present working arrangements on the other. Suggestions to address these concerns are discussed in the report of the Independent Inquiry into Insecure Work in Australia, and include:

- Casual conversion arrangements;
- Broader consultation responsibilities around the engagement or expansion of a casual workforce;
- The FW Commission being permitted to order than an employer offer a worker permanency, where the reality of the working arrangement was consistent with this;
- Removing the casual exclusions from the NES; and
- Defining casual employment consistently with the common law, and restricting its use accordingly.

Labour “Hire”

An enterprise that chooses to engage some or all of its workers through labour hire has very few obligations to those workers and, accordingly, those workers have very few rights to influence their relationship with that enterprise. This occurs notwithstanding that those workers are under a contractual obligation to abide by the direction of their “host employer”. Many workers engaged by labour hire firms are engaged on a casual basis.

¹⁶⁵ *Telum v. CFMEU* [2013] FWCFB 2434 Ata[38]-[58]

Unlike outsourcing, where accusations of “avoidance behaviour” are often met with denials referring to service offerings and industry expertise, labour hire involves the provision of labour only. Its *raison d’être* is purely and simply to permit industry to avoid industrial relations laws and consequently shift risk to workers – so business can take the benefit of labour without the burden of complying with laws that are premised on workers being protected in the labour market and given a fair share of the profits generated. This manifests in a number of ways:

- Labour hire workers can make a collective agreement with the labour hire agency, but this is not the entity that on a day to day basis controls the work that they perform and the conditions under which and location where it will be performed;
- The common law does not see an employment relationship between the host employer that directs the work and the worker. Further, it has generally rejected the idea that there could be more than one employer¹⁶⁶.
- Labour hire workers cannot bargain for an collective agreement with the host employer, or participate in bargaining for such an agreement;
- Labour hire workers cannot make an unfair dismissal claim against a host employer, even where the host employer is the decision maker as to whether the worker will have a continuing job at the workplace or not.
- The “General Protections” contained in FW Act adapt poorly to the work situations of labour hire workers because in the main they protect the labour hire agency itself from “adverse action” rather than the workers it employs and makes available to workplaces.

The majority of labour hire industry is dominated by large organisations such as Skilled, Manpower, Spotless, Programmed Maintenance Services and Chandler Macleod. The dominant organisations also sub –contract to preferred panels of labour-hire subcontractors¹⁶⁷ and a multitude of smaller players. A labour hire employee may be negotiating through various layers of inter corporate sub contracting arrangements as well as the commercial arrangements between the labour hire and host. The case reported at *Matthew Reid v Broadspectrum Australia Pty Ltd*¹⁶⁸ identifies some of the practical difficulties that this can present: namely complying with the practice and procedure at your workplace can lead to you being terminated by your employer – who is *not* at your workplace.

Workers in labour hire arrangements are less inclined to speak up about matters of concern to them, as they understand that the decision to request that they no longer be supplied to the workplace can be made by the host employer at any time, and may mean they have an uncertain period of time before another host engagement becomes available.

The Independent Inquiry into Insecure Work in Australia heard many personal accounts from workers engaged in labour hire arrangements. Their report relevantly contains the following:

“The weight of evidence we heard about the effects this has on workers was overwhelming. We heard of cases of:

¹⁶⁶ Because there can be only one employer, in exceptional cases, the common law is able to treat the imposition of a labour hire agency as sham, and look through that sham in order to treat the host employer as the actual employer. See *Nguyen v. A-N-T & Thiess* (2003) 128 IR 241.

¹⁶⁷ See for example the advertisement placed by Spotless seeking expressions of interest for “Security Labour Hire Subcontractor s”; Sydney Morning Herald; March 2015 and other subcontractors. www.tradeinterchange.com.au/Reg/Security.aspx

¹⁶⁸ [2014] FWC 7108, [2015] FWCFB 519

- Workplaces where the entire workforce was employed as casuals through a labour hire firm. Employees were expected to be available for a full-working week, and were notified by text message around 4pm each day of whether and when they were required to turn up the next day – but without any information about how long their shift would be;
- Employers using labour hire in the workplace to foster divisions among their ongoing staff and temporary workers, weakening workers’ bargaining power and leading to lower rates of pay and lesser entitlements;
- Indirect discrimination on the basis of union activity, age and other grounds being tacitly applied by simply not offering certain workers any more shifts;
- Labour hire workers feeling unable to report bullying, injuries suffered in the workplace, or occupational health and safety risks for the fear that exercising their rights would lead to censure, the loss of shifts or the loss of a job altogether; and
- Labour hire workers finding themselves unable to secure a home loan or a car loan because of their lack of job security.”¹⁶⁹

Labour hire is not a new phenomenon in Australia. What is exceptional about it is that has been allowed to continue so untouched by mainstream regulation. We see no good reason why a situation should be allowed to continue whereby two workers can work side by side in the same role yet one has a lesser standard of employment protections or a lower rate of pay. A first order issue is ensuring that labour hire workers engaged in a workplace – however temporarily – have the same level of industrial citizenship as the employees they work with. The collective bargaining framework must support the participation of these workers through agreement making not only at workplace or enterprise but in an industry more generally and to that end we support the notion of joint agreements raised in the PC Issues paper. An alternative option would be to provide for joint agreements as a complement to a default position of effectively extending the host employer’s conditions to the labour hire workers (either with or without a qualifying period) – this is the position adopted in the European Union’s Directive on Temporary Agency Work (2008/104/EC)¹⁷⁰. Other employment protections for these workers could be facilitated by incorporating the notion of joint employment into the FW Act generally or in particular parts thereof (such as the unfair dismissal system).

Australia currently ranks 5th out of a group of 42 advanced OECD nations in terms of employment protection legislation for temporary workers¹⁷¹. There is ample room for improvement including the measures proposed.

Sponsored Foreign Workers

The key requirement for a worker to be sponsored by a specific business as a condition for that worker to continue to hold their visa (and consequential lawful right to remain in Australia), can and does create circumstances where the employee does not act to protect their interests and

¹⁶⁹ Howe, B & Ors, *Lives on Hold: Unlocking the potential of Australia's workforce*, ACTU, 2012, at p34.

¹⁷⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0104&from=EN>

¹⁷¹ OECD; Going For Growth February 2015; table 6.12 (B)

are exploited by some employers.¹⁷² Australian unions have consistently held these views and are highly sceptical of the business sponsored visas regime.

There have been a number of reviews and inquiries into the temporary 457 visa program. The ACTU has participated in each of those inquiries and reviews and our position on a range of matters to do with the 457 visa program is on the public record. We refer the PC in particular to the most recent of these submissions to the Government-appointed panel that reviewed the program in 2014.¹⁷³ In the section that follows we restate some of the fundamental elements of our position, before considering the specific questions raised in the Issues Paper.

The ACTU and affiliated unions have had a long and significant interest in the 457 visa program. Unions have often represented qualified Australian workers whose primary rights to skilled jobs have been ignored by employers preferring 457 visa workers, as well as representing 457 visa workers whose livelihoods have been threatened by employers and agents who have taken unfair advantage of them.

Our interest in the 457 visa program, and the debate that surrounds it, has always been driven by three key, interrelated, priorities.

The first is to maximise jobs and training opportunities for Australians - that is, citizens and permanent residents of Australia, regardless of their background and country of origin - and ensure they have the first right to access Australian jobs before employers fill positions with temporary overseas workers. This is more important than ever at a time when unemployment is at its highest levels in a decade and the latest ABS figures show there are nearly eight hundred thousand (795,200) Australians unemployed,¹⁷⁴ looking for work and unable to provide a reasonable future for themselves and their families.

The second is to ensure that when overseas workers are granted 457 visas and employed in Australia to meet genuine skill shortages that can't be filled locally, they are fully protected and free from exploitation, employed according to Australian pay and conditions, they are safe in their workplace, and they have access to government services on an equal basis with all Australians. If this does not happen, they must be able to seek a remedy just as Australian workers can do, including by accessing the benefits of union membership and representation.

The third is to ensure that employers are not able to take the easy option and go down the 457 visa route, without first investing in training and undertaking genuine testing of the local labour market. This is also about ensuring those employers who do the right thing are not undercut by those employers who exploit and abuse the 457 visa program and the workers under it.

¹⁷² See for instance: Courier Mail (9-9-2014) "*Engineer on 457 visa allegedly ripped off by almost \$45,000 by Sierra Fleet Services for work at Rivergate Marina and Shipyard, Murarrie*" at: <http://m.couriermail.com.au/news/queensland/engineer-on-457-visa-allegedly-ripped-off-by-almost-45000-by-sierra-fleet-services-for-work-at-rivergate-marina-and-shipyard-murarrie/story-fnihsrf2-1227051995986> and Sydney Morning Herald (29 June 2013) "Big visa debts cripple Filipino workers' dreams of a better life" at: <http://www.smh.com.au/national/big-visa-debts-cripple-filipino-workers-dreams-of-a-better-life-20130628-2p2wj.html>

¹⁷³ <http://www.immi.gov.au/pub-res/Documents/reviews/actu.pdfpanel>.

¹⁷⁴ Australian Bureau of Statistics 12 -2- 2015 Media Release "*Australia's unemployment rate increased to 6.4 per cent in January 2015*" 6202.0 - Labour Force at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0>.

As we have emphasised throughout this debate, Australian unions strongly support a diverse, non-discriminatory skilled migration program. Our clear preference is that this occurs primarily through permanent migration where workers enter Australia independently. At the same time, we recognise there may be a role for some level of temporary migration to meet critical skill needs. However, there needs to be a proper, rigorous process for managing this and ensuring there are genuine skill shortages and Australian workers are not missing out.

Above all, this requires that robust labour market testing form a central part of the regulatory framework for the 457 visa program. It is simply untenable to have a situation where employers are able to employ temporary overseas workers under the 457 visa program without any obligation to first employ Australians who are able to do the work; yet this was the situation that prevailed from 2001 right up until 2013 when a new legal obligation to conduct labour market testing was passed by the Australian Parliament.

At the same time, vigorous safeguards need to be in place to protect the interests of overseas workers under the program. These workers are often vulnerable to exploitation by virtue of being dependent on their sponsoring employer for their ongoing prospects in Australia, including, in many cases, their desire for permanent residency. The potential for exploitation is generally greater for lower skilled occupations, and unions will continue to oppose the push from governments and employers to extend the program into semi-skilled and unskilled occupations. The ACTU also supports measures that allow for a transition to permanent residency for 457 visa holders that is not so dependent on a single sponsoring employer, for example through priority access to independent permanent migration channels or by reducing the qualifying period with a single employer from 2 years to 12 months.

In terms of the two specific questions raised in the discussion paper, the point should be made that the rights and obligations of 457 visa workers and their sponsoring employers go beyond compliance with the FW Act or the industrial relations system. It is not necessarily of much value then to look at the 457 visa issue solely in those terms. Certainly, sponsored workers under 457 visas are entitled to and covered by the provisions of the NES and the wages and conditions set out in relevant awards and agreements. Failure to comply with those obligations can and often does lead to action by unions and the Fair Work Ombudsman to rectify underpayment claims for instance. However, sponsoring employers have additional obligations under the 457 visa program and there are important reasons for this.

For example, in occupations where the market rate or 'going rate' is clearly above the award, employers who tried to pay overseas workers at the award rate only would effectively be driving down local wages and conditions. This also suggests that the existence of skill shortages used to justify the use of 457 visas could instead be a case of employers unwilling to pay genuine market rates, rather than a genuine recruitment issue caused by skill shortages.

This is why sponsorship obligations arising from the Migration Act and associated Migration Regulations also include a requirement for 457 visa workers to be paid the 'market salary rate' – the 'going rate' – an equivalent Australian worker would receive for performing the same or similar work, not just that they pay the bare minimum rate in the award. This requirement is absolutely fundamental to the integrity of the 457 visa program. It recognises that temporary overseas workers should not be used and employed in a way that undercuts Australian wages and conditions.

In addition to the market rates obligation, the Temporary Skilled Migration Income Threshold (TSMIT) provides a floor under which no 457 visa worker can be paid. The requirement to pay market rates is the first obligation that must be met, but in cases where a properly determined market rate still falls below the TSMIT, then the TSMIT applies. This is designed to ensure the 457 visa program does not operate at the very lowest paid end of the labour market where the potential for exploitation of vulnerable workers is at its greatest. Occupations that have market rates below the level of the TSMIT should not be part of the 457 visa program.

The TSMIT was introduced as part of the previous Government's 2009 integrity reforms. The TSMIT is currently \$53 900 per annum. From 2009-2013 it was indexed annually against average weekly ordinary time earnings for full-time employees, but the current Government has chosen to not increase it since coming to office. The panel that reviewed the 457 visa program in 2014 then recommended that it be frozen at its current level for two years.

The TSMIT is designed to ensure all Subclass 457 visa holders have sufficient income to independently provide for themselves in Australia. It helps ensure that Subclass 457 visa holders do not impose undue costs on the Australian community or find themselves in circumstances which may put pressure on them to breach their visa conditions. This is particularly important given these workers do not have access to a range of government support available to Australian citizens and permanent residents, such as Medicare.

It is essential in our view that the TSMIT be retained at its current level with annual indexation. Employers must not be able to sponsor overseas workers who will be paid less than the TSMIT. Unions reject ongoing calls from employer groups like Restaurant and Catering Australia for the TSMIT to be lowered to enable lower skilled occupations to be filled through the 457 visa program.¹⁷⁵

In numerous previous public submissions, the ACTU has highlighted the flaws and problems in the 457 visa program and where it can and should be strengthened in the interests of both Australian workers and the temporary overseas workers. We refer again to our submission to the 2014 Azarias review for further exposition of these. As indicated above, we don't seek to attribute all those problems to the WR system itself and acknowledge that many of the necessary policy and operational changes required to improve the program fall outside the scope of this review.

However, there are some aspects of the issue that relate more directly to the WR system and that warrant attention by the PC, as outlined below.

For example, at present only Australian citizens and permanent residents and citizens of New Zealand on special category visas are eligible for entitlement payments under the *Fair Entitlements Guarantee Act 2012* in the event that their employer becomes insolvent and has not made appropriate provision for their workers. Temporary overseas workers under the 457 visa program do not share this entitlement.

We note with approval that the Senate Legal and Constitutional Affairs Committee, in its June 2013 report into the 457 visa program, recommended that access to this scheme be extended

¹⁷⁵ Bitá, N., Call for visas to serve up chefs, *The Australian*, 7 April 2014, p.2.

to 457 visa holders and the Government Senators in their dissenting report also supported such an extension.¹⁷⁶ However, the Government did not accept this recommendation.

In its submission to the Government's 2014 review of the 457 visa program, the ACTU also recommended a legislative amendment to address this issue but the review panel did not take up this recommendation in its final report to Government.

Another example of how the WR system may unduly influence decisions to engage overseas workers is a case from 2010 in the shipping industry where 3 workers on 457 visas signed off an agreement before they left their home country, the Phillipines, and that agreement was then used to lock down the rates of Australian crew who were yet to be engaged. Unions oppose such a practice as it subject potentially hundreds of future works to conditions agreed by a small number of employees. It is even more egregious when 457 visa workers are used in this way, as they are even less likely to either be aware of their rights or willing to assert them.

On that last point, a further area where the Government could do more to support temporary overseas workers in the vulnerable position of either not knowing their rights in the workplace or being reluctant to enforce them, is to introduce a new sponsorship obligation under the 457 visa program for employers to advise workers in writing of their specific pay and conditions of employment, and their rights and responsibilities under immigration and workplace law. This should include information on the role of government agencies and unions in pursuing underpayment claims and other breaches of sponsorship obligations. There should be ongoing, tripartite input into the development of such materials. It should include hard copy material that is provided directly to the visa holder, rather than just directing people to a website for more information.

Finally, rigorous compliance and enforcement activity is critical to protecting the interests of temporary overseas workers under the 457 visa program. In this respect, unions have been critical of the inadequate level of monitoring and compliance under the Department of Immigration and Border Protection and its predecessors. This was due to a combination of factors: a lack of resources – just 32 immigration inspectors to monitor around 30 000 sponsoring employers – , a reluctance to take necessary action against cases of non-compliance, and, when they do take action, to publicise that action widely and penalise and name employers appropriately so it has a general deterrent effect.

The ACTU and unions therefore welcomed the addition of 300 Fair Work Inspectors as part of the changes to the 457 visa program introduced by the previous Government in 2013. As a result, Fair Work Inspectors now have all the compliance powers conferred on inspectors by the Migration Act, with a particular focus on whether visa holders are being paid correctly and if they are performing the work they were meant to be doing under the terms of their visa.

The monitoring efforts of the FWO have already produced new evidence of rorting and widespread problems with the 457 visa scheme, as set in an internal monitoring report that was obtained under FOI by the Transport Workers' Union and reported in the media. Of the more than 1800 cases the FWO investigated, around half of those involved 457 visa workers on salaries

¹⁷⁶ The Senate: Legal and Constitutional Affairs References Committee, Framework and Operation of subclass 457 visas, enterprise migration agreements and regional migration agreements, June 2013, pp.122-123.

below the legal wage floor for the program – the TSMIT – which is currently set at \$53,900 per annum.

Of those 1800 cases investigated, FWO identified more than 300 workers either being underpaid, or not doing the job they were meant to be doing under the visa, or both.

To take just a few examples:

- A visa holder who was nominated as a customer service manager was found to be actually working as a cleaner for \$28,000 a year - \$25,000 below the TSMIT of \$53,900 a year.
- A registered nurse receiving just \$43,368 per annum
- Electricians being engaged on salaries as low as \$40,000, well below the TSMIT, not to mention well below market rates for that occupation.
- Chefs and cooks brought in promised salaries of more than \$50,000 only being paid \$30,000 – more than \$20,000 below the TSMIT.
- Visa holders nominated as chefs, cooks, or café and restaurant managers actually working as kitchen hands, wait staff or casual delivery drivers, occupations that are not even on the list of eligible occupations for the 457 visa program.

These findings were from a report that looked at less than 2% of the current total of 108,000 plus 457 visa holders in Australia. If these findings were applied to the whole program, it would equate to around 18,000 visa holders who are not being not paid what they should have been paid, were not working in the occupation they were meant to be working in, or both.

In our submission, 457 visa compliance and monitoring should be shifted entirely from DIPB to the Fair Work Ombudsman, with appropriate reallocation of resources. One of the main reasons for this is the inherent conflict with DIBP administering the 457 visa program legislation and regulations, approving sponsors and visas, but then also performing the role of regulator. In our submission, the role of regulator should be separated and FWO is the appropriate workplace regulator. The FWO already has experience in dealing with workplaces with migrant workers, including 457 visa workers, and, as noted above, since the 2013 legislative changes Fair Work Inspectors can now exercise powers under the Migration Act.

Transfer of Business

In our experience, the transfer of business provisions are operating generally appropriately and as anticipated. In our view, the claims of burdensome effects in voluntary transfers between related entities are highly exaggerated, and fail to appreciate that applications for exemptions in relation to the transfer of instruments can be made in relation to transfers that are *likely* – that is the orders can be made pre-emptively to provide certainty. It is hard to conceive of any situation where an order would be refused where it was sought by consent, particularly given the nature of the matters that the FW Commission is required to consider in deciding whether to grant it.

Rather, we see the main difficulty in relation to transfer of business being the treatment of accruing entitlements, where there is potential for some unintended effects.

Currently, there is provision for the second employer to refuse to recognise service with the first employer with respect to Annual Leave (s.91(1) of the FW Act) and Redundancy entitlements (s.122(1) of the FW Act) under the NES. In those circumstances it would be assumed that the first employer should then be required to pay out the entitlements of Annual Leave and Redundancy.

However, where there has been no arrangement between the first and second employer for the second employer to recognise service, there have been circumstances where first employer has also sought to avoid paying redundancy entitlements. If successful, this would result in the employee having their service with the first employer not recognised by their new second employer, while their accrued entitlements with their first employer would also not be paid.

Allowing for employee redundancy entitlements to potentially disappear as a result of a change in contractors results in an unjustifiable windfall for the outgoing employer. The abnormal profit from the avoidance of redundancy entitlement creates an incentive for constant churning of contractors and outsourcing, which weighs against the benefits of capability building and investment in skills and knowledge which are the real drivers of productivity.

There is also available an ability for employers who “obtain suitable alternative employment” for employees to have their redundancy pay obligations reduced. However, employers have sought to use these provisions to avoid redundancy pay where the alternative position does not provide the same level of job security through the recognition of service.

The Transfer of Business provisions should provide for a specific definition for outsourcing to ensure that successive rounds of outsourcing do not result in employees losing their entitlements.

The legal framework under which such results arise are discussed more fully in Chapter 11. For present purposes, we state our strong view that provisions should ensure that in circumstances where service contracts come to an end and there is a change in the contractor providing the core service, if employees transfer from the old to the new contractor they should either be paid their redundancy and other entitlements on termination or have full service and associated accrued entitlements recognised by the new employer. Employees’ entitlements going into one end of a transfer of business process should not evaporate upon the completion of the transfer of business.

There are a few cases currently being appealed by employers which seek to create this redundancy blackhole in the Fair Work framework into which employee entitlements would disappear.

FBIS International is seeking relief from a Full Court of the Federal Court of Australia from a decision of a Full Bench of the FW Commission regarding the meaning of “obtains suitable alternative employment” with judgment currently reserved.

<https://www.comcourts.gov.au/file/Federal/P/VID691/2014/actions>

Serco is currently appealing decisions by Commissioner Roe to a Full Bench of the FW Commission which has been delayed pending the Full Court of the Federal Court of Australia decision in the FBIS case above.

<https://www.fwc.gov.au/documents/decisionssigned/html/2015FWC772.htm>

We encourage the PC to keep abreast of these matters and we will seek to make further comment about them if they are concluded while the PC inquiry remains on foot.

“Clayton’s” Greenfield Agreements

We have long been concerned about the capacity for the intentional making of agreements with a small, temporary “start up” workforce for the purpose of “locking down” conditions in a workplace or a number of workplaces. This led to us adopting a policy at our 2012 Congress that relevantly stated:

“40. In any bargaining process, workers have a right to be represented and that right should not be defeated by practical barriers or a voting cohort that does not represent the workers who will ultimately be bound by the agreement. Accordingly:

- a) For any proposed agreement, where the workforce to be covered by the agreement comprises one third or more of short or long term visa workers, the employer must (as a condition for Fair Work Australia approving the agreement) facilitate an opportunity for the workers to meet and confer with a representative from a union eligible to represent those workers (and any foreign language interpreter if required) within 14 days of the notification time for the agreement.
- b) In circumstances where the number or identity of the workforce changes significantly within 1 year after a non greenfields agreement is approved, the workers upon demonstrating majority support should be able to bring forward the nominal expiry date of the existing agreement.” (emphasis added).**

Recent developments in the coal mining industry confirm our worst fears in this regard, where it appears that mining “start up” labour forces of as little as 3-11 mostly casual employees are, facially, “genuinely agreeing” to agreements that barely improve on Award minimums and thereby lock down conditions at that level on a national basis. We provide at Appendix 4 an outline of recent relevant experiences in this sector, provided by the Mining and Energy Division of the CFMEU.



The Safety Net: (1) Minimum Wages

The FW Act marked a return to a more open and transparent methodology for minimum wage fixation, which explicitly referred to “fairness” as a consideration. Since this institutional change has taken place, the wage fixation decisions of FWA and the FW Commission have been modest and predictable. Notwithstanding this, the minimum wage is often the target for derisive commentary on the basis of its supposed employment effects or that the framework for determining it and applying it is somehow outmoded. We disagree with both of those views.

Whilst we regard the institutional and procedural framework as appropriate, we are of the view that it could be made more effective by a clearer articulation of its re-distributional purposes to more squarely concentrate on reducing inequality and the incidence of low pay.

The minimum wage and employment

The problems of entrenched unemployment or withdrawal from the labour market amongst the lowest skilled has been a focus for policy makers for some time and resurfaces in the recent McClure report. Having summarised the problem in his own analysis (outlined earlier), Bob Gregory commented on possible policy responses. Across the board, he argued, most policy interventions had failed to solve the problem. His list included real wage freezes, expansions in education and training, changes in immigration to favour skilled immigrants, labour market deregulation and the weakening of trade unions. He also concluded that ‘The labour market bifurcation problem cannot be cured by Keynesian economic expansions of the sort that economists of my generation believed in for so long’.¹⁷⁷ With a heavy heart Gregory turned to a micro-economic solution that entailed cuts to relative wages for the unskilled—to create jobs—and cuts to welfare payments—to encourage labour supply. As he admitted himself, these solutions had been lifted out of Economics 101.

While Gregory was able to highlight the problem—the loss of full-time jobs for unskilled workers over a long period of real wage constancy—his attempt at a solution ran aground. It ended up repeating the familiar complaint against minimum wages, that they are job destroying. In this case, it simply invoked the inverse: that low wages create their own jobs. As many other economists not in thrall to neo-classical economics have argued¹⁷⁸, a race to the bottom by cutting wages does not work. More realistic models of the labour market, based on a dynamic monopsony framework rather than perfect competition, are more useful for thinking about how wages and employment are related.

¹⁷⁷ R Gregory 2005, ‘Australian Labour Markets, Economic Policy and My Late Life Crisis’, in: *Labour Market Deregulation: Rewriting the Rules*, ed. by Joe Isaac and Russell D. Lansbury, Leichhardt: The Federation Press.

¹⁷⁸ See J. Rob Bray 2013, *Reflections on the Evolution of the Minimum Wage in Australia: Options for the Future*, SPI Working Paper 01/2013, ANU: Crawford School of Public Policy.

The familiar invocation of the US labour market, with its higher employment to population ratios for the unskilled, is misleading. Labour markets are not separate from society, but an integral part of the social fabric. Along with these higher employment population ratios goes a large population of working poor: full-time workers who still require food stamps to survive; high levels of job turnover, such that permanent 'Vacancy' signs are a feature of low wage workplaces; and a host of social problems that extreme levels of inequality generate.¹⁷⁹

The fallacy behind the Economics 101 prescription is that it repeats the logic of Say's law, that supply creates its own demand. If there are hoards of very low paid workers clamouring at the door, employers will let them in.

Conceptually this is unsound: as long ago as 1926 Sraffa pointed out that firms do not face diminishing marginal returns and that their employment levels are determined by the demand for their products and services¹⁸⁰. In other words, recruiting labour hinges on the current and anticipated state of customer orders, not on some mythical point on the curve where marginal cost equals margin revenue. As Joan Robinson put it more bluntly in her review of Sraffa's 1960 book: 'the marginal productivity theory of distribution is all bosh'.¹⁸¹

It might be argued that Say's law is irrelevant and that *relative* wages are what matter. There are several responses to this view which are based on empirical data. Taking the very long-term perspective—from 1914 to 2010—Bray showed that the minimum wage as a percentage of average earnings has steadily declined for nearly all of that period, with the only exception being the 1970s and 1980s. During that period that percentage nearly halved, from over 80 per cent to just over 40 per cent.¹⁸² Moreover, over the last ten years in particular, the ratio of the minimum wage to the median has dropped from 48.2 percent to 43.3 percent.

Secondly, when Cully examined what employers look for when recruiting low skilled workers he found one major element in their decision-making, something which was likely to be inversely related to the cost of labour: experience. Indeed when employers used the term 'productivity' they did not mean marginal productivity. Rather they used it as a 'short-hand term which refers to a set of characteristics, such as effort, loyalty, likely tenure and pattern of absence'.¹⁸³ Again, all of these elements are inversely related to the cost of labour. The advocates of Economics 101 ignore labour market frictions, even though the concept is buried somewhere in that tome. The high costs of labour turnover, an enduring feature of low wage markets, are ignored in the prescription for cutting the real wages of the low skilled.

104.¹⁷⁹ Eileen Appelbaum, Annette Bernhardt and Richard J. Murnane, editors 2003, *Low-Wage America*, New York: Russell Sage Foundation; Barbara Ehrenreich 2001, *Nickel and Dimed, On (Not) Getting By in America*, New York: Henry Holt and Company; Jerold Waltman 2000, *The Politics of the Minimum Wage*, Urbana: University of Illinois Press; Jerold Waltman 2004, *The Case for a Living Wage*, New York: Algora Publishing.

¹⁸⁰ Piero Sraffa 1926, 'The Laws of Returns under Competitive Conditions', in: *The Economic Journal* Vol. 36. No. 144, pp. 535–550

¹⁸¹ Joan Robinson 1961, 'Prelude to a Critique of Economic Theory', in: *Oxford Economic Papers*, New Series Vol. 13. No. 1, pp. 53–58, p. 58.

¹⁸² J. Rob Bray 2013, *Reflections on the Evolution of the Minimum Wage in Australia: Options for the Future*, SPI Working Paper 01/2013, ANU: Crawford School of Public Policy, p. 14.

¹⁸³ Mark Cully 2005, *What it's worth: Establishing the value of vocational qualifications to employers*, Flinders University: National Centre for Vocational Education Research, p. 19.

Finally, Bruce Chapman's simulation study of the strategy of upskilling the unemployed to increase their employment outcomes suggested poor outcomes, a result which had implications for the notion of cutting wages to solve unemployment:

the answer to Australian job creation, at least in the short to medium term, cannot rely on increasing the skills of the unemployed ... That decreasing real unit costs in the ways considered is not the panacea for employment creation has two significant, albeit speculative, implications. One is that the other way of decreasing labour costs—wage cuts—might similarly have little effect on employment creation in the short to medium term.¹⁸⁴

The naive importation of the American enthusiasm for reducing the minimum wage as an answer to unemployment fails to acknowledge several stark realities about the Australian labour market. As Chapman also observed: 'few employees are now earning a minimum safety net'. The operation of the minimum wage in Australia—as a set of pay scales across the award system—makes any simplistic analysis of wage elasticities at the bottom of the labour market largely meaningless.

Furthermore, would reductions in pay rates make any sense in those sectors of the economy where conditions like minimum wages and penalty rates most apply? Reducing labour costs to gain international competitiveness has been an industrial strategy in some countries, but the sectors of the economy where these conditions apply in Australia are largely service sector work which is not trade exposed. For coffee shops or restaurants facing only local domestic competition, or for public sector workplaces with night shifts, there would be no net benefit to the economy in reducing their labour costs. Instead there would be a drop in aggregate consumer demand as workers' take-home pay fell. Some individual employers might make super-profits and some State Treasurers might smile more often but these are not net benefits for the economy as a whole.

Gregory's dismissal of macro-economic solutions reflects a broad sea change in the economics profession over the last 30 years, which has seen micro economic thinking come to dominate policy formulation. As James Galbraith has observed, this has led down many fruitless avenues, such as the 'skill biased technical change' explanation for the growth of wages inequality.¹⁸⁵ The greater availability of large-scale unit record datasets, such as HILDA and the ABS CURFs, has encouraged this shift to micro-economic thinking. While the availability of such data is to be welcomed, its slant toward framing problems in terms of labour supply is one of its most unfortunate side-effects. Until the recent AWRS there had been no large scale survey of workplaces in Australia since the last AWIRS in 1995. Datasets which might encourage researchers to frame problems in terms of capital investment and labour demand are notably lacking.

¹⁸⁴ Bruce Chapman 1999, 'Could Increasing the Skills of the Jobless be the Solution to Australian Unemployment', in: *Reshaping the Labour Market: Regulation, Efficiency and Equality in Australia*, ed. by Sue Richardson, Cambridge: Cambridge University Press, pp. 197–98.

¹⁸⁵ James K. Galbraith 1998, *Created Unequal: The Crisis in American Pay*, Chicago: University of Chicago Press; James K. Galbraith 2012, *Inequality and Instability: A Study of the World Economy Just Before the Great Crisis*, New York: Oxford University Press.

A research vacuum

In the broader debate about whether minimum wages are an ‘anti-poverty measure’,¹⁸⁶ Neumark suggests that the question of whether minimum wages ‘destroy jobs’ is crucial: if they don’t then they are a ‘free lunch’ that helps reduce poverty.¹⁸⁷ While Neumark argues that evidence from many countries indicates that minimum wages reduce the jobs available to low-skilled workers, this claim is strongly contested. This field of research remains a contested one and it is not clear how one could ever arrive at definitive results because there are no universal economic truths in the labour market, only historically contingent outcomes which reflect the institutional arrangements prevailing in local labour markets.

Much of this international debate in the English-speaking countries has focussed on either the US labour market or the situation in the UK. In both cases, their historical, geographical and institutional arrangements differ markedly from that which prevails in Australia. In the US different states have different minimum wages, and they are set at different times. As Neumark showed, between 2004 and 2008 the number of US states which had minimum wages higher than the federal minimum wage grew from about 12 to over 30. In other words, there were regular adjustments in wage levels by different jurisdictions. Such variation in state minimum wages lends itself to research approaches such as the ‘natural experiments’ method, where one contrasts employment outcomes between one jurisdiction which obtains a pay increase and one which doesn’t. In the case of the UK, one can also contrast a period without any minimum wage to a period when the minimum wage applied.

In both cases, large numbers of workers are on the minimum wage and one might therefore hope to see any potential effects surfacing in the wider labour market. In Australia, there have been attempts to use this ‘natural experiments’ approach, but they have foundered on the problem that most minimum wage workers are covered by the Federal system and that state variations are minor. In 2009, when there was no increase in the FMW, New South Wales broke ranks and awarded an increase. But the number of workers affected was too small to provide a useful test case. One study, carried out by Andrew Leigh in 2003, also came to grief on this problem of small numbers.¹⁸⁸ Leigh used a difference-in-difference estimator to analyse changes in Western Australia between 1994 and 2001, but his large estimates—initially calculated on the wrong data, but subsequently reproduced using the correct data—led to scepticism by many. As Neumark and Wascher observed:

The elasticities that Leigh reports for aggregate employment of young individuals are quite large relative to those found for other industrialized countries, especially given his estimate that only about 4 percent of workers were affected by these changes in the minimum wage. Unfortunately, he does not offer a potential explanation for the size of

¹⁸⁶ Andrew Leigh 2007, ‘Does Raising the Minimum Wage Help the Poor’, in: *The Economic Record* Vol. 83. No. 263, pp. 432–445.

¹⁸⁷ David Neumark 2014, *Employment Effects of Minimum Wages: IZA World of Labor Essay*, Bonn: IZA (Institute for the Study of Labor).

¹⁸⁸ Andrew Leigh 2003, ‘Employment Effects of Minimum Wages: Evidence from a Quasi-Experiment’, in: *Australian Economic Review* Vol. 36. No. 4, pp. 361–73; Andrew Leigh 2004, ‘Employment Effects of Minimum Wages: Evidence from a Quasi-Experiment, Erratum’, in: *Australian Economic Review* Vol. 37. No. 1, pp. 102–5.

his estimates, and in the absence of such an explanation, the magnitudes of these estimates, at least, might be regarded sceptically.¹⁸⁹

In other words, with only four percent of workers affected by these changes, the likelihood of discerning genuinely large elasticities amidst the noise seems remote. It is important to keep in mind the Bayesian critique of frequentist approaches: that in any modelling of random data, one will regularly find statistically significant results, even when there is nothing there but noise.¹⁹⁰

More seriously for Leigh's endeavour was the problem of the 'control group'. Where the US studies compared different states, and ideally comparable states, and the UK studies compared different time periods for the same labour market, Leigh's Western Australian study had no similar comparator. Instead, he used 'the rest of Australia' and simply assumed that his difference-in-difference estimator would remove all confounding. In other words, because he was comparing differences with differences he assumed he did not need to take account of other ways in which Western Australia differed from the rest of Australia. As Machin and Manning have argued, the use of macro models like that used by Leigh assume that all sectors of the labour market behave in the same way. Not only is this unlikely within a single state, but it's highly unlikely across the country.¹⁹¹

- The conditions necessary to undertake a 'natural experiments' study in Australia to explore minimum wages and employment would need to satisfy a number of conditions:
- the number of workers affected would need to be substantial;
- one would need to take account of the pay scales, the way the FMW filters through a range of award rates at different levels;
- the jurisdictions to be compared would need to be genuinely comparable, and not attempt to use a 'rest of Australia' artefact;
- one would need repeated instances of the changes over time, so that the effects could be discerned from the noise and one could be confident that one had isolated a genuine relationship;
- one would need to model time lags adequately, and take account of the complexity of award flow-ons at the state level (where this still happens).

Posed in this way, the task is daunting. The kinds of data necessary for this task are formidable. ABS data, in the form of the EEH, allows one to examine the industrial instruments which cover workers, but this does not take account of the pay scales issue and the different levels at which the FMW 'cuts in'. As an employer-based survey, EEH has many advantages, but tracking individuals over time is not one of them. Therefore, one would need to look for macro-economy effects from any exercise using these data (an approach regarded with some skepticism by Healy and Richardson).¹⁹²

¹⁸⁹ David Neumark and William Wascher 2007, *Minimum wages and employment*, Discussion Paper 2570, Bonn: IZA (Institute for the Study of Labor).

¹⁹⁰ Adrian E. Raftery 1995, 'Bayesian model selection in social research', in: *Sociological Methodology 1995*, ed. by P.V. Marsden, Cambridge, Mass.: Blackwell Publishers, pp. 111–163.

¹⁹¹ Ian Watson 2004, 'Minimum wages and employment: Comment', in: *Australian Eco-nomic Review* Vol. 37, pp. 166–72; S. Machin and A. Manning 1994, 'The effects of minimum wages on wages dispersion and employment: Evidence from the U.K. Wages Councils', in: *Industrial and Labor Relations Review* Vol. 47. No. 2, pp. 319–29.

¹⁹² 'We argue that neither alternative [aggregate economy-wide studies or workplace stud-ies] can be preferred over an analysis focusing on the individual recipients of low pay, because the aggregate data are too far removed from the locus of Commission decisions, and robust workplace-level data are unavailable'

If one chose instead to use household unit record data, such as HILDA, to try to track a cohort of minimum wage workers likely to have been affected by FMW increases, then other problems arise. For several waves, the HILDA team implemented a question on industrial instruments but they soon abandoned this as unreliable. Consequently, while attempts have been made to use HILDA to track minimum wage workers, this has primarily been done by dividing employees into those sitting 'At or below the FMW' and others, using an estimate of the hourly rate.¹⁹³ Some more fine grained approaches have been used with the HILDA data, again based on hourly rate assumptions, such as distinguishing between those on the C10 rate and an upward limit (\$700 per week in 2007), those above the FMW and below the C10 rate, and those on or below the FMW.¹⁹⁴ Studies such as these have been useful for descriptive purposes, and for modelling broad labour market transitions, but their utility for modelling elasticities of labour demand is problematic.

One recent study by Alex Olssen used the HILDA data and avoided some of these difficulties by concentrating on youth rates, where the pay scales are closely tied to age. That is, as juniors reach a particular age, their hourly rate—as specified in the award—increases to a set amount. Using a regression discontinuity design he exploits this variability in earnings tied to age, by assessing whether employment levels differ according to such variability. One of the advantages of Olssen's approach was that the coverage was extensive: between 70 and 90 per cent of youths in the food industry earned wages at or below the award minimums. While Olssen's approach was an innovative one, it did rely on purely local and short-term effects.¹⁹⁵

The minimum wage and inequality

The present structure for fixing minimum wages requires an expert panel of the FW Commission to establish and maintain a safety net of fair minimum wages, taking into account relative living standards and the needs of the low-paid, among other considerations.¹⁹⁶ The ever-widening gap between low-paid workers and the rest of the workforce suggests that this objective is not being met as effectively as it could be. If the gap between minimum and average wages continues to grow, then earnings inequality and prevalence of low pay are also likely to continue to rise. If this occurs, Australia will increasingly come to resemble other OECD countries with less egalitarian labour markets.

(Josh Healy and Sue Richardson 2007, *A Strategy for Monitoring the Micro-Economic and Social Impacts of the Australian Fair Pay Commission*, Flinders University, Adelaide: National Institute of Labour Studies, p. 1).

¹⁹³ Ian Watson 2010b, *Mobility among the Low Paid Workforce: Australia, 2001 to 2008*, Report for the ACTU 26 February 2010.

¹⁹⁴ Ian Watson 2007, *Low paid workers in Australia: insights from HILDA*, Report for IR Victoria, Available from www.ianwatson.com.au.

¹⁹⁵ Alex Olssen 2011, 'The short run effects of age based youth minimum wages in Australia: a regression discontinuity approach', in: *New Zealand Association of Economists Annual Conference, Wellington*, vol. 29.

¹⁹⁶ *Fair Work Act* 2009, s.284(1)(a)

The decline in low-paid workers' relative earnings

Minimum wages have fallen sharply as a proportion of average full-time earnings in the past few decades. The C14 rate, equivalent to the NMW, was 56.1% of the average weekly ordinary time earnings (AWOTE) of full-time adults in 1990. This fell to 50.2% by 2000, then 47.8% in 2005, the last year in which the AIRC had responsibility for adjusting minimum wages. By 2009, the last year of the AFPC, the minimum wage bite had fallen to 44.3%. The 1990s and 2000s saw a substantial decline in the relative living standards of low-paid workers.

Over the past two decades, the minimum wage bite (the ratio of the minimum to the mean or median) has declined during both economic booms and times of slower growth. Under each of the three institutions that have had responsibility for adjusting minimum wages over the past two decades, the bite has declined.

Table 9: Minimum wage bite in selected years since 1990

	Nominal NMW/C14 rate	Nominal AWOTE	Real NMW/C14 rate	Real AWOTE	Minimum wage bite (NMW as % of AWOTE)
Dec 1990	\$311.30	\$555.10	\$562.45	\$1,002.94	56.1%
Dec 1995	\$341.40	\$661.00	\$551.41	\$1,067.62	51.6%
Dec 2000	\$400.40	\$798.40	\$583.89	\$1,164.29	50.2%
Dec 2005	\$484.40	\$1,012.70	\$616.19	\$1,288.23	47.8%
Dec 2009	\$543.78	\$1,227.90	\$614.71	\$1,388.06	44.3%
Dec 2010	\$569.90	\$1,276.30	\$626.95	\$1,404.06	44.7%
Dec 2011	\$589.28	\$1,331.10	\$629.43	\$1,421.80	44.3%
Dec 2012	\$606.40	\$1,396.00	\$633.75	\$1,458.96	43.4%
Dec 2013	\$622.20	\$1,437.00	\$632.89	\$1,461.68	43.3%
Dec 2014	\$640.90	\$1,477.00	\$640.90	\$1,477.00	43.4%

Source: NMW/C14 rate from past FWC/FWA/AFPC/AIRC decisions. AWOTE from ABS 6302. CPI from ABS 6401. Real wages and minimum wage bite are ACTU calculations.

The current minimum wage bite (NMW as a percentage of AWOTE) is 43.4%, around the lowest on record. The ratio of the NMW to the median full-time wage has also fallen steadily, and by a similar magnitude.

Figure 24: Average, median and minimum full-time weekly real earnings

Figure 25: Minimum wage bite (ratio of the NMW to median and average full-time earnings)

NMW as % of median FT earnings

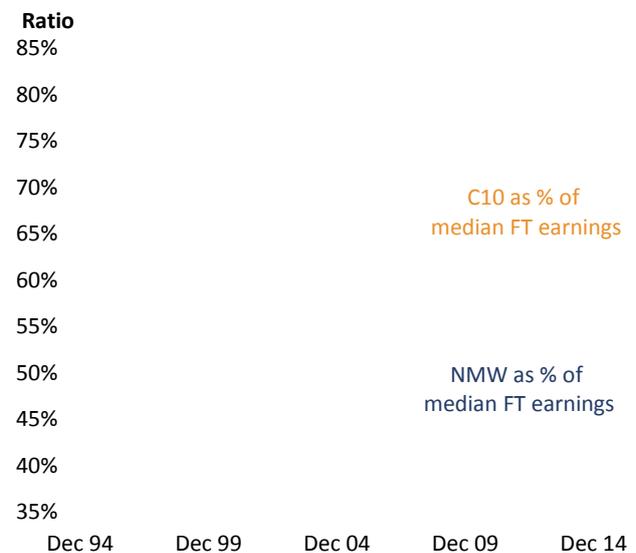
NMW as % of average FT earnings

Source: Average full-time earnings is AWOTE from ABS 6302. Median full-time earnings is from ABS 6310. NMW from past decisions of FWC and predecessors. All series deflated by the CPI (ABS 6401).

Award minimum wages higher than the NMW have declined ever more steeply relative to average or median wages. This is a consequence of 'flat dollar' increases in award minimum wages prior to 2011. The C10 award rate is around the same level, in real terms, as 15 years ago, while there has been a modest real increase in the NMW.

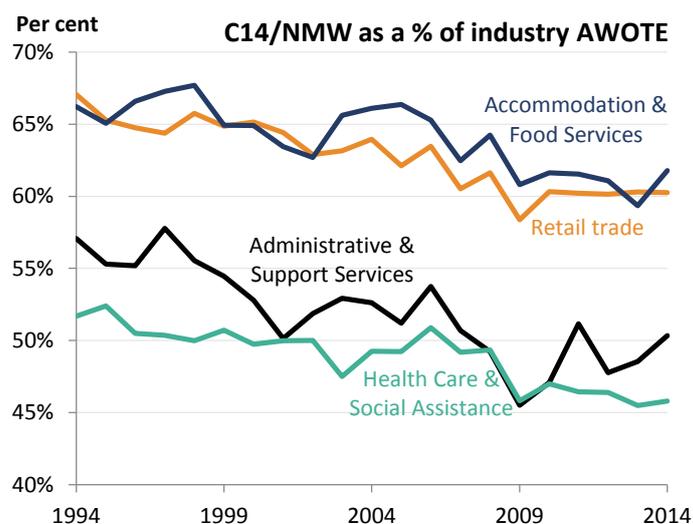
Figure 26: Real value of the C10 award rate and the NMW

Figure 27: C10 award rate and NMW as a percentage of median full-time earnings



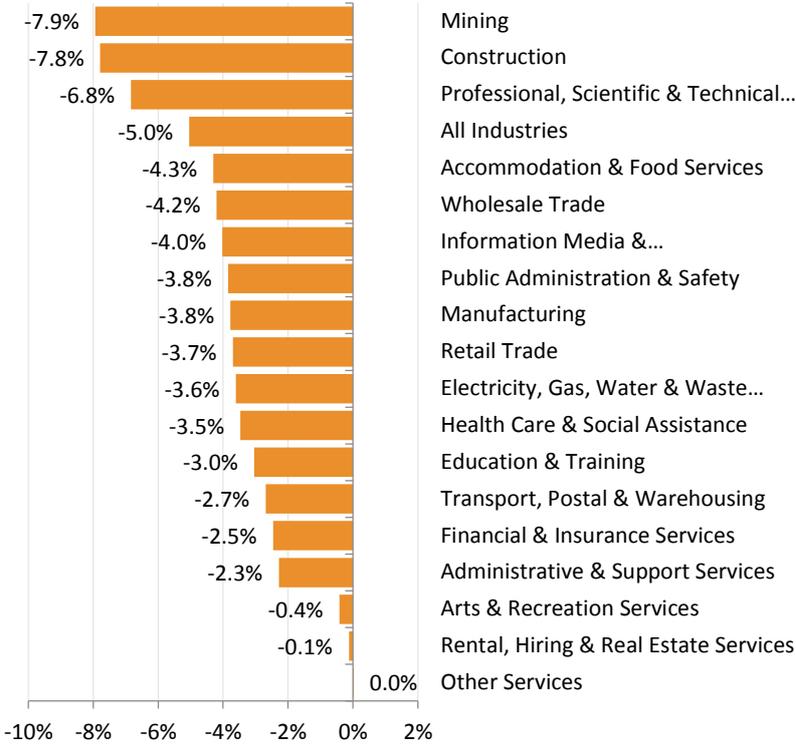
Over the past decade, average full-time wages in every Australian industry have risen more rapidly than minimum wages. The fall in low-paid workers' relative earnings isn't due to some outlier industries (like mining and utilities) experiencing rapid real wage growth and dragging up the average. Minimum wages have also grown much more slowly than average wages within the industries in which low-paid workers are typically employed.

Figure 28: NMW as a percentage of average full-time earnings in the more award-reliant industries



Source: ABS 6302; historical minimum wage rates from FWC; ACTU calculations.

Figure 29: Fall in minimum wage bite within industries over the period 2004-2014



As minimum wages fell relative to average and median wages, earnings inequality grew. Over the decade to May 2012, the earnings of full-time non-managerial workers at the 90th percentile grew more than three times as fast as the earnings of workers at the 10th percentile. Workers at the median saw their earnings rise more than twice as fast as those at the 10th percentile.

Figure 30: Real full-time earnings for non-managerial employees in 1992, 2002 and 2012

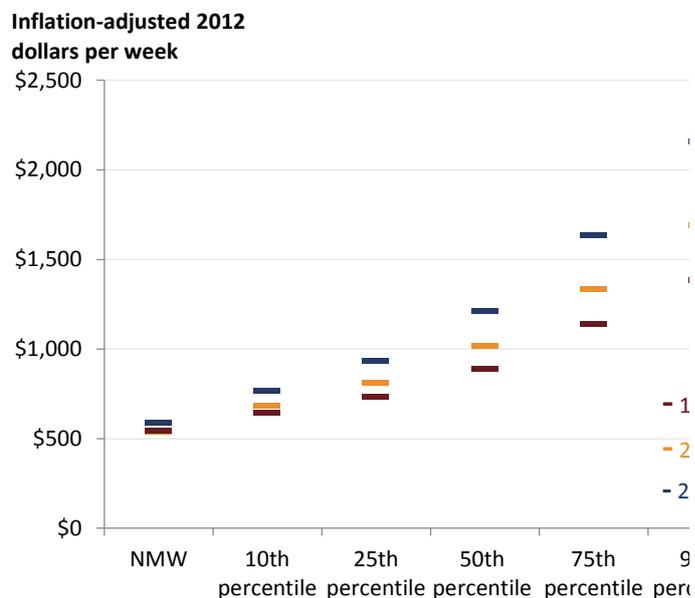
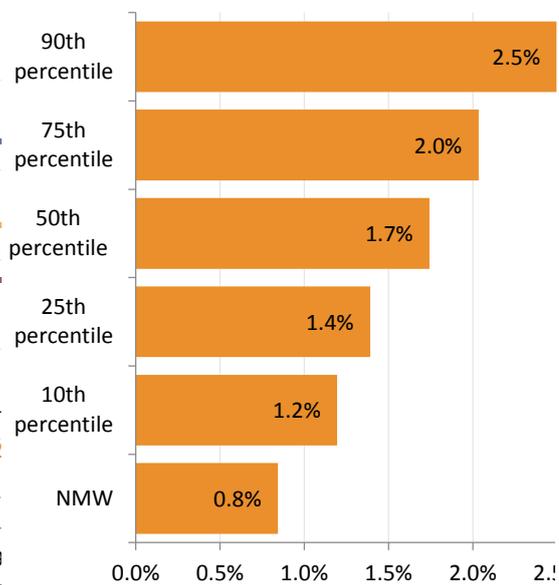


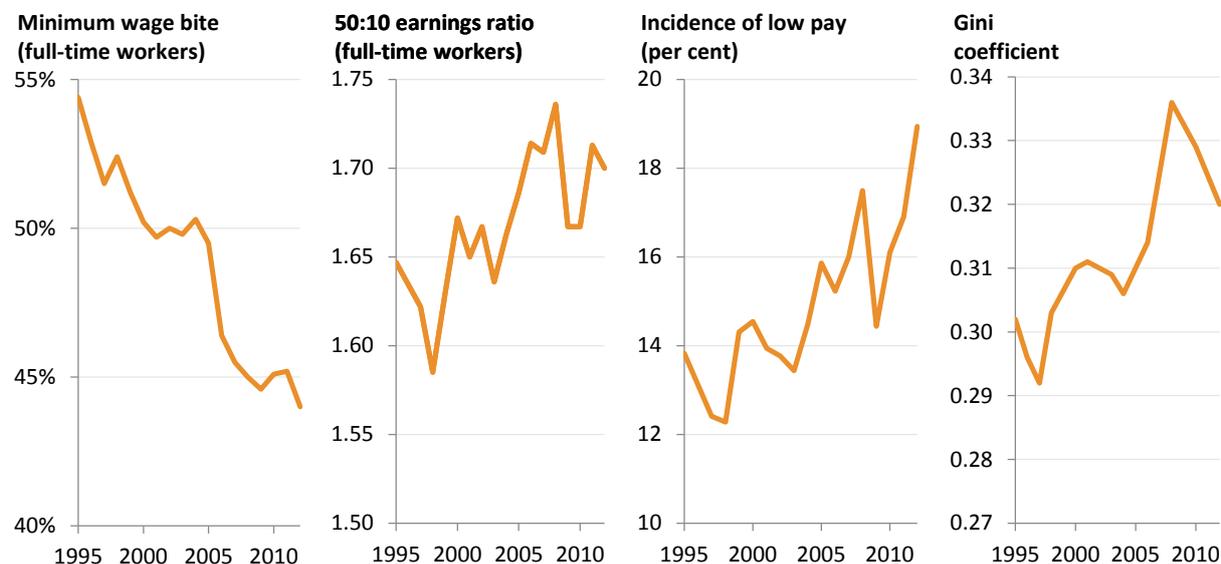
Figure 31: Average annual growth in real full-time earnings: 2002 to 2012



Source: ABS 6306 and ACTU calculations. Wages deflated using the CPI (ABS 6401).

The fall in the minimum wage bite (the NMW as a percentage of the average wage) has coincided with a rise in earnings inequality and a rise in the prevalence of low pay. The figure below shows the fall in the minimum wage bite, alongside the rise in the ratio of the earnings of the median worker to the worker at the 10th percentile – a key measure of earnings inequality known as the 50:10 ratio. It also shows the rise in the proportion of Australian workers who meet the OECD definition of low pay – those with earnings below two-thirds of the median. The final panel shows the Gini coefficient, a measure of the inequality of household income.

Figure 32: The minimum wage bite, the 50:10 earnings ratio, the incidence of low pay, and the Gini coefficient



Source: Minimum wage bite, 50:10 ratio and incidence of low pay from OECD Stat. Gini coefficient from ABS 6523. The bite shows the NMW as a proportion of the average full-time wage. The 50:10 earnings ratio is the ratio of the median full-time wage to the 10th percentile. The incidence of low pay is the proportion of full-time workers with earnings below 2/3 of the median for full-time workers. The Gini coefficient is a summary measure of inequality in equivalised household disposable income.

The rise in the incidence of low pay is particularly sharp and concerning. In 2002, 13.8% of Australian full-time workers had earnings below two-thirds of the median; by 2012 this had risen to 18.9%.¹⁹⁷ We submit that the rise in the incidence of low pay, and of earnings inequality, is at least partly due to the fall in the relative value of minimum wages. This submission is based on the correlation in Australia between the falling minimum wage bite and the rising level of inequality and low pay; as well as the cross-country correlation between the minimum wage bite and the prevalence of low pay and the extent of earnings inequality.

Learning from others' mistakes

There is no one clear criterion by which the relative living standards of the low-paid can be deemed adequate or inadequate. Informed judgement is required. Historical comparisons are clearly relevant – such comparisons tell us that the relative living standards of low-paid Australian workers have deteriorated over time. Historical comparisons also show that measures of inequality and the prevalence of low pay have risen as the relative value of minimum wages have fallen.

International comparisons are also useful. These can provide some information about the consequences for Australia of choosing a particular level of relative living standards for low-paid

¹⁹⁷ OECD Stat 2014, *Decile ratios of gross earnings*. Available from: http://stats.oecd.org/Index.aspx?DataSetCode=DEC_I [Accessed 16 March 2014].

workers. They shed a light on what the possible consequences may be for Australia if our minimum wage bite continues to fall.

There is a precedent for an advanced economy with a minimum wage worth over half the median that allowed this ratio to fall to a dangerously low level: the United States. In 1968, the US minimum was equivalent to 55% of the US median wage. It is now worth just 37.8% of the median. The purchasing power of the US minimum wage was greater in 1968, in inflation-adjusted terms (\$US10.40) than the Australian minimum wage in 2013 (\$US10.20, converted at PPP).¹⁹⁸

The US allowed its minimum wage to fall sharply in real terms in the 1980s. Since then, the minimum has remained more or less constant in real terms (with declines between adjustments followed by relatively sharp rises). The US minimum wage has been worth an average of 35% of the median full-time wage for the past twenty five years or so.

Unlike the US, Australia's minimum wage has increased modestly in real terms in recent decades. However, the decline in the value of the Australian minimum wage relative to the median has been steep, as discussed earlier in this chapter.

Figure 33: Minimum wage in inflation-adjusted 2012 US dollars, at purchasing power parity

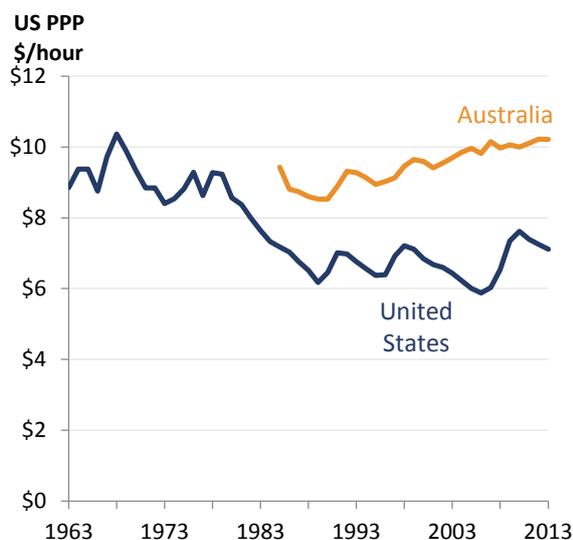
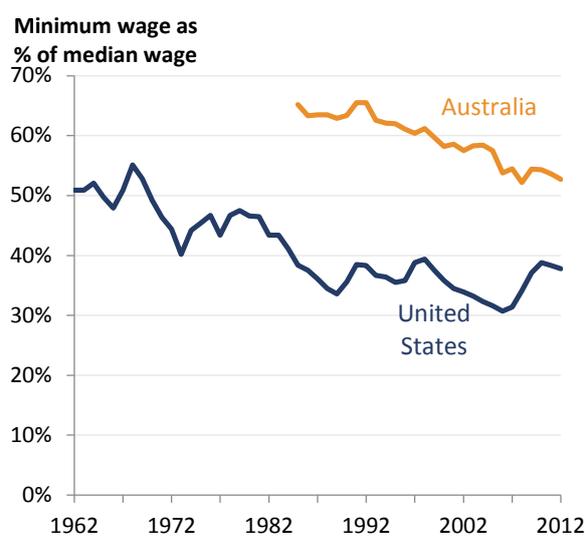


Figure 34: Minimum wage as a percentage of median wage of full-time workers

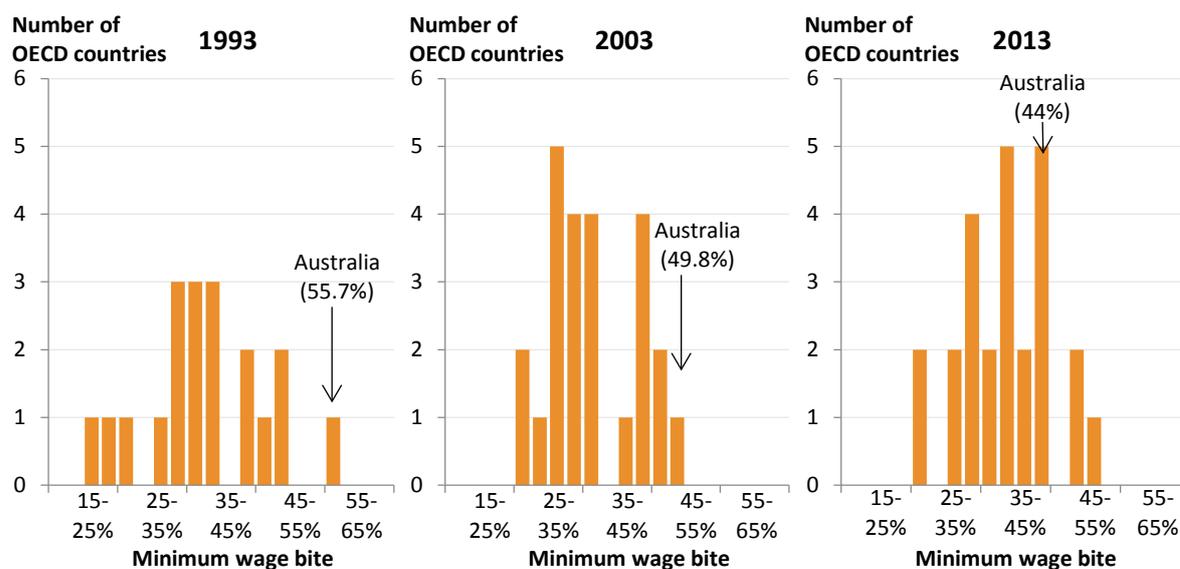


Source: [OECD Stat](#).

Australia's safety net used to be distinctively robust. Only two decades ago (in 1992), Australia's minimum wage (the C14 award rate) was 55.7% of the average full-time wage, clearly the highest ratio in the OECD. By 2003, Australia's minimum wage bite had fallen significantly (to around 50% of the average wage), yet remained the highest in the OECD. But as Australia's bite has continued to fall over the past decade, those of many OECD countries have risen. Australia's bite is no longer distinctively high and we are rapidly converging with the middle of the pack. Figure 35 shows this clearly.

¹⁹⁸ OECD Stat 2014, *Real Minimum Wages*. Available from: <http://stats.oecd.org/Index.aspx?DataSetCode=RMW> [Accessed 15 March 2014].

Figure 35: The distribution of minimum wage bites in OECD countries over time



Source: OECD Stat and ACTU calculations. The minimum wage bite here refers to the minimum wage as a proportion of the average wage.

Over the decade to 2013 (the most recent year for which OECD Stat contains minimum wage information), Australia’s minimum wage bite fell by the largest amount of any OECD country,. The minimum wage bite increased in 15 of the 23 OECD countries that had a minimum wage in both 2003 and 2013.

Figure 36: Minimum wage bite in OECD countries (2013)

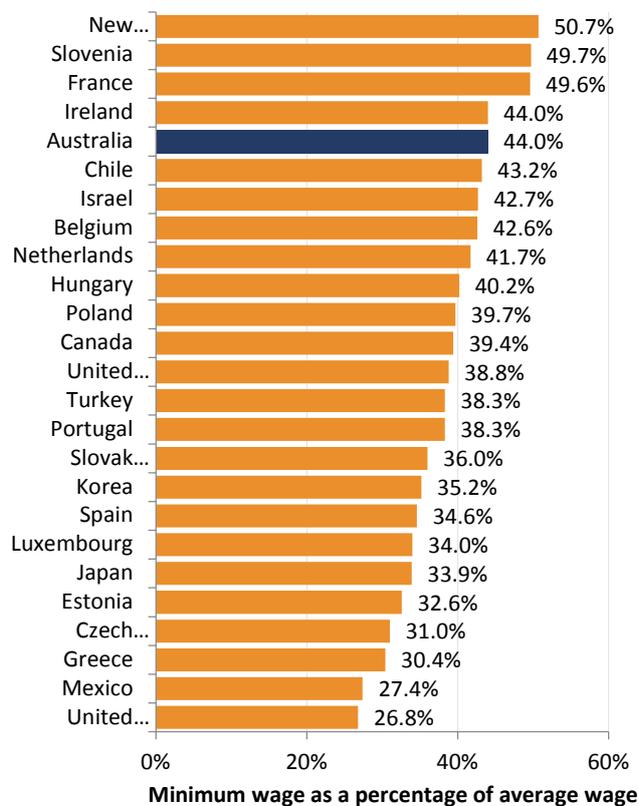
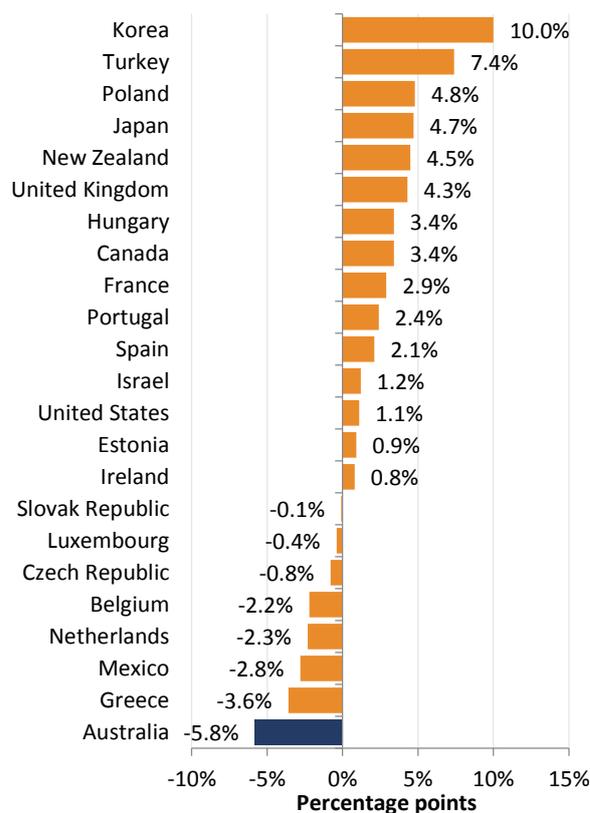


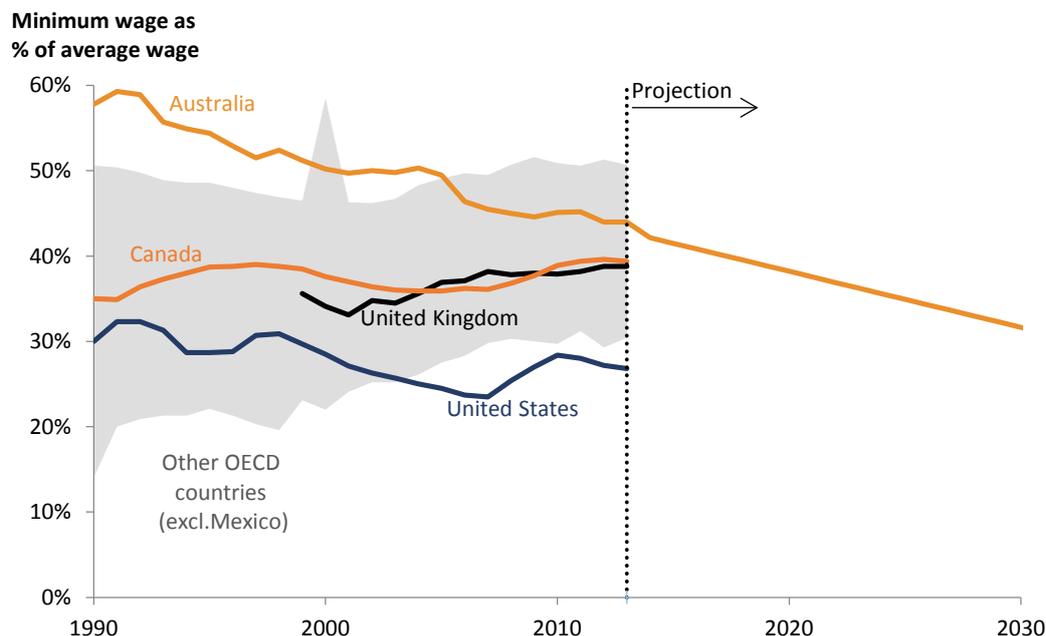
Figure 37: Change in minimum wage bite: 2003 to 2013



Source: OECD Stat and ACTU calculations. The minimum wage bite here refers to the minimum wage as a proportion of the average wage.

Australia's minimum wage bite is rapidly converging with those of Canada and the UK. The grey shaded area in the figure below shows the range of minimum wage bites in all OECD countries other than the US, UK, Canada, and Australia.

Figure 38: Minimum wage as a percentage of average wage, including projected Australian bite



Source: [OECD Stat](#) and ACTU calculations. The projection assumes a 0.67 percentage point decline per year, the average since 1990. The average between 2002 and 2012 was 0.68 percentage points.

If these trends continue, in around 2018 our bite will be the same as Canada's current bite and in around 2019 it will be the same as the UK's current bite. In just two decades, if the trend continues, Australia's minimum wage will be worth less than 30% of the average full-time wage, in the vicinity of the present level in the United States.

Countries with smaller minimum wage bites unsurprisingly tend to experience greater earnings inequality, as measured by the 50:10 ratio (see Figure 39). Countries with smaller bites also tend to have a greater prevalence of low-paid work, measured as the share of workers who are paid less than two-thirds of the median (Figure 40).

In the US, research has suggested that the rise in earnings inequality in the 1980s and 1990s is largely explained by policy-related changes, such as the fall in the real value of the minimum wage.¹⁹⁹ Lee found that the falling real US minimum wage in the 1980s could explain nearly all the growth in inequality in that decade.²⁰⁰ A more recent study by Chernozhukov, Frenandez-Val and Melly found that changes in the US minimum wage can explain nearly all the increase in the US 50/10 ratio since 1979.²⁰¹

There is a correlation between a falling minimum wage bite and rising earnings inequality and rising low-paid incidence for Australia over time (see Figure 32) and across countries at a point in

¹⁹⁹ Card, D. and DiNardo, J.E. 2002, 'Skill-Biased Technological Change and Rising Wage Inequality: Some Problems and Puzzles', *Journal of Labor Economics*, vol. 20, no. 4, p. 774.

²⁰⁰ Lee, D.S. 1999, 'Wage Inequality in the United States During the 1980s: Rising Dispersion or Falling Minimum Wage?', *The Quarterly Journal of Economics*, vol. 113, no. 3, pp.977-1023.

²⁰¹ Chernozhukov, V., Fernandez-Val, I. and Melly, B. 2013 'Inference on Counterfactual Distributions', *Econometrica*, vol. 81, no.6, pp.2205-2268.

time (Figure 39 and Figure 40). Based on this, we submit that further reductions in the minimum wage bite are likely to result in a higher incidence of low pay and higher earnings inequality.

Figure 39: Earnings inequality and the minimum wage bite in OECD countries (2010)

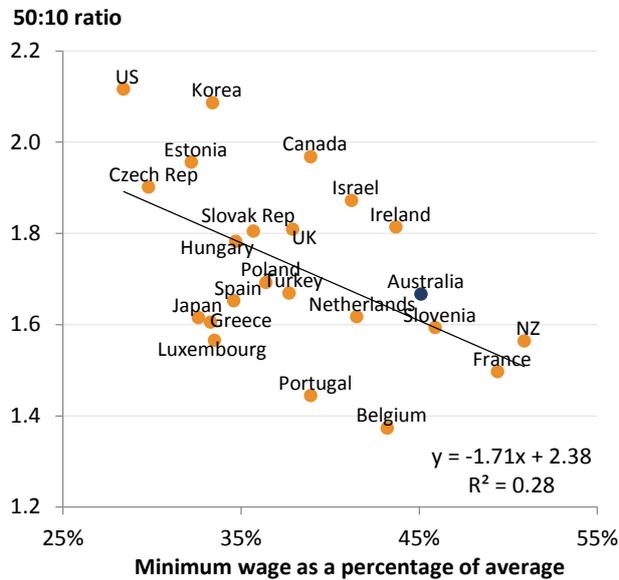
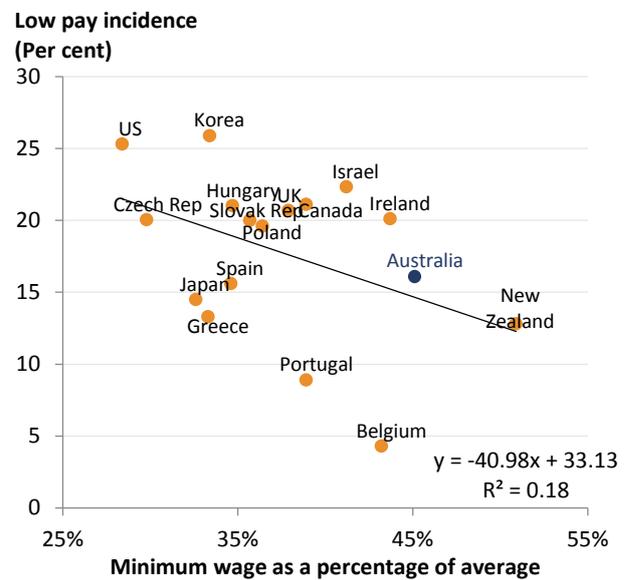


Figure 40: The incidence of low pay and the minimum wage bite in OECD countries (2010)



Source: [OECD Stat](#). The 50:10 ratio measures the earnings of the median full-time employee as a multiple of the earnings of the full-time employee at the 10th percentile. Low pay incidence refers to the share of full-time workers earning less than two-thirds of gross median full-time earnings. The charts include all OECD countries for which data was available for 2010.

The rise in earnings inequality (the 50:10 ratio) and the incidence of low pay has been large in Australia over the past decade, relative to other OECD countries, just as the fall in our minimum wage bite has been relatively large. We believe, though it is difficult to prove, there is a causal relation between the fall in the minimum wage bite and the rise in earnings inequality and the incidence of low pay.

If the minimum wage bite continues to fall, then earnings inequality and the prevalence of low pay are likely to continue to rise.

Figure 41: Incidence of low pay in OECD countries

(% of full-time workers with earnings below two-thirds of the median)

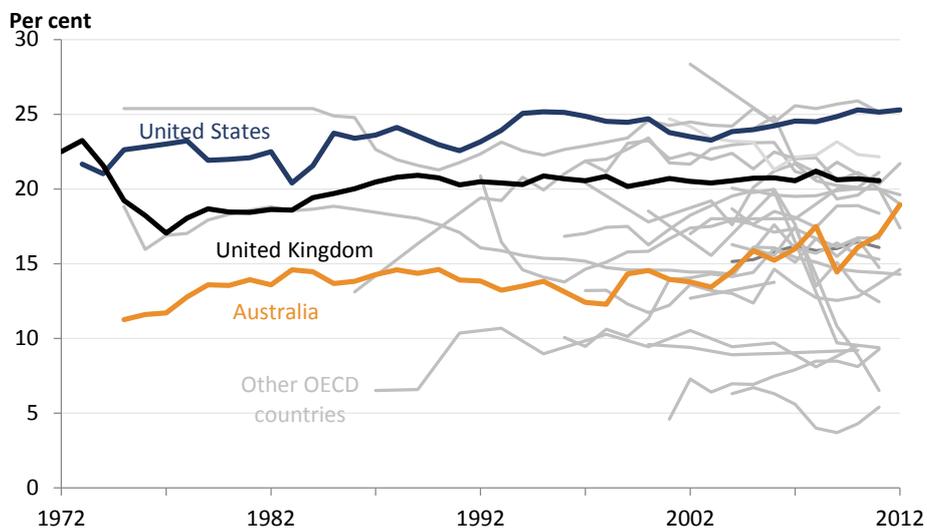
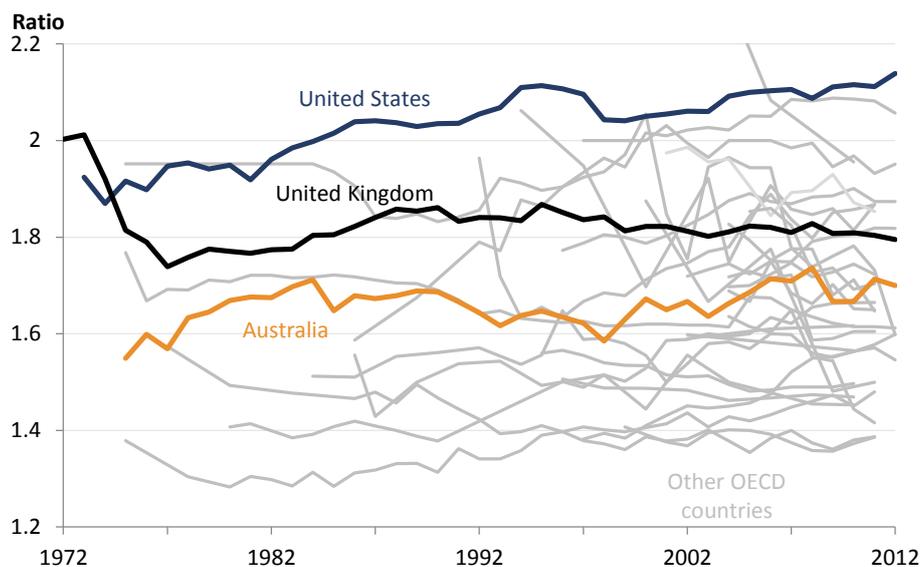


Figure 42: 50:10 ratio among full-time workers in OECD countries



Source: [OECD Stat](#).

An in work benefit?

Policies such as an Earned Income Tax Credit (EITC) can help to boost living standards. However, we believe policies such as EITCs are complements to minimum wages, rather than substitutes. To accept the reverse would involve a substantial alteration the social contract, with consequences which would appear to be inconsistent with the policy positions of successive Australian governments.

In the absence of a binding minimum wage, the value of an in-work subsidy like an EITC will be partly captured by employers.²⁰² The existence of the subsidy would be expected to increase labour supply. This means that, at any given level of employment demand, wages will be lower than they would otherwise have been. The reduction in wages will be larger if the elasticity of labour demand is relatively low, as we believe it to be. In this way, an EITC without a fair minimum wage can serve as an effective transfer to the employers of low-paid workers, rather than the workers themselves. A fair minimum wage can ensure that the EITC has the intended effect of improving the living standards of low-paid workers, which is why we suggest they are substitutes rather than complements.

This view is shared by many economists. For example, Lee and Saez show that the optimal policy package combines both a minimum wage and transfers to low-wage workers, such as through an EITC, concluding that “the minimum wage and subsidies for low-skilled workers are complementary policies”.²⁰³ Dube describes the debate about the desirability of a higher minimum wage versus an expanded Earned Income Tax Credit as a “false dichotomy.”²⁰⁴

In our view, the PC should be more focussed on first ensuring that the existing minimum wage setting framework is capable of delivering what it appears to promise and what it ought to achieve to give better effect to the distributional purposes of the industrial relations system. It is only once that objective has been fulfilled that one can have some confidence that intended beneficiaries of the in work benefit will experience a net gain in their living standards. Furthermore, and at a more practical level, even without doing the sums it is readily apparent that the costs of implementing an EITC or other in work benefit would be substantial. This factor alone is sufficient to make it unappealing to government based on its present policy positions concerning the budget. The likely electoral response to any announcement of the policy changes required to fund such an initiative would also be a powerful disincentive to proceeding with it.

A more direct response

The current framework for determining minimum wages requires the Expert Panel to have regard to a number of considerations which are contained in the “minimum wages objective”²⁰⁵ and the “modern awards objective”²⁰⁶. At first glance, both of these objectives appear to do no more than list a number of considerations to be weighed in the balance in determining what a “fair” or “fair and relevant” safety net may contain. However, there are minor differences in the language used in the “modern awards objective” which, on closer examination, suggest (we submit unintentionally) an order of importance. This arises from the use of the phrase “the need to...” in relation to some criteria, but not others. For example, whilst the FW Commission is obliged to “take into account”:

- relative living standards and the needs of the low paid;
- the principle of equal remuneration for work of equal or comparable value;
- the likely impact of any exercise of modern award powers on business, including productivity, employment costs and the regulatory burden;

²⁰² Evidence suggests that US wages are lower than they would be in the absence of the EITC. See, for example, Rothstein, J. 2010, ‘Is the EITC as Good as an NIT? Conditional Cash Transfers and Tax Incidence’, *American Economic Journal: Economic Policy*, vol. 2, no. 2, pp.177-208.

²⁰³ Lee, D. and Saez, E. 2012, ‘Optimal minimum wage policy in competitive labor markets’, *Journal of Public Economics*, vol. 96, no.9-10, pp.739-749.

²⁰⁴ Dube 2013, op. cit., p.18.

²⁰⁵ FW Act, s. 284.

²⁰⁶ FW Act, s. 134

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and the competitiveness of the national economy.

It is also obliged to “take into account”:

- the need to encourage collective bargaining;
- the need to promote social inclusion through increased workforce participation;
- the need to promote flexible modern work practices and the efficient and productive performance of work;
- the need to provide additional remuneration for:
 - employees working overtime; or
 - employees working unsocial, irregular or unpredictable hours; or
 - employees working on weekends or public holidays; or
 - employees working shifts; and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

We are not suggesting that the FW Commission should or has in practice established any differentiation or order of priority based on the distinctions in language above, however tensions did arise in the Annual Wage Review 2013-2014 wherein the Australian Catholic Council for Employment Relations suggest that the FW Commission had, in the past, placed an insufficient emphasis on “relative living standards and the needs of the low paid” insofar as the FW Commission had stated that “...the low paid need the highest level of wages that is consistent with all other objectives including low unemployment, low inflation and the viability of business enterprises.....”²⁰⁷

In our submission, it is appropriate to return to first principles when considering whether criteria for setting minimum wages are appropriately expressed. The Annual Wage Review is the primary means by which minimum wages are set and adjusted. For national minimum wage-reliant and award-reliant workers this is their only opportunity to receive a wage increase. The matters set out in section 284(1)(c) are clearly fundamental considerations to achieving the overriding objective of establishing and maintaining a fair and relevant minimum safety net²⁰⁸ and should be given due weight. Indeed, as the FW Commission noted in its first Annual Wage Review decision²⁰⁹:

[14] While it is not useful to make a detailed comparison between the minimum wages objective and the parameters which guided the AFPC, there are some important differences which should be noted. In particular s.284(1) contains a requirement that a safety net be established and maintained. Therefore the principal consideration relates to the safety net rather than the “promotion of economic prosperity”. We discuss in some detail later a number of other important considerations which the AFPC was not specifically required to take into account. They include promoting social inclusion through increased workforce participation and relative living standards and the needs of the low-paid.(emphasis added)

²⁰⁷ See [2014] FWCFB 3500 at [75] – [82]

²⁰⁸ S3 and s284, FW Act.

²⁰⁹ [2010] FWA FB 4000.

Drawing on Chapter 1 of this submission, it is elementary that the wages/work bargain involves benefits to both the employee and the employer. The employer benefits from employing the worker's labour, and the worker benefits by receiving wages. Absent regulation (and worker organisation), the power relationship underlying that bargain is inherently unequal; this is the mischief, unfairness or injustice which the legislative policy intervention is directed toward remedying. The FW Act relevantly proscribes that those wages must not be less than a certain amount, determined in accordance with its provisions. It does not proscribe that those wages must not exceed a particular amount. The minimum wage fixation powers contained in the FW Act are a deliberate intervention in what would otherwise be the distribution of market incomes, in favour of employees. Once that is accepted, rising inequality and a continuing deterioration in the position of minimum wage workers relative to market wage workers should be regarded as indicators that the regulatory intervention is not delivering on its aims as well as it should.

In light of this, we are strongly of the view that textually minor but semantically significant amendments are required to the "minimum wages objective" and the "modern awards objective". Those amendments should retain each of the existing criteria in comparatively neutral terms, however should involve references to "reducing inequality and the incidence of low pay" in the same leading text as are contained the references to "fair minimum wages" and a "fair and relevant safety net".

Special minimum wage rate arrangements that apply to juniors, trainees and apprentices

Minimum wages for juniors, trainees and apprentices are generally tied to a percentage of an adult award rate of pay, or some other pre-determined formula in the case of some traineeship rates. The practical effect of these wage arrangements is that these workers are generally on rates of pay that fall well below the national minimum wage that applies to an unskilled, entry-level adult employee. Incontrovertibly then, juniors, apprentices, and trainees are by definition some of the lowest paid workers in the country.

The PC identifies some of the reasons generally proffered for why these three categories of workers should have discounted, lower rates of pay. For example, there is a view that these workers are generally less productive by virtue of their age and lack of experience, and that full adult rates of pay would disadvantage them in the labour market. In the case of apprentices and trainees, the discounted rate of pay clearly also takes into account the time the worker spends in off-the-job training.

While it may be true - certainly in the case of apprentices and trainees - that unions do not argue for these discounted rates to be eliminated entirely, there must continue to be a mechanism for scrutiny and review of the extent of the discount, and the reasons for those lower rates, to determine if they continue to be justified.

Given that there are different arrangements and considerations that apply to each of the three categories, our submission deals with each of them in turn below. However, there are two points of general application we first wish to make to the PC.

The first is that, as low-paid workers, apprentices, trainees, and juniors who rely on the award rate of pay must continue to have access to annual wage increases determined through the FW Commission's annual minimum wage review. Unions support the current practice of apprentice, trainee and junior rates being adjusted in line with increases to the national minimum wage and other award classification levels, provided that this delivers real wage increases.

The second, as noted above, is there must be an ongoing mechanism to assess the continued adequacy and relevance of these discounted wage arrangements, taking into account factors such as changing community standards, changes in the labour market, industry characteristics, evidence of the productivity and experience of these workers, and the needs of the low paid. Again, these should continue to be matters for the FW Commission to determine based on applications brought before it and the evidence and submissions from interested parties. We note there have been two such recent cases conducted under the provisions of the 'two-year' transitional review of the FW Act, which resulted in improved wages for juniors and apprentices respectively. Details of those cases are provided below.

We now provide further detail on issues relating to apprentices, trainees and juniors respectively.

Apprentices

In the vast majority of cases, apprentice rates in modern awards are determined as a fixed percentage of the award rate for a tradesperson (C10 or equivalent trade rate) for each year or stage of the apprenticeship.

Historically, the discounting of apprentice wages in this way was designed to compensate the employer for the lower productivity of the apprentice in the early years of the apprenticeship and the need for employers to allocate resources to their on-the-job training.²¹⁰

By virtue of their link to the C10 or equivalent tradesperson's rate, apprentice wages are adjusted automatically each year in line with annual increases to award rates of pay determined by the FW Commission and its predecessors. Unions support this as a process, although we remain concerned that the link to 'C10 or equivalent' has meant that apprentice wage increases, as with all other award rates, have failed to keep pace with general community wage movements. Our submission to the FW Commission in the Apprentice Case discussed below dealt further with this point.

Notwithstanding this process of annual wage adjustments, until recently, the underlying wage structures (i.e. the relevant percentage of the tradesperson's rate) had remained virtually unchanged since the 1970s in most awards, leaving apprentices on unsustainably low rates of pay.

²¹⁰ A shared responsibility Apprenticeships for the 21st Century, Final Report of the Expert Panel, 31 January 2011, Commonwealth of Australia, 2011, p. 88

In 2012, the ACTU and affiliated unions – the AMWU, CFMEU, and CEPU - made an application to the FW Commission to improve the wage arrangements for apprentices, as well as other conditions of employment. The claim in relation to apprentice wages included:

- Increasing the entry level rate for first year apprentices in modern awards to 60% of the C10 trades rate (previously percentage rates ranged from between 35% to 55% of the trades rate; most sat around 40-45%);
- Providing for adult apprentices to be paid no less than the rate for the minimum adult classification in the relevant modern award (i.e. the National Minimum Wage or higher); and
- Ensuring that adult apprentices who were employed in a workplace prior to starting an apprenticeship do not suffer a reduction in pay.

The key arguments in support of the union claims included:

- Apprentices are by any definition low paid. As a group of employees, they are among the lowest paid in our community, and regularly struggle to make ends meet, often relying on family and friends to get by. Apprentice wages were as low as \$250 a week in some awards (2013 figures) – barely above the New Start unemployment benefit - and were typically around \$300-350 a week. The claim was therefore about ensuring fairness in apprentice wages and giving apprentices the chance to enjoy a reasonable standard of living, something the evidence confirms they were not able to do on current award rates of pay.
- Apprentice wage structures that still largely applied in modern awards were designed for the 15 year old school leaver starting an apprenticeship as their first ever job, living at home with minimal expenses. That typical apprentice no longer exists. Apprentices today are older with more financial responsibilities, have higher levels of schooling, and a wider range of skills and previous work experience. Modern awards should reflect those modern day realities.
- A properly functioning apprenticeship system provides benefits for individuals, employers and the wider economy but these benefits are not being realised with apprenticeship completion rates around 50%. Poor wages are one of the key reasons explaining why apprentices drop out (and why they may not commence in the first place). This is particularly so when apprentices compare their rates of pay with other work and training options available to them. Improved apprentices wages would provide a more realistic chance of attracting and retaining apprentices into the future. The claim targeted first year rates where the bulk of attrition occurs and cost of living pressures are most acute.

We refer the PC to our extensive submissions in the Apprentice Case for further details of the evidence and argument in support of improved apprentice wages.²¹¹

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http://www.fwc.gov.au/documents/documents/awardmod/review/AM201218&ors_corr&outlineofclosing_sub_actu.pdf

http://www.fwc.gov.au/documents/documents/awardmod/review/AM201218&ors_sub_witness_ACTU.pdf

The apprentice case was heard before a full bench of the FW Commission through the course of 2013. On 22 August 2013, the Full Bench issued its decision.²¹² It did not grant the unions' claim in full, but it did determine substantial improvements to apprentice wages and conditions. The key components of that decision in relation to apprentice wages were as follows:

Increases to 'junior' apprentice rates

- A new first year apprentice rate of 55% of C10 or the equivalent trade rate for apprentices who have completed year 12, and 50% to those apprentices who have not completed year 12; and
- A new second year rate of 65% for apprentices who have completed year and 60% to those who have not.

Adult apprentice rates

- Adult apprentice provisions to be inserted in modern awards where they don't currently exist.
- The new rate for a first year adult apprentice will be 80% of the C10 rate, unless the award already provides for a higher rate.
- The new rate for a second year adult apprentice will be the national minimum wage or the lowest adult classification rate in the award, whichever is the greater.
- Unless the award already provides otherwise, an adult apprentice will be defined as an apprentice who is 21 years of age when they commence their apprenticeship.

Existing worker adult apprentices

- Protection of minimum rates for existing workers who take up an adult apprenticeship with their current employer.

Competency-based wage progression

- Provisions for competency-based wage progression to be introduced into awards that were subject to the AMWU and CFMEU applications. This means apprentices under those awards progress through the wage rates for each year or stage of the apprenticeship based upon achievement of the required competencies, rather than through an age-based or time-served model.

Implementation and phasing arrangements

- The new rates (for both 'junior' and adult apprentices) will apply only to apprentices who commenced their apprenticeship on or after 1 January 2014
- The increases will be phased in as follows:
 - If the relevant increase is equal to or less than a 5% increase in the relevant percentage of the award reference rate then the full increase applies from 1 January 2014
 - If the relevant increase is more than a 5% increase in the relevant percentage of the award reference rate, then the percentage or rate increases by 5% from 1 January 2014, with the remainder of the increase taking effect from 1 January 2015
- Where adult apprentice rates are being inserted in awards for the first time, the new rates will apply from 1 January 2014 with no phasing-in.

²¹² [2013] FWCFB5411

In its decision the Full Bench found the changes were necessary to ensure the apprenticeship system met the needs of business and the Australian economy and was both relevant and attractive to modern day apprentices. Among other things, the Full Bench took into account the fact that wage structures had been set when most apprentices were 14, 15, or 16 years of age on commencement. Many are now 17 or older and have completed year 12 schooling and are already undertaking part-time or casual work with higher wages than they receive under an apprenticeship. In some trade areas, a significant number of apprentices have completed a vocational qualification.

It also found that apprentice rates should be considered in light of evidence as to the hardships experienced by apprentices on (the then) current rates of pay and community expectations of reasonable living standards.

The Full Bench considered that increased rates may assist to improve the attractiveness of apprenticeships compared to other training or employment options for young people. It found that only about half of all apprentices complete their apprenticeship and increased wages may also assist in improving completion rates. The Bench was not persuaded having regard to the material and evidence presented that the increases to apprentice wages would have a significant adverse effect on apprenticeship commencements, business or the national economy.²¹³

In terms of the perennial argument about the impact of wages on employment, the full bench decision to increase apprentice wages was criticised for the impact it would have on the employment of apprentices.

We do not seek to overstate a direct causal link either way between apprentice wages and apprentice commencement numbers and acknowledge a range of factors can be at play. In the apprentice case decision, the full bench noted the number of studies that suggest apprentice wages are far from the critical factor in determining employment decisions by employers. It referred to the Toner Report,²¹⁴ which found the key drivers of apprentice commencements are macro-economic variables, such as growth in demand for the output of the firm, and not the level of apprentice wages. In our submission then, apprentice commencements can be influenced by a range of factors but are largely dependent on business activity. If, for example, housing construction activity picks up then it is likely more apprentices will be employed in the building industry.

However, if we do look at apprentice wages and apprentice commencements, at the very least it can be said the dire warnings about apprentices being priced out of employment do not appear to have been borne out, with commencement numbers standing up well since the wage increases came into operation, particularly given the decline in the labour market over the past 12 months.

We note the most recently released September quarter 2014 figures from the NCVER show a 15% decrease in trade commencements over the previous 12 months. However, this result appears to be at odds with other figures from the NCVER cited below and further data releases are required to get a full picture of what has happened with apprentice commencements in the

²¹³ ([2013] FWCFB 5411, paragraphs 172-190

<http://www.fwc.gov.au/documents/documents/awardmod/review/2013fwcfb5411.pdf>

²¹⁴

http://www.fwc.gov.au/documents/documents/awardmod/review/AM201218&ors_sub_witness_ACTU.pdf

full 12 months and more since 1 January 2014. The NCVER figures up to the June quarter 2014 had shown that trade commencements increased 6% over the previous 12 months.²¹⁵ Early trend estimates for the September quarter showed a further increase from 20 900 to 21 500.²¹⁶ Recently released early trend estimates for the December quarter indicated another increase in trade commencement numbers in the December quarter.²¹⁷

This evidence is consistent with previous cases where apprentice wages have increased as a result of tribunal decisions and there has been no discernible adverse impact on apprenticeship commencement numbers. In fact, the opposite has been the case. For example, in Western Australia, in 2006, the state Industrial Relations Commission extended adult apprenticeship rates to award-free employees that three years earlier had been granted to award employees. In doing so, it found the operation over that three year period of the new adult rates for award employees (which were aligned to the third year rate of an apprenticeship; similar to the increase awarded by the FWC decision) had not made adult apprenticeships 'unattractive nor uneconomic' or a disincentive to employers to employ adult apprentices'. In fact there was evidence of the number of adult apprenticeships rising significantly across almost all areas.²¹⁸

Similar evidence of apprenticeship commencements increasing is available in relation to apprentice wage increases that flowed from the 2006 Metals Award case in the AIRC.²¹⁹

We also note that while employers often argue that wage increases mean only one thing – employers will stop employing apprentices – the evidence presented in the FW Commission case was that wage increases can have a number of different and positive affects on the practices and behaviour of both apprentices and employers. For example, the evidence of Professor John Buchanan was that wage increases can be a trigger for changes in practice that improve productivity, “by triggering a reassessment of how labour is deployed, how it’s trained, how it’s supported, how it’s utilised as a productive input”²²⁰

A representative of the NSW Business Chamber also agreed under cross-examination that it is not just a question of the cost of labour, it is also the about the quality of labour, and if faced with a wage increase for apprentices the Chamber would not simply be advising their members to stop employing apprentices but to look at how they could use their apprentices more productively and look at their recruitment and selection of apprentices.²²¹

²¹⁵ Apprentices and Trainees, 2014 June Quarter, NCVER, Commonwealth of Australia, 2014, p. 4

²¹⁶ “Skills and Training Reforms support growing numbers of apprentices and trainees”, the Hon Ian Macfarlane Minister for Industry, Media release, 13 November 2014

²¹⁷ Apprentices and Trainees, early trend estimates, 2014 December quarter, NCVER, Commonwealth of Australia, 2015

²¹⁸ 2000 WA IRCOMM 5589, paragraphs 11, 12, 18

²¹⁹ [2013] FWCFB5411, paragraph 142

²²⁰ Evidence of Professor John Buchanan in the Fair Work Commission Apprentice Case, 5 March 2013, at http://www.fwc.gov.au/documents/documents/awardmod/review/AM201218&Ors_050313.pdf paragraph number 1758

²²¹ Evidence of Mr Nicholas Minto in the Fair Work Commission Apprentice Case, NSW Business Chamber, 3 April 2013, at <http://www.fwc.gov.au/documents/documents/awardmod/review/0301413am201218.pdf>; paragraph number 7950-7955.

Juniors

The ACTU does not believe there is any justification for the retention of discounted wages for workers between the ages of 18 and 21 within the industrial relations system. Adults should be paid as adults, meaning that workers aged 18 and over should be entitled to the relevant adult rate for the work they are performing, unless they are in a formal and genuine apprenticeship or traineeship arrangement that combines work with on-the-job and off-the-job accredited training.

At present, minimum wages for junior employees not covered by formal training arrangements are generally expressed as a percentage of the minimum rate for the relevant classification in modern awards. This means that any minimum wage increases awarded as part of annual wage reviews flow on to junior wages in modern awards. The ACTU supports a continuation of this process for adjusting junior rates of pay, where they exist.

The larger question is whether it is appropriate for existing junior pay scales to continue to be a feature of modern awards, leaving young workers dealing with adult costs of living to remain on lower, discounted wages right up until they turn 21 under many modern awards. It is important to note that junior rates are not a feature of all awards at present. In the building and construction industry for example, modern awards have no junior rate provisions and unapprenticed young workers have traditionally been paid as adults.

The ACTU and affiliated unions have long held the view that the provision of junior rates for workers over the age of 18 years is unjustifiable and discriminatory, and fundamentally inconsistent with the principle of equal remuneration for work of equal or comparable value.

In our submission, wages should be based on skills, abilities and work value and not on the age of the worker.

Australian society recognises the age of 18 years as the start of adulthood for all other purposes. Under the common law, an adult is a person who has attained the age of 18. A person who reaches the age of 18 years in Australia can be expected to be treated as an adult in virtually all contexts – except in terms of the wages they are entitled to receive in the workplace.

Consistent with the position outlined above, unions will continue reject and oppose any argument to insert junior rates into those awards that historically have had no such provisions. In those awards that do have existing provisions for junior rates, unions will continue to advocate for the removal of junior rates for workers aged 18 and over, with the exact approach to be determined on an industry by industry basis.

For example, as a moderate, preliminary step towards that longer-term goal in the retail industry, unions have supported the removal of junior rates for workers aged 20 years. Extensive submissions and evidence in support of this position were presented in the 2013 retail industry junior rates case before the FW Commission, as described further below.²²²

²²² see for example the submissions of the SDA and ACTU to the Fair Work Commission in that matter http://www.fwc.gov.au/documents/documents/awardmod/review/AM2012196_sub_SDA_GRIAjuniors.pdf
http://www.fwc.gov.au/documents/documents/awardmod/review/AM2012196_sub_ACTU.pdf

We further note that Australia's continuing use of junior rates is an issue that has been commented upon by the ILO's Committee of Experts on the Application of Conventions and Recommendations in the context of Australia's compliance with the ILO's *Minimum Wage Fixing Convention, 1970* (No. 131). The Committee has conveyed its expectation that the Australian Government will 'continue to review from time to time the rationale and advisability of fixing differentiated wage rates on grounds such as age or disability'.²²³

We recognise that the payment of discounted wages to junior workers is explicitly permitted under Australian law. However, in our submission these facts do not render the payment of junior wages to young workers necessary or desirable.

Discounted wage rates for junior workers are often justified on the basis that they reflect a reasonable discount for inexperience and so encourage employers to provide employment opportunities to young people. The ACTU submits that this argument is far from tenable, particularly in the case of 20 year old workers. By this age, many workers have previous skills or experience. Indeed, many have been working for several years by the time they reach the age of 18. They bring skills, qualifications and experience to the job, and are entitled to have their work valued accordingly.

The argument that is generally presented by employers any time a wage increase is sought is that it cannot be afforded and that it will lead to fewer people being employed. This is also the argument often put forward for retaining discriminatory wages for young workers. On that point, we refer to the experience and evidence presented in other sections of this submission about the impact of annual minimum award wage increase and the lack of any demonstrable impact on employment growth or employment prospects of the low paid. There is no evidence of adverse employment affects in those industries, such as building and construction, that have long had no provision for junior rates.

The ACTU also notes studies conducted internationally that suggest the elimination of discounted wage rates for young workers will not have adverse employment effects. Studies on the effect of reforms in New Zealand which included lowering the eligibility age for the adult minimum wage from 20 to 18 and increasing the youth minimum wage found no robust evidence to suggest that increases to the minimum wages paid to young workers had negative effects on youth employment rates or hours worked. Indeed, the authors found stronger evidence of positive employment responses to the changes in terms of increased hours worked and increased earnings for young workers.²²⁴

The fact that many employers in the retail industry, for example, have already been paying adult rates to workers of 20 years of age for some time under enterprise agreements also suggests that this measure does not impact negatively on business productivity or competitiveness.

The ACTU therefore welcomed the decision last year by a Full Bench of the FW Commission to vary the *General Retail Industry Award 2010* to ensure that 20 year old retail employees receive the full adult rate of pay provided that they have worked for the employer for more than six

²²³ ILO, *Minimum Wage Fixing Convention, 1970* (No. 131), Direct Request (CEACR), adopted 2006, published 96th ILC session (2007).

²²⁴ D Hyslop and S Stillman, 'Youth Minimum Wage Reform and the Labour Market', *New Zealand Treasury Working Paper 04/03*, March 2004

months.²²⁵ The decision, in response to an application by the Shop Distributive and Allied Employees' Association (SDA) and supported by the ACTU, recognises that the discounted rate for 20 year old adult retail employees did not provide a fair and relevant minimum safety net.

In reaching its conclusion, the Full Bench made a number of important findings, including:²²⁶

*We agree with the SDA's submission that a high proportion of employees in the retail industry are low paid.... It is also accurate to describe 20 year olds, who do not receive the adult rate of pay, as being amongst the lowest paid.*²²⁷

*The evidence presented by both the SDA and the employers generally supports a conclusion that most junior retail employees achieve a satisfactory level of proficiency in their roles after about six months in employment. Further much of the evidence suggests that there is little difference in the duties and responsibilities assigned to 20 and 21 year old retail employees or in the level of supervision required in relation to those employees.*²²⁸

*There was little evidence to suggest a 20 year old, with some experience, required any supervision; certainly not close supervision such that may suggest an additional cost would be incurred by employers to engage persons to provide such supervision. In fact, as we have earlier noted, there was evidence that employees at 20 years of age or younger had supervised other employees.*²²⁹

*Having considered all of the evidence and submissions we are not persuaded the variation will be likely to have a negative impact on workforce participation. In those businesses with a collective or other employment arrangement whereby 20 year olds are already being paid the adult rate, it is unlikely to have any impact on the continuing workforce participation of these workers. ... In the case of businesses where the award rate only is paid, we accept employers may consider whether to hire either a younger employee or an adult instead of a 20 year old. The evidence did not suggest it is a strong possibility they will decide to do so. Their current practice was not to prefer these other employees to an employee about to turn 21 years of age. That is understandable as they would be unlikely to do so particularly in the case of an employee with experience who understands the business and its customers.*²³⁰

*We assess the likely cost impact of the claim to be moderate. Further, that impact will be reduced as a consequence of the period of service requirement we have decided to introduce. We are not persuaded that the provision of adult rates to 20 year old retail employees will have a significant negative impact on business costs, nor on the viability of retail businesses. We are not persuaded it will have a discernible impact on employment growth.*²³¹

²²⁵ [2014] FWCFB 1846, 21 March 2014 .

²²⁶ ([2014] FWCFB 1846, 21 March 2014;

<http://www.fwc.gov.au/documents/documents/awardmod/review/2014FWCFB1846.pdf>

²²⁷ [2014] FWCFB 1846, [41].

²²⁸ Ibid, [171].

²²⁹ Ibid, [94].

²³⁰ Ibid, [140].

²³¹ Ibid, [164].

In varying the Award to give effect to the decision, we are mindful of the cost implications for some employers and the transitional arrangements that are still applicable under the Award. We have therefore decided that the Award should be varied so that the new rates for 20 year old employees in retail classifications will be phased in as follows: 95% of the adult rate to apply from the first pay period commencing on or after 1 July 2014; and 100% of the adult rate to apply from the first pay period commencing on or after 1 July 2015.²³²

Trainees

Modern award minimum wages for employees undertaking an approved traineeship are generally set by the National Training Wage Schedule that forms part of most modern awards. Some modern awards contain separate trainee rates.

Traineeship wages contained in the National Training Wage schedule range from around 45% to 90% of the national minimum wage, depending on the highest level of schooling the trainee obtained, the number of years out of school, and the training package and qualification level.

Trainees undertaking a certificate level IV traineeship are paid an additional loading, and adult trainees receive higher percentage rates of the national minimum wage. Existing workers who commence a traineeship have their existing minimum rate of pay protected.

The ACTU supports the current process of traineeship rates being adjusted in line with increases to the national minimum wage and adult classification rates through the annual minimum wage review process.

We note that there has been no major review of how traineeship rates are formulated since the National Training Wage Award was first established in 1994. There would be value in a review at some point to determine the ongoing adequacy of the national training wage rates of pay, the appropriateness of the current three tier wage structure based on the type of training package, level of qualification and level of schooling, and whether the extent of training and skills development is sufficient to warrant the discounted rate of pay.

As indicated above, these are the types of matters that the FW Commission should continue to have the power to consider and determine based on any relevant applications that come before it.

²³² Ibid, [174].

9

The Safety Net: (2A) The Award System.

The modern awards objective makes it clear that the primary purpose of modern awards is to provide a fair and relevant safety net of terms and conditions of taking into account a range of economic and social factors.

We reject the proposition that ‘the tax and transfer system, the NES and minimum wages already serve as adequate safety nets’.²³³

Modern awards operate *in conjunction with* the NES to provide a comprehensive safety net for employees in the federal system. Unlike its predecessor, the FW Act situates minimum wages within modern awards. It also expressly provides that modern awards may include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES and terms that supplement the NES but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the NES.²³⁴ Minimum terms and conditions of employment are regulated by the NES and modern awards working together.

Modern awards contain matters that must be regulated in order to ensure that employees have access to fair wages and conditions including reasonable working hours, compensation for working unsociable hours or in unpleasant or dangerous conditions, access to consultation and dispute resolution, notice of termination and superannuation. The exploitative practices adopted by employers following the enactment of *WorkChoices*, which enabled award conditions to be removed by individual ‘agreement’, clearly demonstrates that the risk to employees of eliminating or reducing award regulation is not simply theoretical.²³⁵

Further, the legislative provisions do not contain sufficient detail to provide an appropriate safety net even in relation to those matters covered by the NES. For this reason it has been necessary to supplement the NES through more prescriptive award provisions. The additional regulation ensures that the safety net more properly balances the needs of employers and employees. For example, the NES provisions that require annual leave is taken at mutually agreed time are qualified by award close-down provisions that enable businesses in certain industries to direct employees to take annual leave provided certain requirements are met. Similarly, the NES entitlement to severance pay is supplemented by award provisions that deal with other matters connected to redundancy such as notice periods.

The modern awards objective

The Modern Awards Objective (MAO) sets out various factors that must be taken into account in determining a fair and relevant minimum safety net.

²³³ Productivity Commission, *Workplace Relations Framework: Safety Nets*, Issues Paper 2 (2015) p12.

²³⁴ FW Act s55(4).

²³⁵ These amendments are discussed in more detail in Chapter 17

Subject to our view expressed in the previous chapter regarding the need to more directly reference reducing inequality and the incidence of low pay, we believe the MAO is well balanced. It enables the FWC to consider the competing interests of employers and employees in determining minimum standards and craft provisions that are ‘tailored to the needs of the particular industry or occupations’.²³⁶ As FWC has noted:

The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.²³⁷

That the content of modern awards accommodates differences between businesses as well as workers should not be overlooked. These differences explain why it is necessary to retain multiple modern awards with differing terms and conditions of employment. The level of prescription in awards is inextricably linked to the fact that the safety net takes into account, among other matters, the need to promote flexible modern work practices, the efficient and productive performance of work and impact on business, including on productivity, employment costs and the regulatory burden.

The capacity of the modern award system to provide minimum terms and conditions relevant to different parts of the workforce is one of its greatest strengths. As evidenced by our discussion in Chapter 4, flexibility is built into the framework and content of the safety net and consequently there is less need for parties to negotiate alternative arrangements in order to gain access to appropriate minimum terms and conditions of employment. Of course, it remains open to parties to enter into an arrangement that is in excess of the safety net.

The observation that modern awards “still spell out” minimum wages and conditions for a wide range of industries, occupations and skill levels implies that such provisions are outdated or irrelevant.²³⁸ Our position is that it is not possible to provide a fair and relevant safety net without taking into account work value.

Modern awards contain classification structures and minimum wage rates that are directly relevant to work performed in the industry/occupation covered by each award. The classification descriptors are broad enough to encompass the variety of jobs/roles performed by employees in different businesses as well sufficiently comprehensive to ensure that skills, qualifications and experience are properly rewarded. The inclusion of indicative tasks makes it easier for employers/employees to identify the relevant minimum wage level without prescribing business operations. Minimum wages are also underpinned by a system of external relativities that relates classification levels and rates of pay in each modern award to the C10 classification in the Manufacturing Award. These external relativities ensure that employees working in different industries and occupations who perform work of equal or comparable value are entitled to same minimum rate of pay.

We also wish to emphasise that flexibility must not be equated with reductions in award entitlements. The fact that employers succeeded in persuading FWC to reduce penalty rates in the Restaurant Award during the two year review of modern awards does not mean that award

²³⁶ Ibid.

²³⁷ [2014] FWCFB 1788, [60], see also [34]-[35].

²³⁸ Productivity Commission, *Workplace Relations Framework: Safety Nets*, Issues Paper 2 (2015) p.10.

conditions are more flexible than minimum wages. Minimum wages are reviewed every 12 months as part of the annual wage review. It is also possible to vary minimum wages outside the annual wage review on work value grounds. There is ample scope under these provisions to ensure that minimum wages are fair and relevant.

The relevance of modern awards

The practical relevance of the safety net is evident from the relatively high proportion of employees that have their pay and conditions of employment set by modern awards, either directly or indirectly.

According to the most recent ABS Employee, Earnings and Hours survey, there were 1 860 700 employees paid exactly at an award rate in May 2014, representing 18.8% of all employees. 41.1% of employees were paid according to a collective agreement and 36.6% paid according to an individual arrangement, with the remainder (3.4%) being OMIEs.

Research conducted by the FWC²³⁹ highlights the intricate nature of the relationship between modern awards and pay setting practices. Businesses are not neatly divided into those organisations that only rely on awards, those on enterprise agreements and those that use other wage-setting arrangements. Among those that are formally 'non award-reliant', around one-third (36 per cent) use awards as a basis for pay, even though they may have no employees paid at exactly the award rate. Moreover, in award-reliant organisations, close to a third of employees on over-award rates of pay (either through an informal arrangement or enterprise agreement) received the most recent AWR decision wage increase.

The authors of the report conclude that awards 'shape the wage determination process and wage outcomes' generally, that is, for employees covered by other industrial instruments. This appears to be especially the case in those parts of the labour market paying below median wages.²⁴⁰

Further evidence of the relevance of modern awards to pay setting for employees on other industrial instruments is provided by the 2015 Australia Workplace Relations Study (AWRS).

In contrast to the pay-setting categories reported in the ABS Employee Earnings and Hours survey whereby 'over-award' arrangements are included in estimates for individual arrangements, the AWRS defined the method of setting wages by an individual arrangement as a method that did not take account of an award or enterprise agreement. Arrangements that use awards as a base or a guide are included as a sub-set of the award wage-setting method as 'over-award'. Wage-setting practices that are based on an enterprise agreement, even where the enterprise is paying more than the applicable rate for an employee, are included in the enterprise agreement pay-setting category.

Analysis of the method of setting pay for employees based on employer reported data are presented in Table 10 below. The results show that modern awards influence wage outcomes for over a third of the workforce (36%). This can be broken down by whether employees were paid exactly the award rate (Award reliant) or an amount above the applicable award rate (i.e. Over-award).

²³⁹ Buchanan J, Bretherton T, Frino B, Jakubauskas M, Schutz J, Verma G and Yu S (2013) *Minimum wages and their role in the process and incentives to bargain*, Research Report 7/2013, Fair Work Commission, December, Melbourne,

²⁴⁰ Research Report 7/2013, xii.

A further 37% of employees have their wages set by enterprise agreements. The proportion of employees that negotiate individual pay arrangements that are not based on modern awards or enterprise agreements is 28%.

The table also presents employee population estimates for employees who have their pay set by an award-based arrangement, but where it is unclear whether they are paid exactly the award rate or above the applicable award rate.

Analysis of the award-based arrangements that excludes the unknown award-based arrangements show that 18% of the employee population were paid exactly the rate specified in an award. This figure is quite close to the proportion of employees paid exactly at an award rate in the ABS dataset.

Table 10: Method of setting pay for employees based on employer reported data, per cent of employees	
	All employees (%)
Enterprise agreement	36.5
Individual arrangement	27.8
Award-based*	35.7
Award-based arrangements	
Award reliant**	14.8
Over-award***	5.1
Unknown award-based arrangement****	15.8
Award-based arrangements excluding unknown	
Award reliant**	17.5
Over-award***	6.1

Source: AWRS 2014, Employee Relations survey.

Base = weighted workforce count of 9 061 447 employees for Enterprise agreement, Individual arrangements and Award-based analysis. Records where don't know, missing and unknown wage-setting arrangements have been excluded (47 466).

Base = weighted workforce count of 7 633 604 employees for Award-reliant and Over-award analysis Records where don't know, missing and unknown wage-setting arrangements have been excluded (1 427 843).

* Award-based includes arrangements where the award is used as a guide/base for pay setting or pay is set at exactly the award rate.

** Award-reliant is setting a pay rate at exactly the applicable award rate.

*** Over-award is a method where pay is set with reference to an award rate (i.e. as the base) but not at exactly the applicable award rate.

**** Unknown award-based method includes don't know and missing responses.

The level of reliance on modern award *conditions* is likely to be even greater than the proportion of employees whose pay is based on a modern award. Collective agreements and/or individual arrangements commonly incorporate or reference award provisions. Indeed, for many employees covered by common law contracts, the only beneficial provision that is not identical (in substance) to the applicable modern award is salary.

Modern awards and incentives to bargain

The high level of reliance on modern awards has not discouraged collective bargaining. As noted above, 41.1% of employees are covered by a collective agreement.

Moreover, research commissioned by the FW Commission for the 2013-14 Annual Wage Review reveals that there is no positive or negative relationship between minimum wage increases and the incentive to bargain. Instead the evidence points to a complex mix of factors that may contribute to employee and employer decision making about whether or not to bargain.

AWR increases were assessed as a third order factor in generating incentives or disincentives to bargain.²⁴¹

For employers, the 'first order' incentives to bargain all dealt with the preservation of commercial viability for the business including: local labour market and product market concerns; workplace level restructuring; performance management; and policy directives (either macro or micro) which employers identified as having more immediate impacts for pricing or cost structures.²⁴²

For employees, the 'first order' incentives to bargain emerged from a mix of personal and work factors and included: workplace level restructure; perceptions of value to their employer; a desire to achieve a better fit between work and home life; and perceptions about 'receptiveness' to bargaining at the workplace level (ie workplace culture).²⁴³

Scope to consolidate and/or simply modern awards

The creation of modern awards involved consolidation and simplification of award entitlements on a massive scale. In the process, terms and conditions of employment that had been well-entrenched in particular states, sectors or parts of the economy were eliminated. Examples include additional public holidays, jury service make up pay, and more beneficial leave entitlements. In addition, detailed provisions were redrafted in order to clarify and/or simply the safety net. In some cases, critical information regarding the operation of specific entitlements was removed, creating a degree of uncertainty or ambiguity in relation to the safety net. It ought not be forgotten that Award Modernisation in itself came on the back of over two decades of award restructuring, simplification and review within the federal system under which award classifications and wage relativities were aligned, awards were reduced in size and complexity and (from 1986) awards were transitioned from paid rates instruments to a safety net. Some of these processes were initiated by the parties through the C&A Commission and AIRC²⁴⁴ and some were of legislative origin²⁴⁵.

From our perspective, further simplification or consolidation of modern award entitlements would greatly disadvantage employees, make it more difficult to accommodate circumstances that are unique to particular industries/occupations, reduce the flexibility of the existing framework and cause confusion in relation to the operation of minimum wages and conditions of employment.

There is scope, however, to make minor variations to clarify and/or improve the operation of award provisions. It is also necessary that the FW Act provide a satisfactory mechanism for

²⁴¹ Research Report 7/2013 ixx.

²⁴² Research Report 7/2013, x-xi.

²⁴³ Ibid.

²⁴⁴ For example, Restructuring and Efficiency

²⁴⁵ For example the Award Simplification Process mandated by the *Workplace Relations and Other Legislation Amendment Act 1996*

varying and updating the content of modern awards to reflect changes in 'community standards and expectations'.²⁴⁶ The four yearly review process is considered further below.

4 Yearly Review Process

Prior to the FW Act variations could be made on application by one of the parties to an award or at the initiative of the AIRC. There was no requirement for the AIRC to conduct regular award reviews. The legislation provided sufficient scope to modify and update the safety net without causing unnecessary disputation or uncertainty in relation to award entitlements.

When the FW Act was implemented, it was envisaged that modern awards would provide "certainty, flexibility and stability for employers and their employees".²⁴⁷

Unfortunately the legislative requirement to review modern awards every four years has resulted in award entitlements being contested simply because the review process provides a trigger for doing so. Employer organisations and unions are effectively bound by their charters to use the review mechanism as an opportunity to improve their position. As a result, elements of the safety net that were well-entrenched and relatively uncontroversial prior to the creation of modern awards (such as penalty rates) have become a battleground for industrial parties.

In the 2012 Award Review variation 'applications' were made in relation to 85 out of 122 modern awards.²⁴⁸ The vast majority of these applications were dismissed on the basis that there was insufficient evidence. The decision issued by the Full Bench at the commencement of the four yearly review in March 2014 indicates the extent to which unsubstantiated award variations have become an issue. It states:

The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation... Where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.²⁴⁹

The number of applications generated by the review process has created an enormous workload for the FWC, unions and employers. Legislative changes are required in order to prevent variation applications being made without proper legislative grounds, which unnecessarily take up FWA's time and that of intervening organisations.²⁵⁰

In 2012, the ACTU proposed that FWC should be able to strike out applications that are clearly speculative and without foundation on conventional grounds adopted by the courts.²⁵¹ Our experience during the 2012 and 2014 Award reviews are such that we now believe that it is necessary to abolish the four yearly review process altogether and replace it with a mechanism that enables parties to apply for an award variation where necessary to achieve the MAO. This

²⁴⁶ Explanatory Memorandum to the Fair Work Bill 2008, [518].

²⁴⁷ Explanatory Memorandum to the Fair Work Bill 2008, [15].

²⁴⁸ <http://www.fwc.gov.au/documents/documents/awardmod/review/2012FWA8271.pdf>.

²⁴⁹ [2014] FWCFB 1788, [23].

²⁵⁰ Fair Work Act Review, Panel *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, Final Report, August 2012, 5.3.4.

²⁵¹ ACTU, *Submission to the Post Implementation Review of the Fair Work Act 2009*, February 2012.

would essentially restore the position whereby safety net changes were a product of either a genuine contest on the merits within a concrete factual setting or of the FW Commission responding to demonstrable changes in community expectations and economic conditions (for example through the development of test case standards).

The FW Act currently enables the FW Commission to make, vary or revoke a modern award between the four yearly reviews on its own initiative or on application under section 158 where certain requirements are met. These provisions should be modified to provide an alternative to the current review process.

10

The Safety Net: (2B) Penalty Rates

The fact that penalty rates is a topic of its own in the PC issues papers suggests the “squeaky wheel” principle is at play. In our submission, there is nothing extraordinary about our industrial relations system providing for penalty rates. They should remain part of the safety net maintained by the FW Commission and bargaining parties should continue to be free to modify them, as with other award safety net conditions, by collective bargaining on a “better off overall” basis.

We note that penalty rates are a matter of some contention in the present review of modern awards by the FW Commission. Through this process, the ACTU, SDA and United Voice along with a number of other affiliated unions are defending claims by employers to reduce or remove penalty rates in a number of modern awards. As part of our defence we will likely be filing further information and data with the FW Commission that is also relevant to the questions being posed by the PC. We suggest that the PC keep abreast of the proceedings in the FW Commission and take into consideration evidence filed as part of this process²⁵². In any event, it would remiss of us not to make the point that it is undesirable and inefficient to have two government inquiries dealing with this issue in parallel. This point has particular force given the Minister has apparently already ruled out a legislative change concerning penalty rates irrespective of what the PC’s views may ultimately be.

Who, where and why

Penalty rates exist in most industries. Most modern awards provide for higher rates of pay for employees who work on Saturdays, Sundays, afternoons, evenings and early mornings – times which are considered to be unsociable.

The organisation of work and workers in industries where penalty rates are payable is however variable. Some workers work fixed or rotating roster patterns over several days per week which involve the payment of penalties because some unsociable hours are involved within the roster pattern. Some workers who work those patterns on a roster have had the shift penalties incorporated into their regular pay, with only exceptional overtime requirements attracting penalty rates²⁵³. Some workers work casually or part time on fixed or variable rosters and their work, but not necessarily the work of others in that business, is concentrated during unsociable hours. There are some areas in which workers are required to work at any time over a day or week, including unsociable hours, such as in necessary services like hospitals or emergency services etc. There are some employees who are required to work unsociable hours because their employer chooses to open their business during these times. While there is a distinction between work that must be done because the nature of the service is essential or necessary to ensure the health, safety and welfare of Australians, and work which is done because an

²⁵² Material filed in the penalty rates matter can be found here: <https://www.fwc.gov.au/awards-and-agreements/modern-award-reviews/4-yearly-review/award-stage/am2014305-penalty-rates>

²⁵³ For example in the Fire Fighting Industry

employer decides to offer a good or service at a time which is considered to be unsociable, there is no practical difference for the employees. Employees have to work when they are directed to do so by their employer and often they have no choice about when this is as it may be the only time at which the work is available. The negative effects on health and social interaction, which are discussed below, apply equally to all employees who work during unsociable times. As such, all workers deserve to receive penalty rates when they work during unsociable hours regardless of the reasons why they have to work.

Penalty rates were originally introduced as a deterrent to stop employers engaging people under long or abnormal hours and also as a way to compensate employees who performed work outside of the traditional Monday to Friday, 9am to 5 pm pattern of work. In contemporary society the deterrent nature of penalty rates has ceded ground to the compensatory effect.

Penalty rates also help to define the working week: they act as punctuation signalling periods of time when work is not normally done and they form an essential function in this regard. As we set out below all societies have regulated patterns of work with distinct days of rest when it is expected that individuals will be able to participate in activities other than work. Penalty rates form an important part of a broad community consensus of when work activity should mainly take place. There is longstanding historical precedent and broad public support and consensus for distinguishing week end and week day work.

In *Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd* (1909), (3 CAR commencing at p21) Justice Higgins awarded penalty payments valued at time-and-a-half of ordinary payments be made for work on the seventh day in any week, an official holiday and all time of work done in excess of the ordinary shift during each day of twenty hours'. Justice Higgins awarded the penalty rates, firstly as compensation to employees being made to work at inconvenient times, but secondly to act as a deterrent against 'long or abnormal hours being used by employers'.

The rationale for penalty rates; that employees should be appropriately compensated for working long hours at inconvenient and unsociable hours, was reaffirmed almost forty years later by the C&A Commission. It decided that Saturday work should be paid at 125% of the base rate, and people working on Sundays should receive double-pay. ²⁵⁴ The FW Commission, through its various iterations, has not departed from its view even when its discretions were wide enough to permit it to do so. Sensibly, this view is now explicitly referred to in the MAO, which conditions the exercise of the FW Commission's powers to vary modern awards and minimum wages.

While penalty rates have led to commentary for a number of decades, the debate has become more vocal in recent periods owing to changes in the industrial relations framework. Whereas once the award system was based on achieving resolution to actual disputes within an industry, in more recent years the award system has been characterised by legislative requirements to "simplify" or "review" the system in an almost endless cycle in the absence of any such dispute. This necessarily brings with it the opportunity for all concerned to agitate for changes that would undo the consensual status quo and seek to have the safety net re-written in a vacuum to meet only the interests of their constituents.

²⁵⁴ 58 CAR 610 at 615

Throughout this process, no strong arguments or evidence have been provided to justify the wholesale removal or reduction of penalty rates. Penalty rates have existed alongside awards and agreements for the entire period of industrial regulation in Australia.

“Living in a 24/7 economy” doesn’t justify harming the people that make it tick.

Opponents of penalty rates often suggest that the historical justifications are irrelevant in today’s “24/7 economy”. This is a claim that appears to be gathering legitimacy through repetition, but the facts tell a different story. It is a claim that was once often sprouted in the same breath as a suggestion that the FW Act has reduced productivity or led to a “wages breakout” (both of which are also demonstrably untrue).

Skinner and Pocock’s studies show that most Australian workers continue to work during the week between the hours of 8 am and 6 pm. Working during unsociable hours is a minority experience. They say that based on this, and the fact that working unsociable hours has a detrimental toll on employees’ work-life interference, then there is a case for paying a premium to those who work on the weekends, particularly Sundays.²⁵⁵ Sundays are special to workers – it is the day on which they can meet up with family and friends.²⁵⁶

As Bittman notes, assumptions about a 24/7 economy have created an impression that working on Sundays is now the norm for a large and growing proportion of Australian workers.²⁵⁷ Continued reference to Sunday work being ‘normal’ and not harmful to workers is at risk of becoming an accepted proposition – as noted this is something that we urge the PC to resist. Such claims should not be taken at face value. Bittman notes that the chances of a worker working on a weekday are approximately one in two, while the chances of working on a Sunday are approximately one in seven.²⁵⁸ He also goes on to note that the numbers of workers working on a Sunday has risen only very gradually over almost 25 years and if the changes continued at the rate he identifies, not until the twenty second century would we see more than 50 per cent of working-age Australians work on a Sunday.²⁵⁹ This clearly demonstrates that working on Sundays is not the norm, and the figures support the fact that it is very unlikely that it will become the norm.

It is interesting to note that the Australian work and socialising pattern is reflected in Europe. That is, evening and weekends are the times when most people engage in social activities. Sundays are the most utilised for these activities.²⁶⁰

Those who work on Saturday and Sunday have worse life interference than those who do not.²⁶¹ Sunday is a very important day for a number of reasons. It remains the day on which people meet

²⁵⁵ The Persistent Challenge: Living, Working and Caring in Australia in 2014. The Australian Work and Life Index, Skinner, Natalie and Barbara Pocock, Centre for Work + Live, University of South Australia, p 6.

²⁵⁶ The Persistent Challenge: Living, Working and Caring in Australia in 2014. The Australian Work and Life Index, Skinner, Natalie and Barbara Pocock, Centre for Work + Live, University of South Australia, p 28.

²⁵⁷ Bittman, Michael, *Sunday Working and Family Time*, Labour and Industry: a journal of the social and economic relations of work, 16(1), 2005, p 62

²⁵⁸ Bittman, Michael, *Sunday Working and Family Time*, Labour and Industry: a journal of the social and economic relations of work, 16(1), 2005, p 63

²⁵⁹ Bittman, Michael, *Sunday Working and Family Time*, Labour and Industry: a journal of the social and economic relations of work, 16(1), 2005, p 65

²⁶⁰ Wirtz, Anna, Friedhelm Nachreiner and Katharina Rolfes, *Working on Sundays-Effects on Safety, Health, and Work-life Balance*, Chronobiology International, 28(4), 2011, 361

with friends and engage with their communities. Those who work on Sundays have significantly higher levels of work-life interference than those who work during the week or on Saturdays.

Skinner and Pocock found²⁶² that those who work a combination of weekends and nights, or just evenings/nights is associated with the highest work-life interference. For women the most significant negative impact on their work-life outcomes is as a result of working evenings and nights, while for men it is a combination of evenings/nights and weekends. Sunday work is associated with higher work-life interference whether or not it is combined with Saturday work.

For men, working on weekends is associated with lower levels of positive mental health. For men working on Sundays (and not Saturdays) the effect is an even lower level of positive mental health.²⁶³

Workers who work a standard week day pattern – that is no evening/night or weekend work – have the best work-life outcomes, their work-life interference is lower than the national average.²⁶⁴

Sundays provide workers with the opportunity to co-ordinate social and other important times with other people's schedules.²⁶⁵ These other people include significant others, children, other family members and friends. In terms of social contact Sunday is the most significant day of the week for Australians of working age.²⁶⁶ The opportunities lost when someone has to work on Sunday cannot be made up for during the week.²⁶⁷

The PC should not assume that industrial relations system is naïve to the argument concerning the “24/7 economy” - its been dealing with versions of the argument for over 60 years. Rather, the system has adapted to it but has done so in a reasoned way that has not come at the expense of fair and reasonable penalty rates.

The *Weekend Penalty Rates Test Case*²⁶⁸ of 1947 considered appropriate penalty rates payable for work performed under the then-*Metal Trades Award* on Saturday and Sundays. It was argued by the applicants, who sought an increase in the penalty rates payable, that Saturday had become a “non-working day” for a majority of Australian workers, and that a penalty was therefore owing. It was submitted:

“Saturday, it is said, is the great day for recreation, while Sunday is the day of religious observance and family reunion. Saturday is the day on which competitive sports and various forms of organised social activities and public entertainment are held, as well as

²⁶¹ The Persistent Challenge: Living, Working and Caring in Australia in 2014. The Australian Work and Life Index, Skinner, Natalie and Barbara Pocock, Centre for Work + Live, University of South Australia, p 1.

²⁶² The Persistent Challenge: Living, Working and Caring in Australia in 2014. The Australian Work and Life Index, Skinner, Natalie and Barbara Pocock, Centre for Work + Live, University of South Australia, p 3.

²⁶³ The Persistent Challenge: Living, Working and Caring in Australia in 2014. The Australian Work and Life Index, Skinner, Natalie and Barbara Pocock, Centre for Work + Live, University of South Australia, p 7.

²⁶⁴ The Persistent Challenge: Living, Working and Caring in Australia in 2014. The Australian Work and Life Index, Skinner, Natalie and Barbara Pocock, Centre for Work + Live, University of South Australia, p 28.

²⁶⁵ Bittman, Michael, *Sunday Working and Family Time*, Labour and Industry: a journal of the social and economic relations of work, 16(1), 2005, p 68

²⁶⁶ Bittman, Michael, *Sunday Working and Family Time*, Labour and Industry: a journal of the social and economic relations of work, 16(1), 2005, p 71

²⁶⁷ Bittman, Michael, *Sunday Working and Family Time*, Labour and Industry: a journal of the social and economic relations of work, 16(1), 2005, p 75

²⁶⁸ *In the matter of the National Security (Industrial Peace) Regulations and of the Metal Trades Award 1941 re Rheem manufacturing Co Pty Ltd (1947) 58 CAR 610*

being the day which by common usage has come to be set aside for individual recreation in outdoor activities”²⁶⁹.

Although the C&A Commission did not come to a view that Saturdays were a “general whole holiday” as was sought, it did impose a penalty for work performed between midnight on Friday and midnight on Saturday, as an extra payment not cumulative upon any shift premium otherwise payable, and in recognition that Saturday remained a “half-holiday”²⁷⁰.

By the mid-70s it was common practice that double-time rates would apply to all work done on any day which is a holiday or a Sunday, and that a lesser penalty loading would apply to Saturday work. However, the de-regulation and proliferation of weekend trading in the 1990s led to claims that weekend work should include provision for normal trading hours and the reduction or removal of weekend penalties. In 1999 Commissioner Hingley declined to include ordinary hours on Sundays for three Victoria retail awards, or to alter the relevant penalty rate²⁷¹. Commissioner Hingley said:

“I am not persuaded, on what is before me, that the combination of deregulated shop trading hours and the evolution of new shopping lifestyles and consumer demands, consequentially means that for retail workers, an expanded daily spread of hours, late night hours and Saturday and Sunday work, are a sought after lifestyle corollary, diminishing the unsociability of such work schedules. It is a corollary of such changes, should the Commission so determine, that current or future employees with little or no bargaining power may be obliged to work extended evening, Saturday or Sunday hours against their domestic responsibilities or personal convenience as ordinary hours to retain or gain their employment²⁷².”

By the mid-2000s ordinary hours for work performed on Sundays became common in retail industry awards (and in awards in other sectors) and the question became what the appropriate rate would be for such work. In 2004 a Full Bench of the AIRC considered an application by the Shop, Distributive and Allied Employee’s Association to make an award roping in 17,628 employees into the *Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000*. In that decision, a Full Bench came to the conclusion that it was necessary to “recognise the reality that retailing is a seven-day a week industry” in Victoria, and that there was “no reason to distinguish between retailing and the many other industries which operate over seven days, whether those industries be in the services sector of our economy, in arts and entertainment, in health services, in manufacturing, distribution or any other sector. In many of those industries the AIRC’s awards recognise work performed on Sunday as part of the standard working hours”²⁷³. Accordingly, that decision introduced provision for ordinary hours of work between 9am and 6pm on Sundays for retail workers covered by the award.

Despite widening the scope of ordinary hours, the majority of the Full Bench (Watson SDP and Raffaelli C) went on to determine that a penalty rate was still payable for work performed in ordinary hours on Sundays. In awarding the double-time penalty the Bench commented that the only “material change” which had occurred in the Victorian retail sector since 1992 was the

²⁶⁹(1947) 58 CAR 610

²⁷⁰Ibid at [623] – [624]

²⁷¹The *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 1994*, the *Shop, Distributive and Allied Employees Association (Food and Liquor Stores) Interim Award 1994* and the *Shop, Distributive and Allied Employees Association (Booksellers and Stationers) Interim Award 1994*.

²⁷²Dec 1440/98 M Print Q9229

²⁷³*Shop Distributive and Allied Employees Association v \$2 and Under* (2003) 127 IR 408 at 88.

greater incidence of Sunday trading which, in their view, did not affect “the disabilities endured by employees working on Sundays.”²⁷⁴ The penalty was clearly categorised as compensation for the disability associated with working on a Sunday, and not directed to deterring the working of Sunday ordinary time hours²⁷⁵.

In rejecting the employer submission that the disability associated with working on Sundays had decreased as a result of the extension of normal trading hours (as a result of legislative re-regulation), the AIRC accepted evidence that there remains a “significant social disability associated with work on a Sunday”. The AIRC relied on the evidence of Dr Michael Bittman, whose analysis of time-use data produced by the Australian Bureau of Statistics (ABS) indicated that:

- Sunday remains an overwhelmingly non-work day, with only one of five employed working age persons working on a Sunday, compared with four out of five on weekdays;
- working on Sundays reduces family leisure time by over two hours, inclusive of reduced parents’ time with their children and reduces leisure time in the company of friends by an hour and a half; and
- time lost on Sundays by persons working on Sundays is not recovered on other days of the week, other than four additional minutes eating with family members²⁷⁶.

Dr Bittman’s conclusion, which was accepted by the majority, was that as compared to those who work on weekends “Sunday workers miss out on key types of social participation and have less opportunity to balance the demands of work and family”²⁷⁷. The majority further determined that the disability endured by Sunday workers was heightened where the work performed on Sunday was part of ordinary hours.

The majority further accepted evidence from Dr Graeme Russell which concluded:

- family and close relationships matter both to individuals and to family and individual outcomes, including child development;
- time together, shared activities and the active involvement in the lives of other family members are essential to sustain effective family relationships and positive outcomes for families and individuals;
- Sundays are very important in providing time and opportunity for participation / involvement between people; and
- more employees prefer not to work on Sundays²⁷⁸.

Justice Giudice agreed with the conclusion of the majority that the evidence of Dr Bittman and Dr Russell demonstrates a significant social disability associated with work on a Sunday “subject

²⁷⁴Ibid at [106]

²⁷⁵*Shop Distributive and Allied Employees Association v \$2 and Under* (2009) 135 IR 1 at [91]

²⁷⁶Ibid at [93]

²⁷⁷Ibid at [94]

²⁷⁸At [96]

only to the reservation that it suits some people to work on that day” (although he disagreed with the majority’s conclusion as to the appropriate quantum of the penalty for work performed in Sunday ordinary hours)²⁷⁹.

In 2004 the South Australian Industrial Relations Commission (“SAIRC”) heard an application by the Australian Retailers Association (“ARA”) seeking to vary the *Retail Industry (South Australia) Award* to expand the scope of ordinary hours of work to include Sunday work, and to reduce penalties payable on Sundays following South Australian legislation which increased allowable trading hours²⁸⁰. As with the Victorian case, the employer associations argued that historical rationale for the application of penalty rates was an anachronism in a modern economy which trades 7 days a week.

The SAIRC held that there was no longer any doubt that the retail industry in SA is a seven-day industry and that the historical deterrent basis for the Sunday work penalty was therefore no longer appropriate²⁸¹. Accordingly, it was held that work on Sundays should be capable of forming part of ordinary hours. However, under the decision work performed on Sundays attracted a 60% penalty loading intended to take into account considerations including the disabilities associated with Sunday work. The Bench (Hampton and Bartel DPP and Dangerfield C) made a general conclusion that the evidence before them, which again included the evidence of Drs Bittman and Russell, was that there remained a significant social disability associated with weekend work.

In coming to this conclusion the Bench took into account the changed social context, noting that “[t]he level of the additional payment or loading for work performed in ordinary hours on a Sunday requires an assessment of, among other considerations, the level of disability or detriment suffered by those who perform work at this time. Although trite to say, such disability needs to be considered in the current social context. The sorts of detriment identified in the earlier decisions have in some respects decreased and other changes in society have resulted in additional disabilities associated with work on Sundays”²⁸². Social changes which were identified by the Bench as continuing to present significant challenges for weekend workers in terms of families trying to balancing their work and family lives included:

- more women in the workforce, particularly with dependent care responsibilities (especially for younger children);
- more families in which both partners are in the paid workforce and share the care of children and other domestic responsibilities;
- more men who want to be active participants in family life, and more involved with their children; and
- more people in the paid workforce with dependent care responsibilities (e.g. care of elderly parents) and whose engagement in family life is dependent on

²⁷⁹at [6]

²⁸⁰[2004] SAIRComm 54

²⁸¹E.g. see [200]

²⁸²At [201]

availability at critical times (e.g. divorced / separated parents with weekend access to children)²⁸³.

The Bench said:

“While the impact of Sunday work on employees will and does vary from employee to employee, we accept the general proposition of Dr Bittman that for employees who work on a Sunday, certain activities that might otherwise be undertaken on that day are mostly not done at all. There is no simple transference of some events to other available days of the week. We also generally accept Dr Russell’s conclusion that for some employees, working on Sunday poses a risk to social and family interactions. The evidence of individual employee witnesses who identified negative aspects of working on Sundays was consistent with these conclusions. Their evidence indicated that the nature of the activities foregone were, in the main, social and family interactions, the loss of which could not be compensated by having time off elsewhere in the week.

In adopting the conclusions of Drs Bittman and Russell we acknowledge, and certain employee evidence confirmed, that for some individuals Sunday work poses no risk and may indeed be beneficial. We also note the parameters set by Dr Russell that in order for Sunday work to pose a risk to social and family interactions it must be worked on a continuing basis.”²⁸⁴

The Bench also noted that the comments of Commissioner Hingley, which we have quoted above and which relate to changes in the retail industry and the fluid nature of public expectations and the consequent effect on the disability suffered by employees, are generally apposite²⁸⁵.

More recently, in the development of modern awards under the FW Act, the AIRC had this to say concerning claims by employer associations to reduce penalty rates:

“The R&CA’s approach is directed at substantially reducing or eliminating penalty payments provided for in existing instruments applying to the restaurant industry during times when restaurants are open. That approach ignores the inconvenience and disability associated with work at nights and on weekends – which are the basis for the prevailing provisions in pre-reform awards and NAPSAs. Nor does the R&CA approach take into account the significance of penalty payments in the take-home pay of employees in the restaurant industry. A modern restaurant award based on the penalty rates proposed by the R&CA would give the operational requirements of the restaurant and catering industry primacy over all of the other considerations which the Commission is required to take into account, including the needs of the low paid and the weight of regulation. A more balanced approach is required.”²⁸⁶

²⁸³At [202]

²⁸⁴At [186] – [187]

²⁸⁵At [204] – [205]

²⁸⁶[2009] AIRCFB 865 at [232].

“The sky is falling”

Under this popular tabloid theory, the creation of modern awards has reduced workplace flexibility, pushed up labour costs and forced employers to close their cafes and shops on weekends. The argument concerning flexibility, relevantly in relation to working hours, has been debunked in chapter 4. Whilst it is true that some penalty rates, wages and other payments increased for some employers as a result of award modernisation, they reduced for many others and all changes were phased in over a five year transitional period during which the minimum wage rates by reference to which penalty rates are calculated drifted further and further below average earnings and during which the labour share of income both generally and specifically in the targeted retail and hospitality industries continued to decline²⁸⁷. At the same time, employment in those industries grew²⁸⁸ as did the proportion of gross operating profits to total income²⁸⁹ and the growth in turnover in cafes, restaurants and takeaway food services exceeded 30%.²⁹⁰

The result is that, if one is to consider the relative benefit of penalty rates compared to the situation that pertained prior to *WorkChoices* and the FW Act, many of the workers in receipt of the penalty rates that are now “in the gun” are by some measures worse off in relative terms now than was previously the case, and they in any event are working off a very low base. Research shows that the most vulnerable employees rely on penalty rates to make ends meet. These employees include the low paid, women, and those in regional/rural areas. Close to 40% of the Award dependent workforce is employed in two industries – Accommodation and Food Services and Retail Trade. Within those industries workers are highly award dependent, yet these are the industries where the loudest critics of penalty rates reside. A fact that rarely features in the debate is that even mid-senior levels of workers in those awards - such as Retail staff with some management responsibility, Cooks, Bar Staff, Front of House Staff and Waiters in Fine Dining Restaurants – have rates of pay that mean they would still receive less than Full Time Average Weekly Total Earnings even if they worked a full time week at double time for every hour worked²⁹¹.

In the recent Restaurant Industry Award decision²⁹², the Full Bench of the FWC said:

“The current level of penalty payments is a very important component of the income of employees who receive the penalty payments. Many employees are paid at or around the award level, work on a casual or part-time basis and have significant unpaid responsibilities. The penalty payments supplement the base wage rate and allow the employees to receive an income for the hours worked greater than the amount they would receive for working on other days of the week. For a large proportion of the restaurant and catering industry workforce the income they receive for working on Sundays on penalty rates allows them to combine their work with other responsibilities. For this group of employees a reduction in Sunday income would alter the current

²⁸⁷ Refer ABS 5260.0.55.002, Table 14.

²⁸⁸ Refer ABS 8155.0, Table 1

²⁸⁹ Refer ABS 8155.0, Table 1

²⁹⁰ Refer ABS 8501 (Trend Figures, Table 1, Jan 2015 and Jan 2010 compared)

²⁹¹ The level 4 rate of pay in the General Retail, Restaurants and Hospitality Awards is \$746.20. Full Time Adult Average Weekly Total Earnings as at November 14 was \$1,539.40 (ABS 6302).

²⁹² [2014] FWCFB 1996 at [278]:

<https://www.fwc.gov.au/documents/decisionssigned/html/2014FWCFB1996.htm>

balance and require changes of one sort or another to deal with this changed circumstance. The changes may include working longer hours for the same rate of pay or seeking additional work. The changes necessary to strike an appropriate balance may well have an adverse impact on their ability to undertake their other unpaid responsibilities to current standards.” (References omitted) (Emphasis added)

In turning to the economic effects of the penalty rates in that industry, the Full Bench said:

“There is no evidence that the introduction of the modern Restaurant Award in 2010 had any discernible effect or “shock” upon employment growth in the restaurant industry....

Profit margins in the restaurant industry are relatively low, and there is a relatively high rate of business failure. This is in major part a function of an industry which is intensely competitive, is made up of predominantly small businesses, contains an oversupply of businesses and has low barriers to entry....

There are clear examples in the history of industrial regulation of the restaurant industry in which weekend penalty rates have been abolished or reduced, but no evidence was forthcoming to demonstrate that this had discernibly positive effects in terms of turnover and employment. The Deputy President, correctly in our view, pointed to the period 2006 to 2010 in Victoria when restaurant operators not bound by the then-applicable federal award were not required to pay any penalty rates at all as providing an opportunity to test empirically what the business and employment effects of a removal of penalty rates would be. However, no evidence was called at first instance from any restaurant operator in Victoria, and the evidence did not otherwise touch upon this period. There was another historical opportunity which we can identify. Prior to the Work Choices period commencing in 2006, restaurants in New South Wales were largely regulated by an award of the Industrial Relations Commission of New South Wales, the Restaurant &c., Employees (State) Award. In 1996, the NSW Commission (Marks J) heard and determined various applications, including an application from the Restaurant and Catering Association of NSW and other employers, in respect of that award. The employers’ application sought amongst other things a reduction in weekly penalty rates. In the Commission’s decision issued on 23 August 1996, it was determined that the Saturday penalty rate should be reduced from 50% to 25% and the Sunday penalty rate reduced from 75% to 50% (with casual employees receiving casual loadings in addition). On the employers’ case presented before the Deputy President, that change should have increased turnover and employment in the NSW restaurant industry. But there was no evidence that was actually the case.

There was some limited evidence in the proceedings below which suggested that reductions in weekend penalty rates did not produce the business or employment benefits to the extent contended for. As earlier stated, the result of the commencement of the Modern Award was that in some States penalty rates were reduced. The clearest example of that was South Australia, where the Sunday rate for permanent employees was reduced from 100% to 50%, and for casuals from 120% to 75% (including the casual loading). This was partially offset by an increase in the base rate upon which these penalty rates operated, but notwithstanding this the actual hourly Sunday rate for a Food and Beverage Attendant Grade 2 under the Restaurant Award is lower in dollar terms as at the date of this decision than it was for the equivalent classification in the pre-existing instrument in late 2008, and significantly lower in real terms. However, none of the South Australian restaurateur witnesses identified that any benefit had accrued to them from

this, or that it had any effect on the number of staff employed on Sundays.²⁹³
(References removed) (Emphasis added)

Many employees who receive penalty rates are low paid, they are disproportionately dependent upon minimum pay rates and they use their penalty rates to top up their wages to a reasonable level. Paying existing employees lower penalty rates than they currently receive means that they will be significantly disadvantaged, and may need to work additional hours to receive the same income in order to make ends meet which could come at the cost of their engagement in other pursuits which are social desirable (such as participation in education or providing care).

Looking beyond Australia

International standards provide important guidance to states in formulating regulatory frameworks on working time. According to the ILO, state regulation of working time is both justified and necessary. In regulating working time, it is not only hours of work, but the arrangement of working time or working schedules that are equally important.²⁹⁴

Based on its Decent Work agenda, developed and adopted by the ILO's tripartite constituency to guide the organisation's work, the ILO's Conditions of Work and Employment Programme has developed the concept of 'decent working time'.²⁹⁵ There are five criteria to 'decent working time': it should be safe and healthy, family-friendly, promote gender equality, advance productivity and facilitate worker choice and influence.

A recent ILO publication synthesising international research on working time found numerous negative effects associated with working 'non-standard' work schedules (including shift work, night work, and weekend work), including substantially increased work-family incompatibility and adverse health outcomes.²⁹⁶ The ILO has also recognised the effects of non-standard or unsocial working hours are not limited to individual workers, but also affect their families and communities.²⁹⁷ The ILO has emphasised the need for governments to adopt policies that effectively regulate working time, including protecting workers against 'unsocial' working hours.²⁹⁸ In this context, efforts to minimise or remove penalty payments for working weekends, evenings or nights would appear directly inconsistent with the ILO's concept of decent working time and with the promotion of decent work more broadly.

²⁹³ *Ibid.* at [95] and [118-119].

²⁹⁴ See, eg, the *Hours of Work (Industry) Convention 1919* (No. 1); *Hours of Work (Commerce and Offices) Convention, 1930* (No. 30); and ; *Forty Hour Week Convention, 1935* (No. 47); *Weekly Rest (Industry) Convention, 1921* (No. 14); *Weekly Rest (Commerce and Offices) Convention, 1951* (No. 106); *Holidays with Pay Convention (Revised) 1970* (No. 132) and the *Night Work Convention, 1990* (No. 171).

²⁹⁵ Jon C Messenger, 'Towards Decent Working Time' in Jean-Yves Boulin, Michel Lallement, Jon C Messenger and Francois Michon (eds), *Decent Working Time: New Trends, New Issues* (International Labour Organisation), 2006) 420-21.

²⁹⁶ C Fagan et al, *The Influence of Working Time Arrangements on Work-Life Integration or 'Balance': A Review of the International Evidence*, Research synthesis paper prepared as an input to the report for discussion by the Tripartite Meeting of Experts on Working Time Arrangements (17-21 October 2011), ILO, Geneva, 2012. See also Jean-Yves Boulin, *Decent Working Time: New Trends, New Issues*, ILO, Geneva, 2006.

²⁹⁷ See, eg, *Decent Working Time: Balancing Workers' Needs with Business Requirements*, Conditions of Work and Employment Programme, ILO, Geneva, 2007, 6.

²⁹⁸ See, eg, *Decent Working Time: Balancing Workers' Needs with Business Requirements*, Conditions of Work and Employment Programme, ILO, Geneva, 2007, 6.

Relevant principles from ILO conventions that Australia has not yet ratified include:

- There should be one day's rest each week, observed simultaneously by all workers in each enterprise, and across all industries, to be taken where possible on the day established by custom in the country concerned;²⁹⁹
- In enterprises where this 'cannot' be observed because of 'the nature of the work, the nature of the service performed by the establishment, the size of the population to be served, or the number of persons employed', the government may prescribe a different weekly rest scheme, after consultation with unions and employers;³⁰⁰
- The law may authorise employers to require employees to work during weekly rest breaks, but only in cases of (a) emergency or business crisis; (b) abnormal and unforeseeable work demands, where there is no practical alternative; and (c) in order to prevent the loss of perishable goods;³⁰¹
- Children under 18 be prohibited from working on the customary rest day, and that they receive an additional rest days (except in industrial employment).³⁰²

Moving beyond principle to the pragmatic, the ACTU reviewed the laws relating to weekend work in the retail sector in all 34 OECD countries, for the purposes of the PC inquiry into the retail industry. We concluded that Australia's system of penalty rates is also not unusual when considered in an international context. We set out at Appendix 5 a table which relates to the retail sector which indicates which days of the week are classified as rest days, whether work is permitted on these days and the rate of compensation should work be performed.³⁰³

Work during the designated weekly rest period³⁰⁴ is restricted in 18 of the 27 countries (excluding Australia) for which information is available, in relation to the retail sector. Specifically:

- Work is prohibited outright during the weekly rest period, or restricted to cases of emergency or necessity, in 13 countries (Austria, Belgium³⁰⁵, Denmark, Germany, Hungary, Iceland, Israel, Japan, Luxembourg³⁰⁶, Netherlands, Norway, Slovakia, Slovenia, Sweden and Switzerland);
- Work is prohibited unless authorised by a collective agreement, in two countries (France and Italy); and
- Work is prohibited, unless the employee agrees, in three countries (Estonia, Finland and the United Kingdom)

Where work is permitted during the weekly rest period, most OECD countries require it to be paid for at penalty rates. These rates are:

- Less than 150% of the ordinary rate in three countries (Czech republic, Japan, Mexico);
- 150% of the ordinary rate in three countries (Hungary, Israel, South Korea) as well as in three states of the United States;
- 180% of the ordinary rate in one country (Iceland);

²⁹⁹ *Weekly Rest (Industry) Convention 1921; Weekly Rest (Commerce and Offices) Convention 1957.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Weekly Rest (Commerce and Offices) Recommendation 1957; Minimum Age Recommendation 1973.*

³⁰³ Source: ILO Travail database, unless otherwise noted. See <www.ilo.org/dyn/travail/travmain.home>. A blank entry indicates that no information was available.

³⁰⁴ Usually Sunday only, but sometimes 1.5 or 2 days per week.

³⁰⁵ Sunday morning trade is permitted, though.

³⁰⁶ Family businesses may trade, though.

- 200% of the ordinary rate in three countries (Finland, France and Luxembourg);
- A rate to be negotiated with the union, in two countries (Slovakia or South Korea); and
- A 'reasonable' rate in one country (Ireland).

The statistics above relate to adult workers. In addition, most OECD countries restrict the work of children (people aged under 18) on weekends. Specifically:

- There is a longer weekly rest period (usually two days) for children in sixteen countries (Austria, Belgium, Czech republic, Denmark, Finland, France, Germany, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Slovenia, Spain and the United Kingdom).
- Children are prohibited outright from working during the weekly rest period in five countries (Austria, Iceland, Ireland, Luxembourg and Switzerland); and
- Children are permitted to work during the weekly rest period, but with more restrictions than adults, in three countries (Belgium, Germany and Mexico).

In summary, then, it can be seen that most OECD countries ban or restrict the work of adults and (especially) children on at least one day of the weekend. In those few countries where work *can* be required on the weekly day off, penalty rates of pay are usually payable.

This demonstrates that Australia's penalty rate regime is not at all unusual. Indeed, Australia *is* unusual in not providing guaranteed days of rest for adults, and in not providing any restrictions on children's work on weekends. Both of these omissions are contrary to ILO principles.

In any event, we note that the default penalty rate regime set by the modern award can be modified through enterprise bargaining, provided this leaves workers better off overall. This is another good example of the flexibility of the current industrial relations system.

Letting "the market decide"

We have demonstrated above that the sectors in which penalty rates are most criticised are the sectors that are among the most award dependent. This is evidence in itself of the propensity of employers in the industry to do no more than the bare minimum requires. Employers in these industries have repeatedly sought in the last 3 years for certain penalty rates contained in awards to be abolished or reduced. It should therefore be assumed that if their request were granted, they would act upon it.

Employees have little choice in when they are able to work. If work during unsociable times was offered without compensatory penalty rates, some workers would continue to work those hours and some would not. The decision point for each individual worker would be different depending on their personal arrangements such as transport costs and the taper rates for any welfare support they might be in receipt of. Furthermore, as the FW Commission pointed out in the recent matter concerning the Restaurants Award, some workers would seek to take on additional hours at the expense of some of their other pursuits. This re-arrangement of time could ultimately result in some cost shifting back to the public purse. The extent of each of these influences is difficult to quantify in the abstract and it has been an experiment that the FWC and its predecessors have been duly wary of conducting for good reason.

We are firmly of the view that the FW Commission must retain its current role in the fixation of penalty rates, although as noted elsewhere in this submission we recommend that the criteria that apply to the maintenance of the award system require some adjustment.

Alternatives to Penalty Rates

For many workers, particularly those whose working hours are concentrated at unsociable times, there is no sensible alternative to continuing to receive penalty rates.

One of the ways in which penalty rates are still provided to employees, although in a different way to the traditional payment method, is through an annualised salary. Rather than receive varying rates of pay depending on when an employee works, with an annualised salary the employee receives the same rate of pay week in week out regardless of whether he or she has worked unsociable hours.

An annualised salary is a 'rolled-up' rate of pay that is intended to compensate an employee for many items provided for in a modern award. The rolled-up rate is higher than the base or ordinary rate under the award as it is set at a rate which means an employer can pay an employee one rate for all times worked rather than having to apply penalty and overtime rates. An annualised salary must be high enough that an employee is receiving at least what he or she would have received had he or she been receiving the various rates under the award.

There are some modern awards which provide for annualised salaries. An example is the Clerks-Private Sector Award 2010. Clause 17 provides:

17.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

- (i) clause [16](#)—Minimum weekly wages;
- (ii) clause [19](#)—Allowances;
- (iii) clauses [27](#) and [28](#)—Overtime and penalty rates; and
- (iv) clause [29.3](#)—[Annual leave loading](#).

(b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

17.2 Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

17.3 Base rate of pay for employees on annual salary arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause [16—Minimum weekly wages](#) and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

The difficulties with annualised salary provisions such as that above is that the “guarantee” they offer with respect to not disadvantaging the worker are notoriously difficult to enforce where the employer has not properly document working hours or conduct the period reviews required by the clause. In addition, a compliant employer receives no reduction in the regulatory burden because they must maintain alternative records of what the employee would have been paid had the annualised salary not been instituted. Further, as noted above, if a worker is regularly engaged almost exclusively on penalty rate hours, as opposed to rostered over a number of different shifts some of which attract penalties of varying degrees and some which do not, an annualised salary is inappropriate.

Where modern awards do not specifically provide for an annual salary an employer will often enter into an off-setting arrangement with an employee that makes it clear that over-award payments are in satisfaction of all penalties, overtime payment, wages etc. due under the award.

As a general principle, over-award payments can only satisfy entitlements to which the payment is directed. For example, paying a higher hourly rate than the modern award rate of pay will not necessarily off-set penalties or loadings in the modern award, unless it is clear that the employer and employee intended it. This must be set out in the written contract of employment. The contract must be clear and identify what is offset and by what amounts. Also, the over-award payment must satisfy each of the entitlements which would otherwise have been payable to the employee over the salary period (for example annually).

Some employers and employees will have trouble working out whether they have entered into a fair bargain. For example not all industrial participants have perfect industrial literacy. An employer may attempt to pay a rolled-up rate to an employee and may inadvertently underpay him or her. An employee may agree to a rolled-up rate that does not adequately compensate him or her for the work done.

Example

For example, Anna offers Martin an annualised salary of \$65,000 per annum. Anna tells Martin that the salary is in compensation for all overtime, penalty and shift rates he would work and that he must work at least two weekends per month and do 3 hours of overtime per week. We set out a simple example below that does not factor in other amounts such as allowances etc.

- Martin’s base or ordinary rate of pay is \$25 per hour
- His ordinary weekly hours are 38 per week

- Saturday rate is 150% of ordinary rate
- Sunday rate is 200% of ordinary rate
- Overtime is 150% for the first three hours and 200% for all hours thereafter

If Martin only worked 38 hours per week during normal business hours Monday – Friday he would earn: \$49,400 per annum, or \$4 116.66 per month.

If Martin worked the following pattern according to his rates of pay and penalties etc. in accordance with the pattern of two weekends per month and 3 hours of overtime per week, he would earn:

- Weekdays: $4 \times \$25 \times 38 = \3800
- Saturdays: $2 \times \$25 \times 1.5 \times 7.6 \text{ hours} = \570
- Sundays: $2 \times \$25 \times 2 \times 7.6 \text{ hours} = \760
- Overtime: $3 \times 4 \times \$25 \times 1.5 = \450
- Monthly total = \$5 580.00
- Yearly total = \$66 960.00

The \$65 000 annual salary offered by Anna does not adequately compensate Martin for the work pattern he undertakes. If Martin works additional overtime hours, even one per week, or works on public holidays or additional weekends the discrepancy between his annual salary and what he should be receiving will be greater.

This is a simple example and illustrates how hard it is to calculate whether or not an employee is better off receiving individual amounts due under the award or a rolled up rate. It is not easy for an employee to interpret the terms of a contract of employment so that he or she can tell whether or not an annual salary is in fact effective. Likewise, it is hard for an employer to calculate amounts and draft provisions for contracts which ensure that they are not exposed to underpayments in the future.

Annualised salaries may assist employers by instituting more predictable labour expenses, and they may also assist employees in that they know how much money they will receive each week. However, while they may assist in this regard, they are still problematic in that an employee and employer could make mistakes or act in ways which conceal avoidance of minimum terms and conditions of employment. Further, they are clearly unsuitable for workers engaged almost exclusively to work unsociable hours.

Case study: Nurses and Midwives

Under the Nurses Award 2010 nurses and midwives receive standard overtime payments, shift and weekend penalties and additional payments for working on public holidays. The award also provides that nurses and midwives are to be available to be rostered for work as necessary to meet the service requirements of the health care setting.

Most nurses and midwives work according to a roster with changing shift patterns and at anti-social periods day and night.

Whether this be at a hospital, aged care or community setting a nurse or midwife will be on hand to ensure care is maintained, invariably working in chaotic settings for employers who operate their business on a 24 hour a day, 7 days a week basis.

As nurses and midwives are required to be at the frontline of the provision of health care they often suffer stress and other ill health effects from working not only long hours but also nonstandard hours. Their obligations as employees, coupled with their professional commitment to the care and wellbeing of their clients results in exploitation including having to shoulder unacceptable workloads ,working short staffed, double shifts and excessive overtime. This in turn leads to burnout and entrenched recruitment and retention problems in specific health and aged care settings.

Given the business model in both health and aged care it is not surprising nursing remuneration is made up of between 20% to 40 % of allowances shift loadings and penalties depending on the roster arrangements.

Any reductions in these current entitlements would have a deleterious impact on the employees and the provision of care in Australia.

Deregulation of penalty rates will result in nurses and midwives losing these payments in areas where they are industrial weak. The consequence of this will be that there will be a shift in employment to those employers who continue to provide such entitlements.

The direct financial impact of reducing penalties will be significant as is evidenced in the modelling set out hereunder.

Table 11 calculates the impact over a calendar month for registered and enrolled nurses who are full time , work ten shifts per fortnight including day , afternoon and night and work one public holiday in that month. This roster would be viewed as typical in the hospital sectors.

Based on the roster even a marginal reduction in current penalties, as set out in Scenario B , would result in significant income reduction , over \$180 per week for some employees. In Scenario C where penalties are removed completely the loss could be as much as \$470 per week.

It is important also to note that where registered and enrolled nurses are required to work more nights, weekends on public the losses would be substantially more.

Table 11: Penalty Rate Scenarios for Nurses – Example A

		Scenario A -	Scenario B -			Scenario C -		
		Current Penalty Rate as per SA Public Sector EBA 2013	Less Penalty Rates - Assumption			NO Penalty Rate - Assumption		
	Late	12.5%	10.0%			0.0%		
	Night	20.5%	15.0%			0.0%		
	Sat	50.0%	25.0%			0.0%		
	Sun	75.0%	25.0%			0.0%		
	PH	150.0%	100.0%			0.0%		
Sector: Public Acute								
classification	Full time 152hrs/28days @	\$ Total Gross Pay for 28days	\$ Total Gross Pay for 28days	\$ Gross 28-day Pay Difference (A-B)	Pay reduction % (diff/current)	\$ Total Gross Pay for 28days	\$ Gross 28-day Pay Difference (A-C)	Pay reduction % (diff/current)
RN	SA	7667.14	6920.64	746.50	9.7%	5909.76	1757.38	22.9%
EN	SA	5618.23	5071.22	547.01	9.7%	4330.48	1287.75	22.9%
RN	VIC	7105.12	6413.34	691.78	9.7%	5476.56	1628.56	22.9%
EN	VIC	5476.24	4943.06	533.18	9.7%	4221.04	1255.20	22.9%
RN	VICMH	7351.62	6635.84	715.78	9.7%	5666.56	1685.06	22.9%
EN	VICMH	5606.40	5060.54	545.86	9.7%	4321.36	1285.04	22.9%
RN	NSW	7921.52	7150.26	771.26	9.7%	6105.84	1815.68	22.9%
EN	NSW	5415.11	4887.88	527.23	9.7%	4173.92	1241.19	22.9%
RN	QLD	7213.58	6511.24	702.34	9.7%	5560.16	1653.42	22.9%
EN	QLD	5123.26	4624.44	498.82	9.7%	3948.96	1174.30	22.9%
RN	ACT	7467.96	6740.86	727.10	9.7%	5756.24	1711.72	22.9%
EN	ACT	5348.06	4827.36	520.70	9.7%	4122.24	1225.82	22.9%
RN	WA	8152.25	7358.52	793.73	9.7%	6283.68	1868.57	22.9%
EN	WA	5947.55	5368.48	579.07	9.7%	4584.32	1363.23	22.9%
RN	NT	7590.23	6851.22	739.01	9.7%	5850.48	1739.75	22.9%
EN	NT	5736.55	5178.02	558.53	9.7%	4421.68	1314.87	22.9%

Table 12 models the same roster arrangements and penalties for a full time Assistant in Nursing employed in the residential aged care sectors in various states and territories. In Scenario B the Assistant in Nursing would lose around \$100 per week and in Scenario C approximately \$250.

Table 12: Penalty Rate Scenarios for Nurses – Example B

		Scenario A -	Scenario B -			Scenario C -		
		Current Penalty Rate as per SA Public Sector EBA 2013	Less Penalty Rates - Assumption			NO Penalty Rate - Assumption		
	Late	12.5%	10.0%			0.0%		
	Night	20.5%	15.0%			0.0%		
	Sat	50.0%	25.0%			0.0%		
	Sun	75.0%	25.0%			0.0%		
	PH	150.0%	100.0%			0.0%		
Sector: Aged Care								
classification	Full time 152hrs/28days @	\$ Total Gross Pay for 28days	\$ Total Gross Pay for 28days	\$ Gross 28-day Pay Difference (A-B)	Pay reduction % (diff/current)	\$ Total Gross Pay for 28days	\$ Gross 28-day Pay Difference (A-C)	Pay reduction % (diff/current)
AIN	SA	4003.16	3613.40	389.76	9.7%	3085.60	917.56	22.9%
AIN	VIC	4326.57	3905.32	421.25	9.7%	3334.88	991.69	22.9%
AIN	NSW	4095.84	3697.06	398.78	9.7%	3157.04	938.80	22.9%
AIN	QLD	4070.21	3673.92	396.29	9.7%	3137.28	932.93	22.9%
AIN	ACT	4095.84	3697.06	398.78	9.7%	3157.04	938.80	22.9%
AIN	WA	4245.72	3832.34	413.38	9.7%	3272.56	973.16	22.9%
AIN	NT	4003.16	3613.40	389.76	9.7%	3085.60	917.56	22.9%

In looking at the changes in Table 12 it is worth keeping in mind the ordinary hourly rate under the award is between \$18.41 and \$19.64 and for the same worker covered by an agreement between \$18.80 and \$22.64; low wages on any criteria.

11 The Safety Net: (3) National Employment Standards.

The National Employment Standards are inviolable minimum standards in their truest sense. They are directly enforceable through civil proceedings and are not able to be “traded off” on a “Better off overall” basis through agreement making.

The content of the National Employment Standards is largely based on safety net standards developed by the AIRC through the Award system. In broad terms that content is uncontroversial and unobjectionable, however there are some particular features of the National Employment Standards that warrant further development.

Right to Request a Change in Work Arrangements (s. 65) and Extension of Parental Leave (s. 76) FWA

Balancing work and family is critical. The majority of modern families now have both parents in paid work and most rely on two incomes to meet their financial obligations.³⁰⁷ The inability of workplace practices and workplace laws to keep pace with modern working families, presents significant difficulties for working families. This is notwithstanding the fact that the collective bargaining framework has permitted bargaining on work and family matters since its inception.

The ACTU Census of 40,000 workers in 2011 found that the 2nd most important issue of concern for both men and women was balancing work and family and, in particular, ‘sandwich generation’ employees, caring for both children and parents, indicated the single biggest thing that would improve their work life was having the flexibility to balance work and family.³⁰⁸ Similarly, in the 2014 FW Commission Australian Workplace Relations Study, employees ranked ‘the flexibility to balance work and non-work commitments’ as the most important driver of job satisfaction.³⁰⁹

The barriers employees face in balancing work and caring commitments has a direct effect on their ability to participate fully in the labour market, with ABS data demonstrating that as many as one quarter of Australian mothers leave the workforce permanently. Four out of five mothers that do return to their employment required flexible work arrangements to do so.³¹⁰

It is generally acknowledged that the benefits of labour market participation of parents, and in particular mothers, include an increase in government revenue through income tax; increased diversity and quality of the labour market; increase in aggregate demand through higher household wealth and spending; improved economic independence for women and less reliance on welfare.

³⁰⁷ ABS Australian Social trends 4102.0 December 2011, ‘Fifty Years of labour Force: Now and Then’, p.2; AMP NATSEM Report, Issue 34 “Modern Family- The Changing Shape of Australian Families”, October 2013

³⁰⁸ Voices from Working Australia, Key Findings from the Working Australia Census 2011: “The Sandwich Generation”.

³⁰⁹ Fair Work Commission, Australian Workplace Relations Study, “First Findings Report”, 2014, Chapter 6.

³¹⁰ ABS, Australian Social Trends, 4102.0, November 2013

Indeed, reducing the gender labour market participation gap in G20 countries by 25% by 2025 would bring in as many as 100 million women to the paid workforce. In Australia alone if women's participation in the paid labour market increased by 6% from current levels, GDP could increase by as much as \$25 billion.

Whilst significant attention has been given to the provision of paid parental leave and affordable, accessible childcare, employment regulation and workplace practices have not kept pace with the changes in modern working families and in the labourforce generally.

Sections 65 and 76 of the FWA purport to give a right to employees to assist them in balancing their work and family responsibilities.

However, the provisions are drafted so that:

- No obligation is placed on employers to reasonably accommodate a request;
- Employers are only required to give an employee (in writing) the reasons for the refusal which can be on a very wide range of 'reasonable business grounds';³¹¹and
- Under s. 739 of the FWA employees are specifically denied a right to appeal an employer's unreasonable refusal of a request for both sections 65(5) and 76(4), unless they have the bargaining strength to reach agreement with their employer to do so in a workplace agreement.³¹²

We are of the view that these limits on the regulatory framework have meant that it has been ineffective in driving the change in attitudes and practice that is required in order to lift the participation of mothers in the workforce.

UK legislation has enshrined the right to request flexible working arrangements since 2003. That legislation places a statutory duty on employers to give serious consideration to a request according to a set procedure. It also provides an employee with a right to appeal. The UK government noted that the most effective way to promote cultural change was to introduce statutory obligations, noting that "even a sustained and extensive campaign is unlikely to have the significant effect on employment culture sought by this policy, and a major challenge would be reaching and convincing those who are resistant to change- which promotion campaigns will always struggle to achieve without the pressure of change in the operating environment of businesses."³¹³ Regular surveys of both employers and employees have studied the operation and impact of the UK's request provisions since their inception. The most recent research indicates that of the 17% of employees who have requested a change to their working

³¹¹ (5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

- (a) that the new working arrangements requested by the employee would be too costly for the employer;
- (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

³¹² Ss. 739(2), 740 (2)

³¹³ HM Government, Consultation on Modern Workplaces: Extending the right to request flexible working to all: Impact Assessment, May 2011

arrangements, approximately 60% of requests were granted. Of the 40% refused, 25% were appealed.³¹⁴

The case for further reform

Anecdotal evidence collated by the ACTU, and backed up by the available research material, is that s.65 and s. 74 have not operated effectively due to irregular, unpredictable and often unreasonable management attitudes towards employees with caring responsibilities coupled with employees' incapacity to appeal an employer's unreasonable refusal of their request.

Despite the issue being significant to all working parents, it is mostly women who are affected by the need to balance work and family.³¹⁵

Australian employers generally offer a very narrow range of alternative options for employees wanting to stay in the jobs they held prior to needing to balance work and family commitments.³¹⁶ In fact, Australia has one of the highest rates of part-time work in the OECD and is unique in that the solution to the needs of working parents is almost exclusively limited to part-time and casual work.³¹⁷

The limited 'rights' in the current flexible work arrangements provisions will continue to undermine women's access to secure jobs and careers, and this is a significant driver of the gender pay gap, which in Australia is at a 20 year high. Forcing women with caring responsibilities into low quality, insecure work contributes to the gender wage gap because it:

- pays low wages;
- forgoes benefits such as paid leave;
- does not provide for long-term accrual of entitlements;
- stunts career progression and skills advancement;
- places employees in vulnerable negotiating positions;
- is often subject to discriminatory practices; and
- restricts employees' capacity to save for retirement.

There are many stories of employees with caring responsibilities simply giving up because without rights to support their employment and caring roles, it's 'just too hard'. Having been forced into resigning from a job, they find it very difficult to return to the workforce, having lost valuable skills, contacts and confidence.

³¹⁴ The Third Work-Life Balance Employees Survey , March 2007, Employment Relations Research Series No.58 and The Third Work-Life Balance Employers Survey , December 2007, Employment Relations Research Series No.86.

³¹⁵ Women still perform more than 2/3 of domestic and caring work within families and they are far more likely to take extended leave to care for dependents. And employed women made up 34% of all primary carers, Australian Institute of Health and Welfare (AIHW), The Future Supply of Informal Care 2003-2013, p.32.

³¹⁶ HREOC Report, "It's About Time", 2007.

³¹⁷ Australia has one of the highest rates of part-time work in the OECD: OECD Employment Outlook 2008

In particular, there is a significant body of anecdotal evidence that women returning from maternity leave are denied requests for flexible work arrangements, effectively forcing mothers to choose between leaving their new baby in care every day or leaving their job and their career.

The Human Rights Commission 2014 Review of Discrimination in Pregnancy and Return to Work³¹⁸ found that *one in two mothers reported being discriminated against*:

- 27% during pregnancy;
- 32% when requesting or taking parental leave; and
- 35% when trying to return to work from parental leave.

Of those parents (mothers and fathers) reporting discrimination, one in four did not return to the workforce from parental leave as a result.

The Human Rights Commission data demonstrates that a significant number leave as a result of negative attitudes from colleagues or managers (63%) or discrimination when requesting flexible work arrangements upon returning to work from parental leave (50%).³¹⁹

Discrimination case law also offers an insight into the reality of managerial attitudes towards working mothers. The existence of these attitudes must be acknowledged as evidence of resistance by a significant number of employers to genuinely exploring options for flexible work arrangements in order to assist employees with caring responsibilities.

In the recent past alone, the following cases have come to public attention, for example:

- A former media agency manager, made redundant after returning to work part-time following the birth of her baby. Evidence revealed the employer's desire to 'weed out' part-time staff, with one email by the Chairman, stating, "I don't know what has happened in the past but the way we are going to operate in the future is that we are only having full-time employees on the payroll."³²⁰
- A former director of a childcare centre demoted to 'staff relief float' on a casual basis and when she returned from parental leave. Upon refusing to accept the demotion, her employer terminated her employment on the grounds of 'poor performance.'³²¹
- A pregnant employee who complained at being demoted to packaging duties, was told by the male director employees should resign when they fall pregnant and then "stay at home in bed".³²²
- A disability support worker, made to convert to casual employment on return from parental leave because of "the chief executive's refusal to accommodate her need to

³¹⁸ Australian Human Rights Commission, "Supporting Working parents: Pregnancy and Return to Work National Review, Report 2014

³¹⁹ Australian Human Rights Commission, "Supporting Working parents: Pregnancy and Return to Work National Review, Report 2014, p.30

³²⁰ "Discrimination case is Settled Out of Court", Sydney Morning Herald, 27 October 2011, p.3

³²¹ *Ucchino v Acorp Pty Ltd [2012] FMCA (27 January 2012)*

³²² [Fair Work Ombudsman v Wongtas Pty Ltd \(No 2\) \[2012\] FCA 30 \(2 February 2012\)](#)

work shifts that enabled her to care for her child' and then constructively dismissed her was awarded \$44,000 in damages.³²³

- Two former public relations managers for Virgin Blue who were made redundant whilst on parental leave gave evidence that members of their executive management team said 'all females should be on contract so that when they get pregnant it's easy for the company to get rid of them' and that finding roles for them in the organisation was 'like trying to put round pegs into square holes.'³²⁴

It is worth noting that these cases represent merely the tip of the iceberg as by far the majority of cases are not acted on by victims or remain unreported.³²⁵

A right of appeal is necessary

The FW Act stipulates that employees have no right to appeal an employer's unreasonable refusal of a request, unless the parties have agreed to allow such appeals in their workplace agreement.

Women, employees with a non-English speaking background and young workers generally enjoy less bargaining power, are less likely to be unionised or have workplace agreements and are more likely to be dependent on minimum award terms and conditions.

Employees with caring responsibilities have further restricted bargaining power because they are limited by the working arrangements that they can work, particularly in areas where childcare services are inaccessible or unaffordable.

However, it is these groups of workers who are likely to need the right to request flexible working arrangements and yet because of their weak bargaining power, are mostly likely to be locked out of workplace bargaining or have inferior workplace agreements with no right to appeal an unreasonable refusal.

Our introductory discussion concerning "first principles" should compel a conclusion that, once the policy decision was taken that a right of appeal will be available to some workers, the beneficiaries of that right ought have been those most in need rather than those most capable of demanding it (who have had the right to so demand for decades). Whilst doing the reverse might have been seen as "incentivising" worker organisation and bargaining, the reality is that those incentives have clearly been longstanding and insufficient to bring about empowerment.

Overseas experience indicates that there is no reason to believe allowing for either an obligation to seriously consider a request or a right to appeal a refusal will result in an increase in disputation.

Recently published data from the FW Commission indicates that there was a modest 50 applications for FWA to deal with disputes in relation to a refusal by an employer for flexible work arrangements for 2013-14.³²⁶

³²³ Cinotta v Sunnyhaven Limited [2012] FMCA 110 (8 March 2012)

³²⁴ Unsuccessfully conciliated at FWA 3 February 2011, claim to be filed in FCA2011 : Workplace Express, 23 February 2011

³²⁵ AHRC Annual Report, 2011: For the period of 2010-2011 complaints 45% of complaints brought under the Sex Discrimination Act were conciliated, most with confidentiality agreements.

³²⁶ Fair Work Australia, Annual Report 2013-14, p.34

A better model

The ACTU believes it is wholly inappropriate to regulate a matter as important as balancing work and caring commitments without any framework to provide guidance on the obligations of the employer in considering the request or the natural justice of being able to appeal an unreasonable request.

We advocate for:

- Amendments to s. 65(5) and 76(4) to require employers to reasonably accommodate employees' requests for flexible work arrangements or to extend a period of parental leave;
- Inclusion of balanced considerations an employer must give when determining if it can reasonably accommodate a request; and
- Removal of the restrictions imposed by s.739 to ensure all employees have a right to appeal an employer's unreasonable refusal to the FW Commission.

The FW Act right to request provisions should be amended to include an obligation on employers to reasonably accommodate a request with clear guidance to both employees and employers as to what that should entail, minimising the need for refusals to go to formal dispute resolution.

The ACTU advocates the adoption of a provision along the lines of that contained in section 17 of the *Equal Opportunity Act 2010 (VIC)* which outlines the obligations of employers in considering a request, including weighing up the importance of the request on the employee's capacity to balance work with family and caring responsibilities against any potential effects the granting of such a request would have on the organisation.³²⁷ S. 17 of the Act provides:

(2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that a person has as a parent or carer, all relevant facts and circumstances must be considered, including—

- (a) the person's circumstances, including the nature of his or her responsibilities as a parent or carer; and*
- (b) the nature of the role that is being offered; and*
- (c) the nature of the arrangements required to accommodate those responsibilities; and*
- (d) the financial circumstances of the employer; and*
- (e) the size and nature of the workplace and the employer's business; and*
- (f) the effect on the workplace and the employer's business of accommodating those responsibilities, including—*
 - (i) the financial impact of doing so;*
 - (ii) the number of persons who would benefit from or be disadvantaged by doing so;*

³²⁷ 17 of the *Equal Opportunity Act 2010 (VIC)*

(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and

(g) the consequences for the employer of making such accommodation; and

(h) the consequences for the person of not making such accommodation.

The restrictions on the FW Commission being able to deal with a dispute relating to sections 65 and 76 stipulated by s.739 should be removed and an additional dispute resolution function should be conferred on the FW Commission to deal with appeals against an employer's reasonableness of refusal.

The dispute function would allow the FW Commission to deal with disputes regarding unreasonable refusals similar to Right of Entry provision in s.505 of the FWA.

We are firmly of the view that without these amendments to ss. 65 and 76, the cultural attitudes towards employees with family or caring responsibilities will not change.

Long Service Leave

The missing element in the comprehensive suite of minimum standards set out in the NES is long service leave ("LSL").

LSL is a uniquely Australian innovation, whose history can be traced back to colonial times as a form of leave that would long enough to enable public servants to travel to Britain maintain contact with the "mother country". Whilst the original rationale for LSL is by now a quaint anachronism, there is little doubt that today LSL performs an important function as part of the framework of worker entitlements that helps to maintain a healthy balance between work and private life.³²⁸ In this respect, there are three main purposes identified with LSL:

- As an incentive to reduce labour turnover;
- As a reward for long and faithful service; and
- As a means to enable employees halfway through their working life to recover their energies and return to work renewed, refreshed, and reinvigorated.³²⁹

The FW Act proceeds on the basis that LSL is part of the NES and that in due course an appropriate NES standard will be formulated and implemented. The Explanatory Memorandum accompanying the *Fair Work Bill 2008* explains the intent as follows:

³²⁸ Markey, Ray; Parr Nick; Kyng, Tim and Muhidin, Salut; O'Neill, Sharon; Thornthwaite, Louise; Wright, Chris; Lavermiccoca, Catriona; Ferris, Shauna *The Case for a National Portable Long Service Leave Scheme in Australia* McKell Institute/Macquarie University Centre for Workforce Futures June 2013.

³²⁹ Markey et al (2013) at p.22.

This Division sets out the entitlement to long service leave for national system employees.

This entitlement is a transitional entitlement, pending development of a uniform, national long service leave standard with the States and Territories.

This Division preserves long service leave entitlements in pre-modernised awards (referred to as applicable award-derived long service leave terms).

If an employee does not have applicable award-derived long service leave terms, any entitlement to long service leave will be derived from State or Territory long service leave legislation (subject to its modification or exclusion by certain industrial instruments).³³⁰

The transitional position adopted in respect of the NES, no doubt reflects the complexities associated with the regulation of LSL throughout Australia. Various, LSL entitlements are (or have been) contained in State and Territory legislation, State and Commonwealth industrial awards and Commonwealth legislation. In addition, there is a significant degree of variance in the minimum level of entitlement to LSL under the different schemes in existence, as Table 13 below summarising the entitlements contained in the statute based schemes demonstrates.

³³⁰ *Fair Work Bill 2008* Explanatory Memorandum at paragraphs 436 to 439.

Table 13: Features of Long Service Leave Schemes

JURISDICTION	KEY LEGISLATION	ENTITLEMENT
NSW	<i>Long Service Leave Act 1955</i>	2 months after 10 years' service. Then 1 month leave for each subsequent 5 years' service.
NSW	<i>Long Service Leave (Metalliferous Mining Industry) Act 1963 No 48</i>	3 months after each 10 years' service.
VIC	<i>Long Service Leave Act 1992</i>	8.67 weeks after 10 years' service. Then 4.33 weeks after each additional 5 years' service.
QLD	<i>Industrial Relations Act 1999</i>	8.67 weeks after 10 years' service. Then further leave after each additional 5 years' service.
SA	<i>Long Service Leave Act 1987</i>	13 weeks leave after 10 years' service. Then 1.3 weeks leave for each subsequent year.
WA	<i>Long Service Leave Act 1958</i>	8.67 weeks leave after 10 years' service. Then 4.33 weeks leave after additional 5 years' service.
TAS	<i>Long Service Leave Act 1976</i>	8.67 weeks leave after 10 years' service. Then 4.33 weeks leave for each additional 5 years employment.
NT	<i>Long Service Leave Act 1981</i>	13 weeks leave after 10 years' service. Then 6.5 weeks after each additional 5 years' service.
ACT	<i>Long Service Leave Act 1976</i>	0.2 months leave for each year of service, with leave available to be taken after 7 years' service.
Commonwealth	<i>Long Service Leave (Commonwealth Employees) Act 1976</i>	3 months after 10 years service, pro-rata for part-time employees.

A further layer of complexity is added by the operation of the portable LSL schemes applying to the building and construction, coal mining, security³³¹ and contract cleaner³³² industries. These schemes operate on an entirely different basis to the traditional statutory LSL schemes, in that they recognise service with (potentially) multiple employers allowing employees to accrue an

³³¹ Applies only to the ACT.

³³² Applies in NSW, QLD and ACT.

entitlement based on service in an industry or sector. Clearly, the portable schemes have been established to meet a certain need or set of circumstances that any NES based standard should be careful not compromise or undermine. Indeed, as we discuss below, there is a serious question as to whether a national portable LSL scheme is the logical next step in the evolution of LSL, given the growth of casual, part-time and intermittent employment arrangements in the Australian economy³³³ and the high level of employee mobility in particular industries.³³⁴

Table 14: Portable, industry-based Long Service Leave Schemes

STATE	PLSL SCHEME	ENTITLEMENT
NSW	Building and Construction	8.67 weeks for each 10 years' service; 4.33 weeks for each subsequent 5 years' service.
	Contract Cleaning	Cleaning – 8.67 weeks after 10 years' service (3650 days); 4.33 weeks for each 5 years' service thereafter (1825 days)
ACT	Building and Construction	13 weeks after 10 years' service
	Contract Cleaning	6.067 weeks after 7 years' service
	Community Services	4.333 weeks after 5 years' service
	Security	8.667 weeks leave after 7 years' service
QLD	Building and Construction	8.67 weeks after 10 years' service (2,200 days); pro rata entitlement after 7 years' service
	Contract Cleaning	8.67 weeks after 10 years' service; pro rata after 7 years' service
VIC	Building and Construction	42.4 days after each 7 years' service
SA	Building and Construction	13 weeks after 2600 days (260 days p.a.)
WA	Building and Construction	8.67 weeks after 10 years' service (2200 working days); 4.33 weeks after 5 years' service thereafter (1100 days)
TAS	Building and Construction	13 weeks after 10 years' service (2200 working days); 4.33 weeks after each 5 years' service thereafter (1100 days)
NT	Building and Construction	65 days after 10 years' service (2600 days) (i.e. 13 weeks), 32.5 days for each 5 years' service thereafter
Commonwealth	Coal Mining	13 weeks for each 8 years' service

³³³ Markey, et al (2013) at p.23.

³³⁴ Markey, et al (2013) at p.10.

What should an NES LSL standard look like?

The starting point in considering an appropriate NES LSL provision is accepting the inherently beneficial purpose of the provision. That is, LSL cannot be properly described as the result of a careful industrial compromise between employee and employer interests. Certainly, employer interests are protected to the extent that entitlement to LSL only accrues over a long period of time and employers in general have a significant say over when LSL may be taken. However, LSL is unambiguously about the interests and well-being of the employee – it is based on the notion that long service with an employer (and in some cases, in an industry or sector) is of itself deserving reward and recognition by way of additional leave entitlements.

This means that any NES-based national LSL standard must, as a minimum, strive to maintain existing LSL entitlements that apply to employees in various States and industries throughout Australia. Logically, this means that there are only two principal approaches that can be adopted to attain a relevant national standard. However, either approach must also adopt particular measures to ensure the continued successful operation of industry portable LSL schemes ('IPLSL'), and in certain circumstances, more generous State or Territory provisions.

The first approach available is to adopt the 'highest common denominator' in respect of the Statutory LSL schemes. This means the adoption of a scheme based on the legislated standards applying in South Australia and the Northern Territory in relation to the core entitlement, with elements of other statutory schemes being picked up in areas such as access to pro-rata entitlements; the rate of payment of LSL and treatment of casual employees. This is the preferred option of the ACTU.

ACTU preferred national LSL standard: highest common denominator amongst general statutory schemes and preservation of existing IPLSL schemes.

Under this model, workers would receive 13 weeks long service leave after 10 years' service with an employer. LSL would accrue at the rate of 1.3 weeks' for each year of service and pro rata for part years.

In normal circumstances, LSL would be available after 10 years service and the timing of the leave would be by agreement between the employee and employer, subject to a reasonableness test in respect of the operational requirements of the business. In the case of pressing domestic necessity, illness or injury, access to LSL entitlements would be available on a pro-rata basis after five years. Similarly, accrued LSL would become available after five years on termination of employment by the employer, except by reason of serious and wilful misconduct of the employee. Pro-rata access to LSL on termination would be available after 7 years, regardless of the reason for termination, or initiator of the termination.

Other than in the circumstances described above, LSL cannot be "cashed-out".

The LSL scheme would apply to all national system employers and employees, with relevant exclusions pertaining to the coverage of existing IPLSL schemes. The scheme would also provide for coverage of casual and seasonal employees, based on the formula utilised by in the Victorian *Long Service Leave Act 1992*.

The rate of pay applicable to long service leave as taken, would be the employee's normal or actual weekly rate of pay, including shift loadings, regular bonuses, allowances and rostered or compulsory overtime. This position is broadly consistent with the approach in relevant Tasmanian and Queensland legislation.

Under the proposed scheme, 'continuous employment' with an employer would encompass a transfer of business to a new employer, as well as the transfer of an employee's employment from one corporate entity to an associated entity within a corporate group. Also, the termination and subsequent re-hiring of an employee by the same employer or an associated entity within a period of three months, would result in the reinstatement of continuous service for the purposes of accruing LSL.

Similarly, 'service' for the purposes of accrual, would include normal working hours and the all types of leave, plus unpaid parental leave. Unpaid leave including periods of industrial action would not count as service. Employer stand down due to slackness of trade would not break service, but would count as time worked or a period of service. However, interruptions in employment caused by the employer with the intention of avoiding LSL obligations, would count as service.

Finally, as is the case with most existing jurisdictions, a public holiday falling within a period of long service leave will lead to the LSL being extended by that the duration of the public holiday and LSL can be taken in advance, by agreement between an employer and employee.

Alternative position: a minimum safety net provision based on the most common statutory LSL entitlement, but preserving the operation of existing IPLSL schemes and more beneficial State LSL statutory entitlements.

The alternative position in respect of a national NES-based LSL standard, is for the provision to be a minimum safety net provision only, based on the most common LSL standard of 8.67 weeks leave after 10 years service and 13 weeks after 15 years service.

The difficulty with such an approach however, is that a significant proportion of the workforce already have a statutorily derived minimum standard in excess of such an NES standard. In particular, employees generally in South Australia, the Northern Territory, the Australian Capital Territory are in this category. In addition, specific categories of employees such as Commonwealth Public Servants, employees in the coal mining industry nationally and in the metalliferous mining industry in New South Wales, building and construction workers in South Australia, Victoria, Northern Territory, Tasmania and the ACT are also the beneficiaries of a superior standard of LSL.

Therefore, for the NES-derived LSL standard to operate beneficially, it must exempt entirely (or at least, substantially) the existing statutory schemes applying to the relevant classes of employees with superior LSL entitlements.³³⁵ If this were not to occur, then the operation of the FW Act will be such as to over-ride the operation of the State-based statutory schemes - at least to the extent

³³⁵ Whilst it would be possible for the Commonwealth to directly legislate in respect of these employees to replicate under the FW Act, the various entitlements contained in State legislation, this would appear to be an unnecessarily complex approach to dealing with the preservation of these entitlements.

that these schemes cover national system employers and their employees.³³⁶ As previously submitted, the operation of an NES-based LSL scheme should not operate so as to disentitle classes of employees who already have the benefit of a superior LSL scheme. Such an outcome would be perverse and contrary to the stated purpose of the NES as minimum safety net entitlements that are able to supplemented, *inter alia*, by awards and enterprise agreements.

On the basis that this critical issue of maintaining existing entitlements under State³³⁷ laws is properly dealt with, there seems no particular difficulty in crafting a minimum NES entitlement for LSL. The key elements of such a scheme would be as described below.

Under the minimum entitlement model, workers would receive 8.67 weeks long service leave after 10 years' service with an employer, accruing to 13 weeks LSL after 15 years.

In normal circumstances, LSL would be available after 10 years service and the timing of the leave would be by agreement between the employee and employer, subject to a reasonableness test in respect of the operational requirements of the business. In the case of pressing domestic necessity, illness or injury, access to LSL entitlements would be available on a pro-rata basis after five years. Pro-rata access to LSL on termination would be available after seven years, regardless of the reason for termination, or initiator of the termination.

Other than in the circumstances described above, LSL cannot be "cashed-out".

The LSL scheme would apply to all national system employers and employees, with relevant exclusions pertaining to the coverage of State legislation providing for a superior LSL entitlement as well as the existing IPLSL schemes.

Coverage of casual and seasonal employees should be based on the formula used in Victorian legislation.

The rate of pay applicable to long service leave would be based on the current provision in the NES relating to the payment of annual leave taken and on termination.³³⁸

Under the minimum scheme, 'continuous employment' with an employer would encompass a transfer of business to a new employer, as well as the transfer of an employee's employment from one corporate entity to an associated entity within a corporate group. Also, the termination and subsequent re-hiring of an employee by the same employer or an associated entity within a period of three months, would result in the reinstatement of continuous service for the purposes of accruing LSL.

Similarly, the terms 'service' and 'continuous service' would be as defined in s22 of the FW Act. However, interruptions in employment caused by the employer with the intention of avoiding LSL obligations, would also count as service.

³³⁶ *New South Wales v Commonwealth* ("the Work Choices Case") [2006] HCA 52; 81 ALJR 34; 231 ALR 1 (14 November 2006).

³³⁷ We also operate on the assumption that it would not be appropriate (and that there is not intention) to legislatively change the status-quo as to the current interaction of the coal mining industry scheme and the NES. Section 39E of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) excludes the operation of the NES in respect to the matters dealt with in the Act.

³³⁸ FW Act ss90(1) and 90(2).

Consistent with the position in most existing jurisdictions, a public holiday falling within a period of long service leave will lead to the LSL being extended by that the duration of the public holiday and LSL can be taken in advance, by agreement between an employer and employee.

Is an NES LSL standard enough?

The existence of well-functioning and long established portable industry long service leave schemes raises the issue of whether a standard, single-employer based LSL model is sufficient to meet needs and realities of the modern workplace. Indeed, the labour movement is actively contemplating the best models for providing portable accesses to a range of leave entitlements, including long service leave.

In particular, the ACTU would commend serious consideration being given to the 2013 report produced by the McKell Institute and the Macquarie University Centre for Workplace Futures entitled *The Case for a Portable Long Service Leave Scheme in Australia* ('McKell Report'). The McKell Report is the most comprehensive and wide-ranging study to date on the operation of existing IPLSL schemes in Australia.

After a careful study of the existing portable schemes, including consideration of their strengths and weaknesses, the McKell Report identifies three possible models for a future portable national long service leave scheme. These are:

OPTION A – “The ADF Model”. The McKell Report summarises the ADF Model in the following way:

“The ADF model is based on the system of Approved Deposit Funds (ADFs) established in the superannuation industry during the 1980s (also known as Rollover Funds). Employers make their own internal provisions for LSL until an employee leaves or is eligible for LSL. Employees who leave service can roll over a lump sum PLSL benefit into any ADF they nominate. The accrued benefit payable at exit from an employer would be calculated using a defined benefit formula, based on the employee’s wages at the date of exit, in line with existing legislation, awards and/ or workplace agreements. The lump sum benefit would not normally be payable in cash (unless the employee met a LSL condition of release). The ADF invests the money on behalf of the employee, in an accumulation-style account, until the employee is eligible to receive LSL.”³³⁹

OPTION B – “The Industry-based Defined Benefit Fund Model”. The McKell Report summarises the operation of this option in the following way:

“An alternative model involves the creation of a range of industry-based defined benefit funds. There are already more than a dozen established industry based PLSL arrangements, however, each of these provides only limited portability. Workers only accrue LSL benefits while working within the industry, and may forfeit their entitlements if they cease working in the industry prior to

³³⁹ Markey et al (2013), at p.14

completing the vesting period of service. Workers who complete the vesting period, and then leave the industry are usually entitled to claim a cash payout.

Employers in the industries covered by existing schemes are required to be registered with the relevant fund. The employers periodically provide information about each employee and periodically pay levies to the fund administrators. Each fund is invested in line with a strategy determined by the Board and/or approved by the Minister or Trustee. When an employee becomes eligible for an LSL payment, a benefit may be payable directly from the LSL fund; or may be payable by the employer, who then claims reimbursement from the fund. The benefits payable are calculated in accordance with the relevant legislation and/or award. This currently means that LSL benefits are defined benefits.

Each fund is periodically reviewed by an actuary, who assesses the adequacy of the fund's assets, relative to the fund's liabilities, using reasonable assumptions about the future experience of the fund. The actuary might recommend an increase or a decrease in the levy rate, in order to maintain an acceptable level of solvency. The fund administrators play a role in ensuring that employers comply with their obligations, for example, educating new employers, inspecting records of registered employers and imposing financial penalties for late payments."³⁴⁰

OPTION C – “The Accumulation Model”. The McKell Report summarises the operation of this model in the following way:

“Employers would be required to make regular contributions for all eligible employees into designated LSL accounts administered by superannuation funds and/or authorised financial institutions. (The minimum contribution would be determined by the National Employment Standards.)

Account funds would be invested on behalf of the account holder and investment earnings would be credited. Administration fees would be deducted. The account-provider would be required to maintain records sufficient to determine the worker's eligibility for LSL cash payments in the future. The LSL benefit would not become payable in cash until the worker met an “LSL condition of release”, similar to the preservation requirements applicable to superannuation benefits. The LSL account provider would be required to meet registration, reporting, and corporate governance requirements, similar to those imposed on the financial institutions that hold superannuation savings. APRA would set standards for authorisation and monitor account providers. Banks, life insurers, and superannuation funds would be eligible to offer LSL accounts, as long as they met the authorisation standards.”³⁴¹

The possible introduction of a portable national LSL scheme as envisaged in the McKell Report involves an important and complex reform of existing industrial arrangements. It is for this reason that the widest possible input and consultation should be sought before any fundamental reform in this direction is proposed by Government. Indeed, the ACTU can see the value of both the NES LSL standard and the question of the desirability of a portable national scheme being the subject of an independent inquiry inviting contributions from all interested stakeholders.

³⁴⁰ Markey et al (2013) at pp 15-16.

³⁴¹ Ibid at p.17.

The current PC process, given its wide scope and truncated timetable, is not in a position to properly examine and consider the merits of a portable national LSL scheme, or the interaction of such a scheme with a new NES standard. The ACTU believes that the best means of developing soundly based recommendations in the area of LSL reform would be the establishment of an Inquiry Panel consisting of a chairperson that would be a senior serving member of the FW Commission, along with four ordinary members of the Panel being equal numbers of nominees from the ACTU and peak employer groups the ACCI, and AiGroup. Secretariat and research services could be provided by the Department of Employment. The aim of the Inquiry Panel would be to report on both the appropriate NES LSL standard, as well as the possible introduction of a national portable LSL scheme.

It is to be hoped that the Inquiry Panel would aim for consensus, or at least a narrowing of differences on key issues, based on a consideration of relevant evidence, submissions and experience. To the extent that members of the Inquiry Panel cannot agree on recommendations concerning these issues, it would be the job the Inquiry Chair to fairly put the case of the respective interest groups and to recommend a preferred position. The Inquiry Panel report could form the basis of further legislative action, particularly in respect to the practicality of a national portable long service leave scheme, as a supplement to, or variation of, a proposed NES standard of LSL in the FW Act.

Redundancy pay

Redundancy is the loss of employment at the employer's initiative because the employer no longer needs the job done by the employee to be done by anyone³⁴². Or in other words, "*it is the abolition of a position which leads to that position being redundant*"³⁴³.

During the post-war era of full employment, redundancy pay for retrenched workers was determined by industrial tribunals on a case-by case basis. Indeed such cases were infrequent, given the rarity of retrenchments at this time. It was not until the economic recession and the resulting widespread job losses in the early 1980's that called for the need for the industrial tribunals to deal with the issue in a more formal, structured and uniform manner. In response, Unions commenced a number of 'redundancy cases' across Australia.

At the federal level it was the 'Termination, Change and Redundancy Case' of 1984³⁴⁴ (**First TCR Decision**) that set the first national standard for redundancy provisions, while other cases were also being run at a State and Territory level. All of these decisions were made during a period of economic recession and reflect the grim reality and devastating personal consequences of the economic situation at that time³⁴⁵.

It was against this background, that these cases established a minimum standard for redundancy payments, notice periods and eligibility criteria. The need for some form of compensation for retrenched workers was undeniable, however the industrial tribunals were also weary not to burden business with extra costs at a time when they could least afford it. On review

³⁴² See Print F6230 and s 119 of the Act

³⁴³ *Construction, Forestry, Mining and Energy Union (CFMEU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Spotless Facility Services Pty Ltd T/A Spotless* [2015] FWCFB 1162 at [66].

of these cases, it is fair to say that it was the latter consideration that really guided the scale of redundancy payments established at that time. As acknowledged by the Full Bench of the NSW Industrial Relations Commission in 1994, “*a balance had to be struck but the constraints were severe*”³⁴⁶.

The minimum redundancy standards now included in the NES share much in common with their predecessors. In fact there has been little if any change to these standards, notwithstanding that much has changed in terms of the economic position of Australia and the make-up and structure of the modern workforce.

There has always existed some judicial debate about the primary purpose of redundancy payments. On the one hand, redundancy pay is “*a utilitarian response directed as far as it could reasonably be to the central core of the social and economic disadvantages of those displaced from employment*”³⁴⁷. In determining the appropriate scale for redundancy pay, the industrial tribunals were required to decide at which point an ‘industrial’ citizen is no longer the responsibility of industry and therefore becomes the responsibility of the social services network. As such, redundancy pay was a form of income maintenance to reduce the financial hardship suffered by retrenched workers.

However, an alternative view was made by the first TCR Decision, where it was determined that, first and foremost, the purpose of redundancy payments is to compensate employees for the loss of non-transferable employment ‘credits’ such as long service leave and personal/sick leave. Essentially, the payment compensates employees for the loss of recognition of their service with the employer.

There are of course other detrimental consequences of retrenchment that are beyond financial. Redundancy pay is also compensation for the inconvenience, hardship and anxiety of searching for another job and/or changing jobs. This includes such things as loss of seniority and the loss of security of employment. Again, this arises in part because of the loss of recognition of service.

Regardless of the view, it is clear that redundancy entitlements are intended for the benefit of employees.

Since that time, the Australian labour market has evolved, and notably ‘non-standard’ workers now make up a larger proportion of the workforce. Non-standard workers include casual employees, independent contractors, and employees on fixed term or task contracts. In addition, the way in which business operates in the contemporary market has changed. There is less focus on direct employment and a greater reliance on external labour sources such as labour hire and contracting out.

As we refer to elsewhere, these kinds of working arrangements disenfranchise workers who are distanced from the source of control over their working lives. There is often a disconnect between their employer (the labour hire or contracting company) and the host, where they perform their work and who give them day to day instructions. This disconnect is exacerbated by dual working

³⁴⁴ Print F6230; (1984) 294 CAR 175

³⁴⁵ “*long-term unemployment in Australia reached an unprecedented peak of 366,000 persons in March 1993, representing 38% of the unemployed and 4% of the labour force. The previous peak of 231,000 persons (31% of total unemployment) occurred in February 1984.*” [Australian Bureau of Statistics, 4102.0 - Australian Social Trends, 1994](#)

³⁴⁶ *Transport Ind Mixed Enterprises Redund (State) Award* [1994] NSWIRComm 75 (24 June 1994)

³⁴⁷ *Transport Ind Mixed Enterprises Redund (State) Award* [1994] NSWIRComm 75 (24 June 1994)

conditions, where often labour hire workers are engaged on inferior wages and conditions. Ultimately, loyal and often long service is no longer protection from job loss.

Redundancy entitlements have not kept pace with the changes to the way in which workers are engaged, the way in which work is performed, or the way in which the contemporary market place operates.

This growing issue becomes clearer with a review of the ways in which employers avoid their statutory safety net obligations to redundant employees. We consider these exclusions and avoidance mechanisms below. This has the effect of making already vulnerable workers, more vulnerable to 'quick and cheap' company restructuring.

Exclusion – Ordinary and Customary Turnover of Labour

Section 119 Redundancy pay of the FW Act, provides:

Entitlement to redundancy pay

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
 - (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (b) because of the insolvency or bankruptcy of the employer.

The first exclusion is that provided for in subs 119(1)(a). An employee who has had their employment terminated at the employer's initiative will be excluded from a safety net entitlement where the redundancy was due to the ordinary and customary turnover of labour. The origin of this exclusion is found in the First TCR Decision. Its meaning is set out in the *Termination, Change and Redundancy Case - Supplementary Decision (Second TCR Decision)*.³⁴⁸

In the Second TCR Decision the Full Bench said:

"There is no doubt that we did not intend the redundancy provisions to apply where an employee is dismissed for reasons relating to his/her performance, or where termination is due to a normal feature of a business." (Emphasis added.)

The question then begs, what is a normal feature of a business? The industrial tribunals have typically taken a case by case approach in answering this question. However the exclusion itself has not kept pace with the evolving 'normal features' of doing business.

The exclusion for the "ordinary and customary turnover of labour" should only be applied in very limited circumstances. At the time that this exclusion was conceptualised, it was intended to only apply to work that was clearly intermittent and as such it was assumed that employees were compensated for this intermittency in their terms and conditions of employment (for example in the building and construction industry). The payment of redundancy in the circumstances was

³⁴⁸ Print F7262, *Termination, Change and Redundancy Case - Supplementary Decision*, Print F7262, Moore J, Maddern J and Brown C, 14 December 1984.

therefore considered to be 'double dipping' or overcompensation when an employee did not have an ongoing expectation of work in any event.

Intermittency of work is now far more prevalent than it was at the time that the TCR decisions were being considered. It is a feature of the contracting services industry, which has grown in pace with the privatisation of government services. Also, largely as a result of growing privatisation, the industries and sectors in which contracting services businesses operate has diversified.

In response to this, industries such as the building and construction industry have implemented redundancy schemes in order to provide a safety net for workers should they become unemployed. Schemes such as Incolink and ACIRT (Australian Construction Industry Redundancy Trust) mean that workers are able to access redundancy pay as well as a range of other services (e.g. accident and illness insurance, portable sick leave, income protection etc.). These schemes are funded by employers, who make regular contribution payments on behalf of their employees. The amount of contribution is set down in an industrial instrument. These schemes have been operating for over 20 years and are now an established part of the building and construction industry (including those in the construction/contracting, engineering construction/contracting and labour hire industries).

However, other workers in the growing contracting services industries are not protected by such schemes, and hence have no reliable safety net making them in effect, second class workers. This means that already vulnerable workers, are made more vulnerable. Workers in industries such as, contract cleaning, security and catering suffer just the same during times of unemployment as other workers. Their entitlements should not be eroded just because of the industry in which they work.

It is unfair that employees bear the brunt and risk of corporations structuring their operating models such that employees find themselves at the bottom of a chain of control. It is the business engaging their employer who is in control, but the employees have no ability to influence or comment upon the way that business acts. It is also particularly unfair to rely on attempts, for example in a contract or employment or letter of offer, to notify an employee that their employment is contingent upon the retention of a commercial contract.³⁴⁹ The shifting of risk onto the most vulnerable party should not be so easily achieved.

Businesses which operate in industries involving periodically rotating contracts, the rotation of which is a construct to ensure that employees are disenfranchised, should not be able to rely on the "ordinary and customary turnover of labour" exclusion. The rotating nature of the contracts is a constructed, rather than normal feature of the business. It is unfortunate that the prevalence of such practices has led to an ill-founded acceptance that such a feature is normal. We are concerned with growing workplace relations jurisprudence that appears to accept 'as a given' that the loss of a commercial outsourcing contract is as normal feature of a business.³⁵⁰ It cannot be said that the loss of a commercial outsourcing contract, particularly in industries where there is a small group of bodies seeking tenders from a pool of regular and known providers, is due to the ordinary and customary turnover of labour. In such circumstances it is within the ability of a business to control, and if not that business, the business to whom it is providing labour or services, when a contract is lost and when labour is no longer required.

³⁴⁹ See for example: *Kilsby v MSS Security Pty Ltd T/A MSS Security* [2014] FWC 7475

³⁵⁰ See for example: *Kilsby v MSS Security Pty Ltd T/A MSS Security* [2014] FWC 7475

Exclusion - Types of employees

We now deal with the types of employees who are excluded from redundancy provisions of the FW Act through no fault of their own. Many employees have no ability to determine the manner in which they are engaged. This issue relates to matters of informed employment choices. The issue is really regardless of whether an employee is informed about the type of employment they are to be engaged in (for example the benefits and risks it poses to them) they are often unable to make a choice whether to accept it or to seek to alter it due to their significant disadvantage in the relationship due to the inherent power imbalance.

Section 123 Limits on scope of this Division of the FW Act relevantly provides:

Employees not covered by this Division

(1) This Division does not apply to any of the following employees:

(a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;

...

(c) a casual employee;

(d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;

...

Other employees not covered by redundancy pay provisions

(4) Subdivision B does not apply to:

(a) an employee who is an apprentice; or

.....

The first group of excluded employees are fixed term, fixed task or seasonal employees.

Employees may reluctantly accept fixed term, fixed task or seasonal employment because it is all that there is available or they do not know the consequences of the kind of employment in relation to their rights.

Many employees who are engaged under fixed term or task contracts find themselves being re-engaged repeatedly to do the same work. These workers should be treated no differently to permanent ongoing employees in relation to many aspects of the workplace relations system and the redundancy provisions in the FW Act should reflect the industrial reality of how these employees are used by employers.

In the case of seasonal employees the argument for non-availability of redundancy payments is relatively clear. These employees know that they are engaged for a particular season, something which is outside of the employer's control, such as a certain time of year when certain fruits or vegetables require picking and processing or when there is a cycle of demand and down turn due

to weather, for example alpine resorts. It can be said that such seasonal variances are normal features of a business.

The second group of excluded employees are casual employees.

The FW Act provides a number of rights and entitlements³⁵¹ to a certain class of casual employees. Generally speaking it is employees who have been engaged on a regular and systematic basis for a prescribed period of time (**regular and systematic casuals**). Regular and systematic casuals are not entitled to redundancy pay even though for all intents and purposes (and in some cases in law and fact) they are utilised by the employer as if they were permanent employees. We submit that the redundancy provisions of the NES should not exclude regular and systematic casuals.

Reduction of Entitlements

Section 120 Variation of redundancy pay for other employment or incapacity to pay of the FW Act provides:

- (1) This section applies if:
 - (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
 - (b) the employer:
 - (i) obtains other acceptable employment for the employee; or
 - (ii) cannot pay the amount.
- (2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.
- (3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.

An employer can seek to reduce the amount of redundancy pay provided to an employee if the employer has obtained other acceptable employment for the employee. There are two questions to consider in relation to this. The first is, what is meant by 'obtain' and secondly, what is meant by 'other acceptable employment'.

There is currently much contention in relation to the first question and the issue is the matter of Federal Court Proceedings³⁵², referred to in Chapter 7. It is vitally important to remember that the primary purposes of redundancy pay are to compensate employees for the loss of non-transferrable employment 'credits' such as long service leave and personal/carer's leave and, as

³⁵¹ For example the right to request flexible working arrangements (s 65(2)), unpaid parental leave (s 67(2)) and access to relief from unfair dismissal (s 384(2)).

³⁵² *FBIS International Protective Services (Aust) Pty Ltd v Fair Work Commission and Anor* (VID691/2014)

compensation for the inconvenience, hardship and anxiety of searching for another job and/or changing jobs. While there is some element which provides for income maintenance during unemployment and compensation for termination, such elements are not the focus of redundancy pay. In the First TCR Decision the Full Bench said:

“...we do not believe that the primary reason for the payment of severance pay relates to the requirement to search for another job and/or to tide over an employee during a period of unemployment.

...it would be misleading to assume that success in obtaining a new job indicated that an individual made redundant had managed to recover the security built up over years of service in the redundant job and we are prepared to grant severance pay, in addition to the measures we have awarded to assist employees find alternative employment.”

As such, an employer’s obligation to make redundancy payments does not disappear if an employee finds alternative employment, even when the employer assists with this.³⁵³

In *Derole Nominees Pty Ltd and Australian Chamber of Manufactures* (1990) 140 IR 123 (**Derole**), where it was held that the intention of the meaning of “obtaining alternative acceptable employment” within an award was “not to impose an absolute test of the employer’s ability to ‘obtain’ alternative employment but [rather refers] to an action which causes alternative employment to become available to the redundant employee. The Employer must be a strong moving force towards the creation of the available opportunity.”

It should not be an easy thing for employers to avoid their obligations to make redundancy payments. The first reason is that obtaining other acceptable employment does not remedy or resolve the primary reasons for which redundancy pay is required.

Further, in some situations, particularly those where a commercial outsourcing contract comes to an end and employees are needed by the next service provider, employees may be offered work with the incoming contractor, who needs the labour to fulfil their contractual obligations. As such, it is common to see the same group of employees working for the same host with a cyclical list of employers, over which the employees have little to no control over.

An entitlement to redundancy pay is meaningless unless a worker has the requisite service to be entitled to some payment (i.e. 12 months service). Where these change of contracts occur suddenly and frequently, workers may change employers on a regular basis meaning that they might never accrue the needed service to be entitled to any payment.

In determining whether the new position is ‘acceptable alternative employment’, the FW Commission applies an objective test where a number of factors are weighed up. These factors might include the nature of the work, the rate of pay, working hours, skills, duties, seniority and location of the work.³⁵⁴ Critically however, continuity of service is not a necessary element to satisfying the criteria that a position is acceptable alternative employment.

We submit that whilst the test that is generally applied by the FW Commission is appropriate, and that they are the most appropriate body to deal with such questions, it is manifestly unfair that a

³⁵³ See for example *Datacom Systems Vic Pty Ltd v Khan and another* [2013] FWC 1327

³⁵⁴ See for example *Vicstaff Pty Ltd v May* [2010] FWA 3141, *Central Norseman Gold Corporation Ltd v Kempton* [2010] FWA5316, *UXC Connect v Moore* [2012] FWA 4296.

position can be 'acceptable alternative employment' where continuity of service is not recognised.

This unfairness gives rise to a scenario where an employee is not entitled to redundancy pay from their old employer, however starts with the new employer without any recognition of their prior service. This means in practice that these workers are particularly vulnerable to spurious dismissals because they are not eligible to make an unfair dismissal application and are forced to satisfy a new probationary period of employment. It also means that they are not compensated for other non-transferable credits such as:

- Personal / carers leave
- Long service leave
- Access to service based entitlements such as parental leave
- The amount of redundancy pay that an employee might be entitled to be paid in the future
- Amounts of compensation that might be awarded in the future, which are based on service, will be reduced (for example unfair dismissal application will only consider the service with the current employer in respect to the calculation of compensation).

This is unlike transfer of business arrangements, whereby generally the employee's service is counted with the new employer.

Transfer of business arrangements arise where the same or similar work performed by an employee effectively transfers to a new employer and there is one of the following 'connections' between the old and new employer:

- An arrangement that the new employer owns or has use of some or all of the old employer's assets that relate to the transferring work;
- The work from the old employer is outsourced to the new employer;
- Work previously outsourced is insourced; or
- The old and new employer are associated entities within the meaning of section 50AAA of the Corporations Act 2001.

Under the transfer of business provisions, where the new employer is not an associated entity of the old employer, the new employer decides whether or not to recognise the employees accumulated service for the purposes of annual leave and redundancy pay under the NES. If the new employer decides not to recognise their previous service, then the employee is entitled to receive payment for their accrued leave entitlements and redundancy.

Change of contract scenarios typically do not give rise to a 'connection' and therefore workers and their conditions of employment are not protected by the transfer of business provisions.

12

The Safety Net: (4) Resolving Disputes

Object 3(b) of the FW Act is to ensure a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the NES, modern awards and national minimum wage orders.³⁵⁵ Object 3 (e) of the FW Act is to provide accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms. The provision of accessible and effective dispute settlement procedures is integral to guaranteeing the safety net. However, the lack of access to an arbitrated, binding decision to settle disputes under the current provisions of the FW Act and the modern award framework undermines these objectives.

Disputes about matters arising under an Award or the NES

Until Work Choices, a dispute about award or NES terms of employment could have been conciliated by the FWC (with attendance mandatory) and ultimately arbitrated. Under Work Choices, the FWC could conciliate (without compulsion to attend) but not arbitrate. Workers could not strike in support of their claim. In these circumstances, the employer would almost always prevail.

As part of the award modernisation process in 2008, The FWC was required to make a decision on the appropriate dispute settlement procedures to be included in all modern awards. The FWC faced the challenge of making this decision prior to having full knowledge of the final FW Act. During the award modernisation process, the ACTU and unions argued that this should not prevent the FW Commission from including in the modern award a dispute settlement procedure which clearly provided for the Commission to settle disputes through arbitration as a last resort. The resulting model dispute resolution clause provided that the FWC may conciliate a dispute about a matter arising under the award or NES (with participation compulsory) but cannot arbitrate without the consent of both parties. Given that, under the FW Act, workers cannot take protected industrial action over a dispute about an award or NES matter, the employer is likely to prevail.

If the employer's action can be characterised as a breach of the award or NES, workers can seek relief in a competent court. However, this is an expensive and time-consuming proposition, so it is rarely taken by workers, particularly those low paid employees who rely on the minimum NES or award terms of employment.

Further, restrictions on parties to access the FWC for assistance to deal with disputes about the reasonableness of an employer's refusal to a request for flexible work arrangements to extend a period of unpaid parental leave (under ss. 65 and 76 of the NES) hampers the capacity of most employees to resolve these disputes at all.

³⁵⁵ Fair Work Act (2009), s. 3(b),(e).

The effect is that many workers are deterred from, or unable to enforce their NES and award rights.

Accordingly, we submit that the FW Act still does not provide ‘accessible and effective’ dispute resolution options for disputes about matters arising under awards or the NES. Without recourse to arbitration for disputes about all award or NES terms of employment, there is no way of guaranteeing the effective and on-going settlement of disputes about award and NES matters.

The FWA should empower the FWC to arbitrate disputes about any matters arising under awards or the NES, as a last resort.³⁵⁶ If necessary, such orders can lay down rules for the future conduct of the parties (for a nominated time, or indefinitely) in order to avoid further disputation.

How are existing dispute resolution pathways working?

The FWC is an efficient and effective option for resolution of disputes due to the relative inexpensiveness of hearing procedures and the speed at which the tribunal is able to deal with disputes.

Access to courts is often costly and subject to lengthy processes less suited to the speedy resolution of a workplace dispute. In particular, the informality and efficiency of the FWC is generally more conducive to enabling the parties to a dispute to maintain a working relationship post the settlement of a dispute and in particular avoiding similar disputation in the future. This is an important aspect of the objective of the employment law framework in promoting harmonious workplace relations.

Whilst access to other Tribunals may be suitable in certain cases, the processes are sometimes quite lengthy and many employer and employee advocates have experience in the FWC as the appropriate Tribunal with specific experience in dealing with workplace matters.

Access to arbitration in the FWC, within a range of mechanisms to assist in the resolution of disputes is in our experience the most accessible, cost efficient and timely way for settling disputes about employment terms and conditions.

Do people know where they can seek assistance?

Union members, and employees working in unionised sectors, are generally well serviced with access to assistance from their union or a number of internet and telephone advice services.

However, with the growth of employment sectors in non or low unionised areas, we expect there is a lack of knowledge from some groups of employees. This gap is currently filled by the FWO which provides a useful role in disseminating information and advice to employees who are not members or do not have access to a union and specific programs, for example the FWC trial program to assist non-represented applicants in unfair dismissal matters.

³⁵⁶ The FWC power to make such orders is available under the corporations power in the Constitution, as the orders are directed at avoiding disputes affecting companies and their workforce.

13

The Safety Net: (5) Flexibility beyond and within.

In the context of a regulatory framework so fundamentally premised on minimum standards as means to a desired regulatory end, demands for greater flexibility must be met with some caution.

Flexibility for business means the absolute discretion to not follow the rules, or the abolition of rules altogether. As pointed out in chapter 4, the flexibility of our labour market was most recently soundly demonstrated during the GFC: the existing rules have plenty of room to move within them. Calls by industry for even further flexibility must surely be met with the legitimate question – what rules are left to set aside?

Flexibility within the safety net

Modern awards provide for significant degrees of flexibility, partly because of the requirements of the process that led to their creation, and partly because (as referred to elsewhere), the instruments that were synthesised and compromised to become the modern awards had been through multiple rounds of review for decades before.

In describing the various elements of the framework, the Explanatory Memorandum to the *Fair Work Bill 2008* provides on page i:

- modern awards, which provide flexibility and stability for employers and their employees and which may include:
 - additional minimum terms and conditions of employment (such as minimum wages, overtime and penalty rates, allowances, representation and dispute settlement) tailored to the needs of the particular industry or occupation to which the award relates; and
 - terms which supplement the NES.

It is important to keep in mind that the flexibility and stability considerations are balanced. The awards aim to provide both a set of rights and obligations that are relatively consistent and do not change frequently but which are also flexible enough to meet the needs of specific industries. Beyond base level, broad and inherently flexible regulation of hours of work, we would challenge the PC to find any example of single award provision in any of the 122 modern awards that actually prescribes how work is to be performed in any industry.

We seek here to demonstrate the inherent flexibility of the award system by reference to three significant awards in very different industries.

General Retail Industry Award

The General Retail Industry Award provides for a large span of ordinary hours of work, with shift lengths of up to 11 hours without overtime being paid:

27.2 Ordinary hours

(a) Except as provided in clause [27.2\(b\)](#), ordinary hours may be worked, within the following spread of hours:

Days	Spread of hours
Monday to Friday, inclusive	7.00 am–9.00 pm
Saturday	7.00 am–6.00 pm
Sunday	9.00 am–6.00 pm

(b) Provided that:

(i) the commencement time for ordinary hours of work for newsagencies on each day may be from 5.00 am;

(ii) the finishing time for ordinary hours for video shops may be until 12 midnight; and

(iii) in the case of retailers whose trading hours extend beyond 9.00 pm Monday to Friday or 6.00 pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00 pm.

(c) Hours of work on any day will be continuous, except for rest pauses and meal breaks.

27.3 Maximum ordinary hours on a day

(a) An employee may be rostered to work up to a maximum of nine ordinary hours on any day, provided that for one day per week an employee can be rostered for 11 hours.

The Manufacturing and Associated Industries Award 2010 also provides flexible rostering and hours of work provisions:

36.2 Ordinary hours of work—day workers

(a) Subject to clause [36.5](#), the ordinary hours of work for day workers are an average of 38 per week but not exceeding 152 hours in 28 days.

(b) The ordinary hours of work may be worked on any day or all of the days of the week, Monday to Friday. The days on which ordinary hours are worked may include Saturday and Sunday subject to agreement between the employer and the majority of employees concerned. Agreement in this respect may also be reached between the employer and an individual employee.

(c) The ordinary hours of work are to be worked continuously, except for meal breaks, at

the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.

These kinds of provisions have been developed to ensure that the needs of specific industries are met and clauses of this type can be found in various modern awards.

Manufacturing and Associated Industries Award

In addition to the flexibility outlined above many modern awards already provide that certain terms can be altered via facilitative provisions. For example, the Manufacturing and Associated Industries Award provides:

8. Facilitative provisions

8.1 Agreement to vary award provisions

(a) This award also contains facilitative provisions which allow agreement between an employer and employees on how specific award provisions are to apply at the workplace or section or sections of it. The facilitative provisions are identified in clauses [8.2](#), [8.3](#) and [8.4](#).

(b) The specific award provisions establish both the standard award condition and the framework within which agreement can be reached as to how the particular provisions should be applied in practice. Facilitative provisions are not to be used as a device to avoid award obligations nor should they result in unfairness to an employee or employees covered by this award.

8.2 Facilitation by individual agreement

(a) The following facilitative provisions can be utilised by agreement between an employer and an individual employee:

Clause number	Provision
13.2	Minimum engagement for part-time employees
13.4	Variation to hours of part-time employment
14.2	Minimum engagement for casuals
24.1(g)	Annualised salary arrangement
32.1(c)(iii)	Tool allowance
36.7	Make-up time

38.5	Meal break
40.1(d)	Time off instead of payment for overtime
40.4	Rest period after overtime
40.10	Rest break

(b) The agreement reached must be kept by the employer as a time and wages record.

8.3 Facilitation by majority or individual agreement

(a) The following facilitative provisions can be utilised by agreement between the employer and the majority of employees in the workplace or a section or sections of it, or the employer and an individual employee:

Clause number	Provision
14.4(j)	Period for casual election to convert
34.1(b)	Payment of wages
36.2(b)	Ordinary hours of work for day workers on weekends
36.2(c)	Variation to the spread of hours for day workers
36.5(a)	Methods of arranging ordinary working hours
37.2	Variation to the spread of hours for shift workers
38.1(b)	Working in excess of five hours without a meal break
44.2	Substitution of public holidays

(b) Where agreement is reached between the employer and the majority of employees in the workplace or a section or sections of it to implement a facilitative provision in clause [8.3\(a\)](#), the employer must not implement that agreement unless:

(i) agreement is also reached between the employer and each individual employee to be covered by the facilitative provision; and

(ii) the agreement reached is kept by the employer as a time and wages record.

(c) Where no agreement has been sought by the employer with the majority of employees in accordance with clause [8.3\(b\)](#), the employer may reach agreement with individual employees in the workplace or a section or sections of it and such agreement binds the individual employee provided the agreement reached is kept by the employer as a time and wages record and provided the agreement is only with an individual employee or a number of individual employees less than the majority in the workplace or a section or sections of it.

8.4 Facilitation by majority agreement

(a) The following facilitative provisions may only be utilised by agreement between the employer and the majority of employees in the workplace or a section or sections of it:

Clause number	Provision
36.3(c)	Ordinary hours of work, continuous shift workers
36.4(b)	Ordinary hours of work, non-continuous shift workers
36.5(c)	12 hour shifts
37.5(d)	Public holiday shifts
41.2	Conversion of annual leave to hourly entitlement
41.8(g)	Annual close down

(b) Where agreement is reached with the majority of employees in the workplace or a section or sections of it to implement a facilitative provision in clause [8.4\(a\)](#), that agreement binds all such employees provided the agreement reached is kept by the employer as a time and wages record.

(c) Additional safeguard

[8.4(c)(i) substituted by [PR994530](#) from 01Jan10]

(i) An additional safeguard applies to:

Clause number	Provision
34.1(b)	Payment of wages
36.3(c)	Ordinary hours of work, continuous shift workers

(ii) The additional safeguard requires that the unions which have members employed at an enterprise covered by this award must be informed by the employer of the intention to use the facilitative provision and be given a reasonable opportunity to participate in the negotiations regarding its use. Union involvement in this process does not mean that the consent of the union is required prior to the introduction of agreed facilitative arrangements at the enterprise.

8.5 Majority vote at the initiation of the employer

A vote of employees in the workplace or a section or sections of it which is taken in accordance with clauses [8.3\(a\)](#) and [8.4](#) to determine if there is majority employee support for the implementation of a facilitative provision, is of no effect unless taken with the agreement of the employer.

Road Transport and Distribution Award

The Road Transport and Distribution Award provides a similar level of flexibility around working time arrangements, but without reference to annualised salaries:

8. Facilitative provisions

8.1 Facilitative provisions

(a) Agreement to vary award provisions

(i) This award contains facilitative provisions that allow agreement between an employer and employees on how specific award provisions are to apply at the workplace or enterprise level.

(ii) The specific award provisions establish both the standard award conditions and the framework within which agreement can be reached as to how the particular provisions should be applied in practice. Facilitative provisions are not to be used as a device to avoid award obligations nor should they result in unfairness to an employee or employees covered by this award.

(b) Facilitation by individual agreement

(i) The following facilitative provisions can be utilised upon agreement between an employer and an employee:

- clause [16.2\(f\)](#)—[Travelling allowance](#);
- clause [22.2](#)—Hours of work—ordinary hours, days of the week;

- clause [22.3](#)—Hours of work—spread of hours;
- clause [22.5](#)—Hours of work—normal rostered day off;
- clause [23.3](#)—Hours of work—ordinary hours, spread of hours;
- clause [23.6](#)—Hours of work—rostered days off; and
- clause [24.6](#)—Shiftwork—transfer to or from shiftwork.

(ii) The agreement reached must be recorded in writing and kept as a time and wages record.

(c) Facilitation by majority agreement

(i) The following facilitative provisions can be utilised upon agreement between the employer and the majority of employees in the workplace or part of the workplace. Once such an agreement has been reached the particular form of flexibility agreed upon may be utilised by agreement between the employer and an individual employee without the need for the majority to be consulted:

- clause [22.2](#)—Hours of work—ordinary hours, days of week;
- clause [22.3](#)—Hours of work—maximum number of hours, spread of hours;
- clause [23.3](#)—Hours of work—ordinary hours, spread of hours;
- clause [23.4](#)—Hours of work—rural distribution operations;
- clause [23.6](#)—Hours of work—rostered days off; and
- clause [24.2](#)—Shiftwork—shiftwork hours and rosters.

(ii) The agreement reached must be recorded in writing and kept as a time and wages record.

These provisions are examples of just how flexible modern awards can be. There is great scope to change and adjust working conditions and requirements in the awards themselves.

Flexibility beyond the safety net

The well established rule of bargaining in all Australian jurisdictions, suspended only during the early period of *WorkChoices*, is that bargaining must occur above the safety net in an overall sense. This does not require that every condition in an award be maintained and improved upon, rather it requires a global assessment. For example, in a circumstance where all other compromises are equal - the loss of award overtime pay in exchange for employees being able to

volunteer for additional hours rather than be directed – would lead to an agreement being not approved. If the agreement however contained some additional benefits in relation to other matters, such as higher meal allowances, gym membership and higher hourly wages, the assessment would be a different one. In our view, this is as it should be in collective negotiations. Further, the rule that the base level standards contained in the NES must remain intact if not improved upon, is a sensible step in ensuring that employment arrangements meet community standards.

The operation of the BOOT

We understand the PC is seeking views on the operation of the BOOT as it applies to “registered” agreements. We take this to be a reference both to collective agreements and individual flexibility agreements, notwithstanding the fact that the latter are not registered in any sense.

The view of the ACTU is that the BOOT is sufficiently clear and is generally operating in an effective and fair manner in relation to collective agreements. There is no evidence that the BOOT is being applied in a manner that is too ‘rigid’ that results in agreements being inappropriately rejected. The missing point from the PC issues paper dealing with this matter is that the FW Act, like the WR Act, gives the FW Commission (or gave the AIRC at the relevant time), the power and flexibility to adjourn an agreement approval matter into a private discussion, tell the parties why their agreement does not pass the test and offer an opinion as what types of “undertakings” could be made to fix the problem and get the agreement operating as soon as possible³⁵⁷. It’s the most reliable advice in town - and it’s free.

If it is the case (as the employers have argued in the past) that the BOOT is a deterrent for businesses to negotiate collective agreements, the figures simply do not support it.

Table 15 below identifies the number of collective agreements lodged and approved in the relevant periods. It shows that whilst there is variation in the number of agreements that are lodged and approved in those periods, there is no overall trend that agreement making is disproportionately low under the FW Act (and hence the BOOT).

The number of agreements lodged in a relevant period will vary depending on a number of factors. These include:

- The shifting legislative focus on collective bargaining as opposed to the award system.
- The simplification, rationalisation and modernisation of awards, which will tend to increase the number of agreements made. For example, there was a marked increase in lodgements in 1998 post the Award Simplification Decision³⁵⁸ handed down in December 1997 and then again in 2011 after the commencement of the modern awards. As awards became less comprehensive, enterprise level bargaining becomes necessary in order to capture terms and conditions no longer dealt with by the award system.
- Substantial reform to the system, for example, there is a significant increase in lodgements in 2005, prior to the introduction of Work Choices. There is another spike prior to the commencement of the FW Act. A lack of familiarity with changes or concern

³⁵⁷ See WR Act s. 170LV, FW Act s. 190.

³⁵⁸ Award Simplification Decision Dec1533/97 and Print 7500, December 1997 where the AIRC (the removable of non-allowable content)

about the legislative amendments will drive parties to negotiate and settle agreement making before the commencement of statutory reform.

- The agreement making cycle of major industries (typically three years) will have an impact on the lodgement figures year to year. For example, *Trends in Federal Enterprise Bargaining June Quarter 2014* notes that:

“A total of 1310 agreements were approved in the June quarter 2014, covering 142,000 employees, which is low relative to an average of 1782 agreements approved each quarter since the Fair Work Act commenced on 1 July 2009. Seasonality is one factor behind this drop with June quarters since the Fair Work Act commenced recording around 60 agreements on average less than the All Quarters average of 1781 agreements, but this factor only explains a small portion of the fall in approved agreements in the June quarter 2014. The more significant explanation in the low level of agreement making in the June quarter 2014 is the cyclical downturn in agreement making in certain industries, particularly construction – this industry alone accounts for over 200 of the difference between the 1310 agreements approved in the June quarter 2014 and the 1781 All Quarters average.”

Table 15: Collective Agreements Lodged and Approved

PERIOD (Fin/Year)	Assessment Test	Lodged	Approved
1997	No disadvantage test <i>Workplace Relations Act 1996</i>	5849	5540
1998	No disadvantage test <i>Workplace Relations Act 1996</i>	7413	7532
1999	No disadvantage test <i>Workplace Relations Act 1996</i>	5738	5539
2000	No disadvantage test <i>Workplace Relations Act 1996</i>	8409	7316
2001	No disadvantage test <i>Workplace Relations Act 1996</i>	6495	6738
2002	No disadvantage test <i>Workplace Relations Act 1996</i>	7812	6514
2003	No disadvantage test <i>Workplace Relations Act 1996</i>	8709	8549
2004	No disadvantage test <i>Workplace Relations Act 1996</i>	6173	5197
2005	No disadvantage test <i>Workplace Relations Act 1996</i>	8198	8265
2006	No test <i>Workplace Relations Amendment (Work Choices) Act 2006</i>	7100	N/A
2007	Fairness test <i>Workplace Relations Amendment (A Stronger Safety Net) Act 2007</i>	7896	N/A
2008	No disadvantage test <i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008</i>	7771	N/A
2009	Better off overall test <i>Fair Work Act 2009</i>	7420	5154
2010	Better off overall test <i>Fair Work Act 2009</i>	7081	7282
2011	Better off overall test <i>Fair Work Act 2009</i>	8565	8149
2012	Better off overall test <i>Fair Work Act 2009</i>	7087	6772
2013	Better off overall test <i>Fair Work Act 2009</i>	6754	6403

We also dispute that there is any conclusive evidence that the number of collective agreements ‘failing approval’ has risen since the introduction of the BOOT. Table 16 below is reproduced from the *General Manager’s Report into enterprise agreement making in Australia under the Fair Work Act 2009 (Cth) 2009-2012*³⁵⁹.

³⁵⁹ released November 2012, Fair Work Australia.

Table 16: Collective Agreements Not Approved

	Lodgements	Not approved
2009-10	7420	242
2010-11	7081	494
2011-12	8565	410
Total	23 066	1146

Notes: The agreements classified above as 'not approved' include agreements that have either been withdrawn or adjourned indefinitely.

Source: Fair Work Australia administrative data.

Relative to the large number of agreements lodged in the relevant periods, the average number of agreements 'not approved' remains a small percentage of the total figure (less than 5%).

Table 17: Proportion of agreements not approved

	Lodged	Not approved	%
2009-2010	7420	242	3.26%
2010-2011	7081	494	6.98%
2011-2012	8565	410	4.79%
TOTAL	23066	1146	4.97%

This is even less significant in consideration of the broad number of matters which might be categorised as 'not approved', such as applications for approval that are withdrawn or indefinitely adjourned. In fact, the overwhelming majority of matters that make up the 'not approved' category are matters that are withdrawn. The table below shows the proportionate number of applications that are 'not approved' and those that were 'withdrawn'.

Table 18: Agreements not approved v. applications withdrawn

	Not approved	Withdrawn
2009-2010	231	550
2010-2011	123	329
2011-2012	83	294
2012-2013	63	314
2013-2014	103	294

Even stripping out those applications that are withdrawn, the reason why an agreement is not approved by the FW Commission could relate to a number of other deficiencies, other than non-compliance with the BOOT. These include:

- The agreement has not been made with the genuine approval of those involved
- The agreement includes unlawful terms
- That the group of employees covered by the agreement was not fairly chosen
- The agreement specifies an expiry date greater than 4 years
- The agreement does not contain a compliant dispute settlement procedure
- The agreement does not contain a compliant flexibility or consultation clause

Table 19 below (reproduced from the FWC Report 2009-2012) includes the reasons for the approval applications not being approved:

Table 19: Reasons for approval applications not being approved 2009/10 to 2011/12

Reason for refusal	Number of instances			Total
	2009–10	2010–11	2011–12	
s.172—Not an agreement	5	3	1	9
s.185(2)—Incomplete declaration	–	2	–	2
s.185(3)—Application not made within 14 days of agreement	18	9	3	30
s.186(2)(a)—Not a genuine agreement	118	46	28	192
s.186(2)(c)—Contravenes the National Employment Standards	2	1	1	4
s.186(2)(d)—Does not pass the No Disadvantage Test (lodged pre 31 December 2009)	69	17	–	86
s.186(2)(d)—Does not pass the better off overall test	8	36	23	67
s.186(4)—Includes unlawful term/s	–	1	2	3
s.186(5)—Does not include a nominal expiry date	3	–	–	3
s.186(6)—Does not include a dispute settlement term	3	1	–	4
Withdrawn	7	365	309	681
Lodged in error	2	–	1	3
Unclear	–	–	1	1
Adjourned Indefinitely	7	13	39	59
s.172(2)—Greenfields requirements not met	–	–	2	2
Total	242	494	410	1146

Table 19 demonstrates that the most common reason for an agreement not being approved is that the application is withdrawn (681), followed by the agreement not being genuinely agreed to (192) and then failing to comply with the BOOT (67).

It is also notable that there is a similar non-approval figure under both the no-disadvantage test for agreements lodged prior to 31 December 2009 (86) and the BOOT (67). If it was the case that there were issues with the BOOT more so than previous agreement assessment tests, this figure would be higher. In any event, the mere fact that only 67 out of 23,066 agreements lodged fail test (0.29%) seems to indicate that the requirements of the test are in fact well understood by bargaining parties and not as nebulous as some might seek to portray.

The radical era

Appendix 6 sets out the various legislative ‘tests’ that have applied to collective agreements, both at a State and Federal level.

It shows that, except for the period from March 2006 to March 2008, the legislative tests are generally comparable.

Prior to 27 March 2006, all jurisdictions (both state and federal) had a statutory tribunal empowered to both assess and approve enterprise agreements and it was the role of these tribunals to test whether the application of the enterprise agreement would leave the employee(s) disadvantaged when compared with the relevant safety net of entitlements.

There was no precedent at all for the radical shift that occurred with the introduction of WorkChoices. From 27 March 2006, there was no tribunal or other body empowered to assess and approve enterprise agreements. The agreements were lodged with the Office of Employment Advocate (OEA) who were empowered only to review the agreement for the purpose of identifying and removing prohibited content. There was neither an assessment, nor an approval process.

Accordingly, the safety net was seriously undermined.

Arising from the backlash and concern about the inferior agreements that were being made during this time, the Government at the time passed the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* which introduced the ‘fairness test’.

The fairness test only required that an employee be “fairly compensated” for the modification or removal of a limited range of protected award conditions³⁶⁰.

It was the role of the Workplace Authority to ‘approve’ enterprise agreements and there were a number of complaints from employers at the time about the inefficiency of the process as it was time consuming, lengthy and the staff lacked the requisite skills and knowledge to understand industrial instruments. Unions were concerned that agreements were being approved in circumstances where employees were not fairly compensated for the removal of protected

³⁶⁰ These included: penalty rates including working on public holidays and weekends; shift and overtime loadings; monetary allowances; annual leave loadings; public holidays; rest breaks; incentive-based payments; and bonuses.

conditions. In part this concern arose because it was permitted for employers to rely on non-monetary benefits to satisfy the fairness test, however largely it was due to the ambiguity caused by the subjectivity of this assessment that was the trigger for disputation. The fact that the legislative amendment that introduced the fairness test ran to 35 pages³⁶¹ didn't help matters either.

Non-monetary compensation

Non-monetary compensation should not be permitted as trade-offs for safety net conditions. Non-monetary compensation in exchange for penalty rates and overtime does not assist workers to meet their financial obligations, such as a mortgage, rent or bills. Such a framework is rife for exploitation by employers to the detriment of their workers.

This power dynamic in employment relationships can manifest in an employee feeling compelled to 'agree' to an arrangement that they may not necessarily have wanted or which may not benefit them. The industrial relations system seeks to equalise the relationship and in many instances is able to do so to the extent that employees are placed in a fairer position. Allowing employers and employees to trade-off safety net monetary benefits for non-monetary benefits in a collective agreement, undoes the benefits the system has worked to create in terms of equality.

It is also the case that non-monetary benefits are typically poorly described and non-prescriptive such that a great deal of ambiguity and differing opinion about what the precise benefit is that is being traded. This is fertile grounds for bargaining disputation but also it makes it difficult for employees at a workplace to genuinely understand what it is they are agreeing to and hence, complications arise for the parties in demonstrating that the agreement has been genuinely agreed to. It also permits an employer to assess the precise value of the non-monetary compensation and as such, it would allow them to 'act as judge in her or his own cause'.

In any event, such a concept is totally unworkable under a collective bargaining system as the 'value' of non-monetary compensation will differ (often greatly) from worker to worker. Further, the value of the non-monetary benefit has potential to change, meaning that workers terms and conditions are eroded over the life of an agreement. It would be interesting to test how it is that the proponents of non-monetary benefits could demonstrate the BOOT becoming easier to understand and more certain if non-monetary benefits were permitted to play a role.

In any event, the small class of non-monetary benefits that are capable of tangible valuation, such as car-parking or a child care place, could have implications for families' tax benefits and could potentially reduce the social benefits to which they would otherwise be entitled to (such as family tax benefits or low income offsets).

Working families need certainty about their income so that they can manage the often tightly constrained household budgets. The unpredictability of a test involving non-monetary benefits leaves workers unable to evaluate whether the agreement offered to them is either fair or will enable them to meet their financial commitments.

Finally, there are no safeguards to protect workers from being ripped off by employers who may place a premium value on a goods or service or impose an administrative fee or the like. This comes back to precisely the sort of exploitation that industrial tribunals have always been concerned about and which legislatures have sought to protect against. All relevant industrial

³⁶¹ *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*, Schedule 1.

statutes have provisions that mandate wages to be paid in money³⁶². This concept arose out of the contractual principles of the employment relationship, whereby there is an agreement between an employer and employee for pay (money) in exchange for work. This exchange constitutes 'valuable consideration' and hence the employment contract is validly made. Similar legislative protections are in place with respect to permitted deductions from wages in order to prevent employers making unreasonable and arbitrary deductions without the agreement of the worker³⁶³. Allowing non-monetary compensation to trade off other benefits undermines these fundamental existing protections.

Ensuring every employee is “better off”

An enterprise agreement is 'approved' when a majority of the employees who will be covered by the agreement cast a valid vote to approve the agreement (section 182 of the FW Act). This means that only 50% +1 of eligible employees need vote in favour of an agreement for it to be approved. For this reason, it is theoretically possible for an enterprise agreement to be 'approved' even where some employees are worse off than under a modern award. The BOOT operates as a safeguard to prevent this sort of outcome – to ensure objectively the collective welfare of the group of employees who will be covered by it..

Whilst the objective of enterprise bargaining is to “provide a simple, flexible and fair framework³⁶⁴” it must not allow for flexibility at the expense of the derogation of minimum standards. A safety net has no work to do if it can be undermined by enterprise bargaining. In circumstances where an employee is left worse off under a collective agreement, even where the majority of employees may be better off, the objectives of collective bargaining cannot be said to be have been achieved.

The BOOT requires that each award covered employee and prospective award covered employee would be better off overall. However this does not mean that the FW Commission cannot apply the BOOT to relevant classes of employees. As stated in the explanatory memorandum, “*it does not require FWA to enquire into each employee’s individual circumstances*”. The relevant provision is section 193(7), which provides:

“For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.”

As such, the requirement that all employees be better off does not impede on the efficiency of the FWC to assess enterprise agreements.

³⁶² See section 323 of the Fair Work Act

³⁶³ See section 324 of the Fair Work Act.

³⁶⁴ Section 171 of the Fair Work Act.

Mutual benefit

The recommendation of the Fair Work Review Panel that flexibility terms give more explicit acknowledgement to non-monetary benefits in exchange for other benefits was in reference to IFA's and not collective agreements.

In the collective agreement sense, for the reasons that we give above, the BOOT does not inhibit flexibility in the workplace simply because it does not permit safety net conditions to be traded off for non-monetary compensation.

The BOOT operates so that enterprise agreements do 'not need to comply with every condition in the relevant award' but could be approved by FWA 'as long as the agreement means employees are better off overall against the safety net'.³⁶⁵³⁶⁶

The essential problem with adopting a lesser test for IFAs comes from the fact they are individual negotiations (and so inherently more susceptible to the types of power dynamics that the system itself was erected to combat) and from the fact that the BOOT is unsupervised. They are thus already predisposed in fundamental ways to delivering poorer outcomes for workers. Opening them up to the trade of monetary for non-monetary entitlements could only make a bad situation worse. The issues associated with individual arrangements are explored more fully in chapter 17.

The recent FW Commission report, *Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*³⁶⁷, demonstrates various practical examples of flexibilities that employers have negotiated with their employees that in their view, promote productivity. The report looked at clauses in three broad categories;

- flexibility and leave (flexibility as to how and when work is performed)
- skills (development and deployment of skill)
- incentives and engagement

The case studies show that the flaw is not the system itself, but the skills and effectiveness of the negotiating parties. Effective negotiators, with a view to solving problems through workplace innovation and engagement are in no way inhibited by the BOOT. There is also a strong connection between workplace culture and policies and the resulting focus of enterprise agreement content. In some instances, the enterprise agreement is a means by which beneficial workplace practices are formalised because the employer would be inclined to do it anyway.

Ultimately, a collective agreement must be voted on by the employees who will be covered by it. This is essentially their endorsement of the deal that has been struck. There is little, if any evidence, that in these circumstances, the BOOT prevents the formal approval of agreements where a deal has been done. The views of the negotiating parties rightly carry significant weight in the approval process. Typically any concerns that arise with respect to BOOT issues are dealt with efficiently with the use of undertakings pursuant to section 190 of the FW Act.

³⁶⁵ FWF, 14.

³⁶⁶ DEEWR submission to the FW Bill inquiry, pp. 25–26.

³⁶⁷ Future Directions 2014–15: Initiative 29: *Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level* (December 2014)

Threats to the consensus

Every element of the award safety net is capable of modification through bargaining, and many are open to modification either through individual flexibility arrangements or facilitative provisions in Awards. Many important aspects about how business conducts itself, such as the manner in which work is actually performed, are not touched upon in the award system itself other than the requirement that if a work reorganisation might cost somebody their job or preclude them from attending work, an employer should at least consult about it before implementing their final decision³⁶⁸. Collective agreements offer an alternative path for workers who seek better conditions and for employers who seek greater flexibility and who are content with the notion that their workers are worth more than the bare minimum.

The only minimum standards left that are not up for negotiation in the current framework are the NES. The fact that we were able to weather the storm of the GFC while maintaining each element of the system including these base standards - such as annual leave (itself introduced by consensus during the recovery of the great depression), sick leave, paid public holidays and severance and redundancy pay - tells strongly that the calls for further flexibility by industry are ambit claims of dubious merit.

³⁶⁸ See, for example, clause 8 of the Miscellaneous Award.

14 Collective Bargaining: (1) Making an agreement.

Restrictions on the content of agreements

We are firmly of the view that there is no place in our Industrial Relations laws for restrictions on the content of collective agreements. If proper effect is to be given the objects and purposes of such laws as identified in the introductory chapter, there is simply no role for the State to use those laws as a device to impose a limitation or ideological judgement on the merits of that which workers might seek to pursue to protect and advance their interests. Any legitimate limitations must come from elsewhere, such as income tax laws or laws prohibiting discrimination.

Voluntary negotiation

Imposing restrictions on the content of collective agreements is not consistent with our international obligations and in particular article 4 of the *Right to Organise and Collective Bargaining Convention* and article 3 of the *Freedom of Association and Protection of the Right to Organise Convention*. The supervisory mechanisms of the ILO have had much to say about this matter, both generally and specifically in relation the limitations in Australian industrial relations laws. Some of this commentary suggests that, if the PC is to uphold its duty to have regard to the need for Australia to meet its international obligations, it must recommend that all restrictions on agreement content be lifted. For example, the Committee on Freedom of Association has said:

“Where intervention by the public authorities is essentially for the purpose of ensuring that the negotiating parties subordinate their interests to the national economic policy pursued by the government, irrespective of whether they agree with that policy or not, this is not compatible with the generally accepted principles that workers’ and employers’ organizations should enjoy the right freely to organize their activities and to formulate their programmes, that the public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof, and that the law of the land should not be such as to impair or be so applied as to impair the enjoyment of such right.”³⁶⁹

In giving specific consideration to Australian laws, the Committee of Experts on the Application of Standards and Recommendations has recently said, in uncharacteristically direct language:

“The Committee had also noted that while section 172(1) of the FW Act provided that an agreement may be made on matters pertaining to the employment relationship, deductions from wages, and the operation of the agreement, the exact scope of the term “matters pertaining to the employment relationship” was elusive and sections 186(4) and 194, as well as sections 353 and 470–475, exclude from collective bargaining as

³⁶⁹ ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed, 2006 at [1005]

“unlawful terms” any terms relating to the extension of unfair dismissal benefits to workers not yet employed for the statutory period, the provision of strike pay, the payment of bargaining fees to a trade union, and the creation of a union’s right to entry for compliance purposes more extensive than under the provisions of the FW Act. It had therefore requested the Government to review the abovementioned sections in consultation with the social partners so as to broaden the scope of collective bargaining.

The Committee notes the Government’s indication that the review panel considered that the prohibition on clauses requiring the payment of bargaining services fees was not a general matter of concern. Furthermore, the panel observed that current rules about matters that can be included in an enterprise agreement “accord a fair balance between the prerogative of management to manage and the reasonable desire of employees to jointly govern their terms and conditions of employment” and that any further refinement of the matters should be left to the Fair Work Commission (FWC).

The Committee notes that the Australian Council of Trade Unions (ACTU) in its communication dated 30 August 2013 regrets that the Government has not reviewed the relevant sections of the FW Act in consultation with the social partners, with a view to broadening the scope of collective bargaining.

The Committee recalls that legislation or measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention. It further recalls that tripartite discussions for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties. *The Committee once again requests the Government to review the abovementioned sections in consultation with the social partners so as to broaden the scope of collective bargaining and asks the Government to provide information on the measures taken or envisaged in this regard.*³⁷⁰ (emphasis in original).

“Permitted matters”

As noted in our introductory chapter, the Australian industrial relations system was built upon paragraph 51(xxxv) of the Constitution which provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

(Conciliation and Arbitration Power)

³⁷⁰ ILO, Direct Request of the Committee of Experts on the Application of Standards and Recommendations, adopted 2013, published 103rd ILO session (2014).

This power provided the parliament with a limited ability to create machinery to prevent and settle disputes that crossed state borders. It did not permit the parliament to do deal with employment conditions at large.

The Conciliation and Arbitration Power remained the foundation upon which the system operated until the 1990s. While other heads of power could have been used, the federal government was loath to 'step on the toes' of the States. The Territories Power, set out in section 122 of the Constitution, has been used to govern the jurisdictions of the ACT and NT. Likewise the Constitution provides the power for the federal government to regulate commonwealth places, for example ports and airports, under paragraph 51(i), the Trade and Commerce Power.

The *Industrial Relations Reform Act 1993* (Cth) and the WR Act, both utilised other heads of power. For example, reliance was placed upon paragraph 51(xx) (**Corporations Power**) which provides Parliament with the power to make laws with respect to:

foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

Both pieces of legislation also relied on paragraph 51(xxix) (**External Affairs Power**) which provides Parliament with the power to make laws with respect to external affairs, which in reality means the ability to enact laws to ensure we comply with international treaty obligations, such as those relating to unlawful termination.

Use of the Corporations Power dramatically expanded the reach of the federal government in the industrial relations system. The Corporations Power is broader and allows the federal government to deal with employment conditions in a significantly more expansive way than the Conciliation and Arbitration Power.

Recently most of the States, apart from WA, have now referred their powers to the Commonwealth under paragraph 51(xxxvii).

Despite having originated at the time reliance was wholly placed on the Conciliation and Arbitration Power, the concept of 'matters pertaining to the employment relationship' does not have origins in the Constitution. There is no constitutional impediment to workplace relations legislation dealing with matters that fall outside of the scope of the employment relationship. The impediment arises from the definitions contained in the legislation.

This was confirmed in *Re Alcan Australia Limited; ex parte Federation of Industrial, Manufacturing and Engineering Employees*³⁷¹ (*Alcan*). *Alcan* was a case about whether the deduction of union dues was capable of being defined as an industrial dispute. At paragraph 14 of the High Court said:

...the expression 'industrial disputes' ... must be given its clear meaning. Even if there were no material on the subject, the popular meaning would, in our view, extend to a dispute as to the deduction of union dues from the wages of employees who authorise that course.

...

³⁷¹ (1994) 181 CLR 86 at [17]

The material... confirms that a dispute with respect to that matter is an industrial dispute within the popular meaning of that expression and, hence, an industrial dispute for the purposes of s 51(xxxv) of the Constitution.

...

Even though a dispute as to the deduction of unions dues falls within s 51(xxxv) of the Constitution..., it will not be an industrial dispute within the jurisdiction of the Commission unless it is also a dispute as defined by the Act.

The concept of matters pertaining arose because of the various definitions of 'industrial dispute' which were used in the various iterations of the legislation. It is a construct of the legislation rather than the Constitution. While it is a concept which has persisted since the commencement of the system it has no other reason for being than that the drafters of the original legislation used it as a way to define what an industrial dispute was. Subsequent pieces of legislation have taken up the definition and it has continually been used over time.

The C&A Act relevantly provided in section 4 that an 'industrial dispute' was one in relation to industrial matters arising between an employer or an organisation of employers on the one part and an organisation of employees on the other part which extended beyond the limits of any one state. The C&A Act also relevantly provided that 'industrial matters' included all matters "pertaining to the relations of employer and employees". This formulation is hardly surprising in its period given that employee-employer relationships were the dominant form of engagement. It would be quite implausible to suggest that the definition at the time was seen as or designed to be a limitation – it merely reflected a link between the rise of protective labour law regulation and the model of work organisation that predominated where large scale manufacturing and other industries were structured through vertically integrated firms providing employment for life.³⁷²

In *R v Kelly; Ex parte State of Victoria* [1950] HCA 7 the High Court held that "the relations of employers and employees" refers to the industrial relationship, and not to matters having an indirect, consequential and remote effect on that relationship. The case was about whether a clause in an agreement was about an industrial matter for the purposes of the C&A Act. The High Court said:

The question of the validity of clause 16A depends primarily on the question whether it deals with an "industrial matter" within the meaning of the Commonwealth Conciliation and Arbitration Act. The term "industrial matters" is defined by s. 4 as meaning "all matters pertaining to the relations of employers and employees"... The words "pertaining to" mean "belonging to" or "within the sphere of," and the expression "the relations of employers and employees" must refer to the relation of an employer as employer with an employee as employee.

By 1968 the Court had become acutely aware of limitations inherent to tying the nature of the "employment relationship" in statutory labour law to common law concepts of employment:

"..we shall commence our examination of the validity of the clause bearing in mind that the prohibition contained in par. (a) extends to the performance of any work of the

³⁷² McCrystal, S. "Collective Bargaining beyond the Boundaries of Employment", Melbourne University Law Review 2014 (37), p662.

description contained in cl. 5 of the award whether performed by a servant or by a person who is, in truth, - as appears to have been the case in this instance - an independent contractor.

This is of considerable importance in view of the pronouncement by a majority of the members of the Court in *Reg. v. Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd.* [1952] HCA 10; (1952) 85 CLR 138 . In that case the Court had occasion to consider the content of the definition of "industrial matters" contained in s. 4 of the Act as it then stood - "all matters pertaining to the relations of employers and employees and, without limiting the generality of the foregoing includes" a great many of the incidents of such a relationship and of the work to be done pursuant to such a relationship - and after examining the provisions of the definition and its history, the decision in *Amalgamated Society of Carpenters and Joiners v. Haberfield Pty. Ltd.* [1907] HCA 37; (1907) 5 CLR 33 , and other authorities dealing with State industrial legislation in *pari materia*, expressed the view "that the kind of relationship to which the definition in s. 4 of 'industrial matters' refers by the expressions 'employer' and 'employee' is, under another name, in substance the relation called at common law master and servant". This, of course, means that there never could be an industrial dispute simply as to whether it should or should not be permissible for an employer in any particular industry to employ independent contractors in performing relevant work outside the employer's factory or workshop and that a dispute as to any such question would not be an industrial dispute as defined. It is as well to remember that it is not every dispute between employers and employees in an industry which constitutes an industrial dispute within the meaning of the Act; it must be a dispute as to an industrial matter or industrial matters as defined and the subject matter of a dispute will not become an industrial matter simply because employers and employees are sufficiently interested in it to dispute about it. Disputes may, of course, arise between employers and employees with respect to any practice in an industry but the Act does not commit to the Commission authority to regulate generally the manner in which industry shall be carried on; its authority is limited to regulating the relationship of master and servant in the industry and matters which are truly incidental to that relationship. Accordingly, matters specifically designated in the definition such as (a), "all matters or things affecting or relating to work done or to be done", must be understood as a reference to work done or to be done pursuant to contracts of service and such as (e), "the question whether piece-work or contract work or any other system of payment by results shall be allowed, forbidden or exclusively prescribed", must be understood as limited to authorizing the prescription of a particular system of payment in the case of persons engaged under contracts of service."³⁷³

In the IR Act, 'industrial dispute' was relevantly defined to include the limitation in section 4 as follows:

- (a) an industrial dispute (including a threatened, impending or probable industrial dispute):
 - (i) extending beyond the limits of any one State; and
 - (ii) that is about matters pertaining to the relationship between employers and employees; or

³⁷³ *R v. Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313

Section 4 of the WR Act relevantly provided that an industrial dispute “extend[s] beyond the limits of any one state” and “is about matters pertaining to the relationship between employer and employees”. Under the WR Act, s170LI agreements were those made with corporations and the Commonwealth (Division 2 agreements) and s 170LO agreements were those made to resolve industrial disputes or situations (Division 3 agreements). It is clear that Division 3 agreements were based on the Conciliation and Arbitration Power and Division 2 agreements were based on the Corporations Power. It is interesting to note that while there were two types of agreements which could be made, only one of which relied on the Conciliation and Arbitration Power, yet both still had restrictions based around matters pertaining. The legislature could have chosen to remove the requirement from Division 2 agreements.

Under section 353 of WorkChoices workplace agreements had to contain dispute settlement procedures to settle disputes about matters arising under the agreement between an employer and the employees whose employment would be subject to the agreement. Section 356 provided that a workplace agreement could not include prohibited content and referred to the regulations for the definition thereof. Regulation 8.7 broadly provided that matters that do not pertain to the employment relationship are prohibited content. Broadly speaking, a matter pertained to the employment relationship if it pertained to the relationship between and employer and persons employed by the employer.

Under the FW Act the scope of matters on which agreement can be reached has been somewhat expanded. Section 172(1) relevantly provides:

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;

...

The restriction that an agreement be about matters pertaining to the relationship between an employer and its employees which existed in the predecessor legislation has been expanded and now the relationship between an employer and a union(s) is a matter which can be contained in an agreement. However, this expansion does not compensate for the defects inherent within the “matters pertaining” test which serves limit the scope of bargaining to antiquated notions derived from an employment contract construct. This limitation directly frustrates the capacity of industrial relations law to serve its central objectives. This is particularly the case concerning the social cohesion and social citizenship outputs of the protective purpose of the law and more generally concerning the distributional purpose. That this is so is evident from even a few examples of the types of matters that the limitation rules to be outside the scope of legitimate bargaining:

- A claim that an employer will ensure Visa workers are employed only in accordance with work entitlements of their Visas³⁷⁴;
- A claim that an employer will pay premiums for income protection insurance³⁷⁵;
- A claim that an employer will pay accruing employee entitlements into a trust fund³⁷⁶;
- and
- A claim that contractors will not be used by the employer to reduce the number of directly engaged employees³⁷⁷

The matters pertaining rule is archaic and restrictive. There is no good reason to retain it and it is an impediment to ensuring that the industrial relations system is relevant, responsive and fair.

Unlawful terms

Slightly different considerations arise when considering the types of provisions that the FW Act describes as “unlawful terms”.³⁷⁸ We regard it as entirely necessary that collective agreement not be permitted to contain terms that would undermine the protections provided in the FW Act with respect to Freedom of Association and the prevention of discrimination. We also accept the necessity of ensuring that collective agreements do not permit default superannuation contributions being made to funds that do not comply with relevant prudential and financial regulation. However, restricting agreement content so as to prevent workers and employers from freely agreeing to improve upon the statutory schemes for unfair dismissal and entry by union representatives are of an entirely different character. Furthermore, such prohibitions run directly contrary to the general thrust of agreement making which permits – and in fact requires – that the existing safety net be improved upon.

Reform is required

The link between the need to remove the restrictions on agreement content and the objects and purposes of industrial relations laws is clear. Even the often ambiguous stated objects within the FW Act include the statement that:

“The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

...”³⁷⁹

If parties should be able to engage in co-operative and productive relationships that promote social inclusion and national prosperity and do this by conducting enterprise level collective bargaining, they should not be constrained by archaic definitions that impinge on their ability to

³⁷⁴ [2013] FWC 2671

³⁷⁵ [2009] FCA 231

³⁷⁶ [2001] AIRC 879

³⁷⁷ *Wesfarmers Premier Coal v. AMWU* [2004] FCA 1737.

³⁷⁸ FW Act s. 194

³⁷⁹ At section 3.

foster the type of relationships encouraged by the FW Act. From a civil society perspective Enterprise Bargaining offers workers the capacity to influence arrangements relating to their employment and the employment of others that can have wider impacts for the benefit of society as a whole. Allowing parties to an agreement to determine the terms on which they will agree free of interference by outdated definitions will help to accommodate the differences in the needs and circumstances of different types of businesses, workers, communities and different regions in Australia.

The current regulatory requirements are arbitrary and are difficult to understand. An experienced practitioner can spend a great deal of time attempting to work out whether a matter will be permitted and whether it relates to the necessary relationships which exist in the workplace. Removing the “matters pertaining aspect” of the FW Act will mean that parties can be certain that what they want to agree about is something they can include in an agreement without fear of running afoul of the FW Act. The restrictions are also unnecessary as parties know what they want to agree on and should not be constrained in this regard.

In addition, the restrictions do nothing to curb any abuse of power which could add to social and economic costs where enterprise bargaining is conducted fairly under the auspices of the FW Act and employees are truly able to exercise their right to withhold labour in support of their claims. A compelling argument to remove the restriction is obvious when one considers what the High Court said about the popular meaning of industrial dispute in *Alcan*. The popular and commonly understood meaning of an industrial dispute is broad. It is only a legislative construct which constrains it. The constraint is a deliberate and misguided policy choice misrepresented as a legal or constitutional necessity.

A less restricted scope to bargaining content would make the system far less complex and would continue the path of reform toward more meaningful multi employer bargaining, including supply chain bargaining which at least indirectly covered labour hire workers who are economically dependant servants and agents of an entity with which they have no “employment relationship” for any “matter” to “pertain to”. Many of the proponents of continuance of the “matters pertaining” hold that position precisely because of the insulation it provides in relation to labour supply chains. It is because of those proponents that policy makers have, through inaction, made a choice about what communities of interest are legitimate and which are not.

Finally, if one accepts that bargaining for a collective agreement should occur within the machinery structures of the Fair Work framework, it is difficult to support the current limitations on bargaining and agreement content. The machinery structures have been established to allow workers to participate on a more even footing with employers and to make sure that the inherent power imbalance which exists is somewhat equalised. In restricting the matters which parties can agree on, they are forced out of the established system to the extent that claims are made for matters which are not able to be accommodated and enforced within it. In the current system, parties feel that they are forced to make agreements which are not contemplated within the Fair Work framework – such as memorandums of understanding, deeds or common law agreements – either formal or informal instruments – in order to have their individual needs met. This can result in parties having to rely on the good will of the other in order to continue to enjoy their agreement on the matters which are outside of the Fair Work framework. This does not provide certainty for employers or workers and comes with risks and potential costs. For example, it

would be costly and inefficient to enforce a common law deed, and it brings with it great uncertainty as to outcome³⁸⁰.

Good Faith Bargaining

The ACTU welcomed the enactment of the good faith bargaining ('GFB') provisions of the FW Act. Since their introduction, the GFB provisions have generally had a positive impact on industrial behaviour³⁸¹ and have the potential – when properly understood and applied – to promote the take up of collective agreements across the Australian economy consistent with the objects of ss3(f) and s171 of the FW Act.

However, the operation of the GFB provisions of the FW Act has not been uniformly positive, particularly in the area of first agreement negotiations involving workers with limited bargaining power. Some high profile cases have pointed to a lacunae in the FW Act in circumstances where a determined employer simply refuses to accept a negotiated collective agreement as an acceptable outcome of the existing workplace relations system. The 'surface bargaining' case studies discussed below deal with this particular weakness in the Australian GFB framework.

The GFB provisions of the FW Act are found in Division 8, Part 2-4. Bukarica and Dallas have argued that there appears to be a degree of similarity between some of the central concerns of the GFB provisions of the FW Act, and the focus of existing law and practice in countries with more established GFB systems, such as Canada and New Zealand.³⁸² As a consequence there is a valid basis for cross-jurisdictional comparisons, provided that appropriate caution is exercised.³⁸³

Drawing on relevant international comparisons, Bukarica and Dallas have identified eight distinct issues or "lessons" that are fundamental to the effective operation of a GFB-based collective bargaining system.³⁸⁴

The identified matters include the central importance of the legal "agent" status accorded to bargaining representatives and the concomitant need for simple and quick recognition processes; the need to place limits on employer direct dealing during collective bargaining; the need for clear rules of conduct for parties during the bargaining process and the desirability of the active involvement of industrial tribunals where bargaining is at an impasse; the need for restorative and effective legal remedies against bad faith conduct; recognition of the particular challenges attending 'first agreement' bargaining contexts; and finally and perhaps most significantly – the promotion of a normal expectation that bargaining parties should reach an agreement unless there are genuine reasons based on reasonable grounds not to do so.

³⁸⁰ For example, see *Ryan v. TCFUA & Anor* [1996] 2 VR 235

³⁸¹ Forsyth, Anthony "The impact of 'Good Faith' Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the USA" *Working Paper No 17* Workplace and Corporate Law Research Group, Monash University June 2010.

³⁸² Bukarica, Alex and Dallas, Andrew. *Good Faith Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand*, The Federation Press, Sydney 2012.

³⁸³ See for example, Kahn-Freud, O. "On Uses and Misuses of Comparative Law" (1974) 37 *Modern Law Review* 1.

³⁸⁴ Bukarica and Dallas (2012) at pages

Whilst the ACTU believes each of the issues identified requires serious consideration, the continued healthy functioning of a GFB based collective bargaining system relies on the protection and enhancement of three primary objects.

First, the statutory good faith bargaining obligations should be seen as constituting substantive and not merely procedural obligations.³⁸⁵ The underlying principle that should permeate the GFB framework is that the parties to collective bargaining must come to the table with the intention of attaining a mutually satisfactory enterprise agreement. Or to put the same proposition by way of the negative – a party cannot be acting consistently with the GFB obligations if the intention is to simply avoid the making of a collective agreement, regardless of its terms. Whilst the Australian jurisprudence in this area is still developing, there are signs that the substantive character of the GFB obligations is being more widely accepted and applied.³⁸⁶

Second, the articulation of clear rules of conduct is essential to the proper operation of a GFB system. Whilst the matters adumbrated in s228 of the FW Act are crucially important (and provide a good starting point), consideration should also be given to a more detailed or expository statement of desirable bargaining conduct. In New Zealand, the Government has by regulation promulgated a “Code of Good Faith Bargaining” - which has been a feature of New Zealand labour law for some years.³⁸⁷ In Canada, relevant industrial tribunals have sought to flesh out in substantial detail, key GFB issues such as the appropriate degree and type of employer ‘direct communications’ during bargaining and the distinction between legally permitted ‘hard bargaining’ versus the prohibited practice of ‘surface bargaining’.³⁸⁸ Either approach – that is, the issuing of a Code via the regulation making power in the FW Act, or via more expository decision making by the FW Commission - is available in the Australian context in any consideration of how to improve the implementation of GFB practices.

Third, the involvement of the FW Commission in bargaining disputes should be both pro-active and facilitative of the parties reaching agreement on ‘interest’ issues. The expertise and corporate knowledge contained within the FW Commission make it ideally placed to play a positive role in facilitating enterprise agreements being made.³⁸⁹ This requires the FW Commission to adopt an expansive view of its powers in a conciliation context and to not accept a “hands-off”, neutral umpire approach to bargaining disputes. In appropriate cases the FW Commission should be empowered to initiate a form of supervised negotiation process where parties are assessed to be on a trajectory towards an intractable dispute. Internationally, the active involvement of mediators and conciliators in a collective bargaining system operating

³⁸⁵ Bukarica and Dallas (2012) at pages 95-101

³⁸⁶ See in particular, *Association of Professional Engineers, Scientists and Managers, Australia, The Collieries’ Staff Division v Endeavour Coal Pty Limited* [2012] FWA 13 and *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764 and the very recent FWC Full Bench decision in *Association of Professional Engineers, Scientists and Managers, Australia, The Collieries’ Staff Division v Peabody Energy Australia Coal Pty Ltd* [2015] FWCFB 1451.

³⁸⁷ Bukarica and Dallas (2012) at p151.

³⁸⁸ Ibid at pp 41- 47; p 39.

³⁸⁹ Ibid at pp 98-100.

within a GFB paradigm is nothing new and is not seen as inconsistent with the ‘voluntarist’ ethos of decentralised collective bargaining.³⁹⁰

However, the apparent systemic failure in the operation of the GFB framework in Australia does not, perhaps with one exception, relate to the content of the GFB obligations - so far as they go - but are exposed at their outer limits when employers simply refuse to countenance entering into a collective agreement. It is at this point, that the operation of the GFB obligations is impeded by the inadequacy of existing mechanisms providing for an arbitration of interest disputes in enterprise bargaining. In other words, the exceedingly remote prospect that an unreasonable and intransigent employer will be subject to third party intervention to impose an arbitrated outcome does nothing to promote the type of behaviour that FW Act objects so clearly aspire to.

The question of a more sensible framework governing access to arbitration of bargaining disputes is dealt with separately later in this paper chapter. However, for present purposes, Dave Noonan, the National Secretary of the CFMEU Construction & General Division captured the essential point we advance when he contrasted the radically different responses to access to arbitration in the disputes involving the 2011 Qantas shutdown and the long-standing fight by employees of bionic ear manufacturer Cochlear to obtain a collective agreement:

“If you are big and ugly enough to engineer a hit on the Australian economy, airline passengers and your own shareholders, then arbitration is an almost certainty.

It's a bit different if you are a Cochlear worker, an AMWU member, a woman of non-English speaking background and you don't have the industrial muscle to force your employer to bargain in good faith.”³⁹¹

The exception alluded to above, relating to the content of the good faith bargaining requirements, concerns to the requirement to disclose “relevant information (other than confidential or commercially sensitive information) in a timely manner”.³⁹² The breadth of the exemption is considerable and has permitted some rather brazen conduct including failing to disclose job automation and consequent mass redundancies during negotiations and failing to disclose changes to remuneration policy. If one accepts that workers have a material interest in such matters that would affect their decision making in negotiating their conditions, it can hardly be considered “good faith bargaining” to condone non-disclosure. Shareholders of listed companies benefit from an obligation on the company to disclose information that would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of them³⁹³ and there is force in the suggestion that workers’ and their representatives would be more appropriately informed by a materiality test adapted to their circumstances that was not so easily avoided.

Case studies: surface bargaining in first agreement contexts

The current limitations in the GFB framework that applies in Australia are highlighted by the litigation surrounding attempts by employees of three employers, Cochlear Ltd, ResMed Ltd and Endeavour Coal Pty Ltd to achieve a collective agreement.

³⁹⁰ Ibid at

³⁹¹ “Give tribunal power to address surface bargaining: Noonan” *Workplace Express* 19 November 2012

³⁹² FW Act s. 228 (1)(b)

³⁹³ *Corporation Act* s. 677

Contained below are summaries of the course of “bargaining” engaged in by the relevant employers – conduct that would appear on any objective analysis to conflict with GFB obligations in the FW Act. Yet to this day, two of the employers concerned have successfully avoided entering into a mutually acceptable enterprise agreement with their employees – notwithstanding their majority support for collective bargaining.

Cochlear Limited (“Cochlear”) is a high profile manufacturer of implantable hearing devices. The company employs hundreds of employees at its production facility in Macquarie Park in Sydney.

In 2007, following the expiry of a non-union collective agreement,³⁹⁴ the Australian Manufacturing Workers’ Union (“the AMWU”) sought to negotiate a new collective agreement with Cochlear under the WR Act. Cochlear refused to negotiate with the AMWU despite the union representing a majority of the workers.

Two years later, when the FW Act commenced, AMWU members at Cochlear were no closer to obtaining a collective agreement. At the time, the workers’ plight had become a high profile industrial issue and the dispute was specifically referred to in the explanatory memorandum to *Fair Work Bill 2009*.³⁹⁵

On 17 July 2009, the AMWU applied to FWA for a majority support determination. On 20 August 2009, FWA issued the determination, finding that a majority of Cochlear’s employees wanted to bargain.³⁹⁶ The determination effectively enlivened the good faith bargaining obligations under the FW Act. Cochlear and the AMWU agreed on a protocol to cover the bargaining and some bargaining meetings ensued.

On 15 December 2009, the AMWU (having earlier given Cochlear notice that it considered Cochlear was not bargaining in good faith), applied to have bargaining orders made against Cochlear. The application was vigorously contested over 17 days of hearing. The proceedings involved thousands of pages of written submissions and other documentary material.

On 3 August 2010, FWA made good faith bargaining orders against Cochlear.³⁹⁷ The issuing of the orders did not fundamentally alter the stance of Cochlear in relation to entering into a collective agreement with the AMWU.

The AMWU has continued to press for an agreement. However, the reality remains that five and half years after the making of the majority support determination, Cochlear still refuses to enter into a collective agreement with the union that represents the majority of its workforce and there appears to be little that the employees or AMWU can do to make the employer change its stance.

ResMed Limited is also an established manufacturer of medical equipment for the diagnosis, treatment and management of sleep disordered breathing and other respiratory disorders.

³⁹⁴ The *Cochlear Limited Enterprise Partnership Agreement 2005* registered under the *Industrial Relations Act 1996* (NSW).

³⁹⁵ See paragraphs 110 and 128 of Explanatory Memorandum to the *Fair Work Bill 2009*.

³⁹⁶ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Cochlear Limited - re Bargaining - majority support determination* [2009] FWA 125 (20 August 2009)

³⁹⁷ *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) and another v Cochlear Limited* [2012] FWA 5374 (3 August 2012)

Interestingly, the Chief Executive Officer of Cochlear, Chris Roberts, is also a Director of ResMed.³⁹⁸

In 2012, the AMWU sought to bargain with ResMed for an enterprise agreement to cover workers at ResMed's Bella Vista site in Western Sydney. ResMed refused to bargain with the AMWU. By February 2013, more than two-thirds of the production workers at ResMed had signed a petition appointing the AMWU as their bargaining representative.

In March 2013, the AMWU applied to the FW Commission for a majority support determination. ResMed strongly opposed the making of such a determination on the basis of a jurisdictional objection, contesting that the AMWU's eligibility rules did not allow it to represent the employees covered by the proposed agreement.

Commissioner Bull of the FW Commission dealt with the matter in conference in March, April and May 2013. The matters at issue were not resolved and the FW Commission heard ResMed's jurisdictional objections over four days in September and issued a decision in December 2014.³⁹⁹ The decision found that the AMWU was able to represent the industrial interest of some, but not all, of the employees within the scope of the proposed agreement. The decision went on to indicate that the matter could now be listed so that the merits of the application could be dealt with.

Both ResMed and the AMWU appealed the decision at first instance. A Full Bench of the FW Commission handed down a decision in April 2014 dismissing ResMed's appeal.⁴⁰⁰ On 17 July 2014, the same Full Bench handed down a decision upholding the AMWU's appeal.⁴⁰¹ The Full Bench found that Commissioner Bull erred in finding that the AMWU was not able to represent workers within the scope of the proposed agreement. The Full Bench went on to find that the AMWU did have coverage over all but one of the contested categories of workings. The Full Bench referred the question of the remaining category of workers to a single member of the FW Commission to take further evidence and have that issued determined.

To date, two years after the AMWU made an application for a majority support determination, no determination has been made. ResMed continues to refuse to bargain with the AMWU. ResMed and the AMWU remain locked in litigation concerning representational rights before FW Commission and the Federal Court. As of the date of this submission, it is unclear how long the present proceedings are likely to continue, but the prospect of a negotiated collective agreement seems very distant indeed.⁴⁰²

³⁹⁸ *Workplace Express* 11 February 2015 "Manufacturing demarcation heads to Full Bench". The article says the following about Chris Roberts: "Roberts has been a vocal supporter of the Abbott government's push to change the Fair Work laws, and continues to criticise the former ALP government for, in his words, "re-regulating the labour market".

³⁹⁹ *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2013] FWC 9725 (19 December 2013)

⁴⁰⁰ *ResMed Limited* [2014] FWCFB 2418 (11 April 2014)

⁴⁰¹ *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v ResMed Limited* [2014] FWCFB 3501 (17 July 2014)

Endeavour Coal Pty Ltd is a subsidiary of BHP Billiton that operates the Appin Coal mine in the Illawarra region in New South Wales.

In April 2010, the Association of Professional Engineers, Scientists and Managers, Australia (“APESMA”) sought to bargain on behalf of a small group of supervisory, technical and administrative staff at the Appin Coal Mine. Endeavour Coal refused to bargain. APESMA made use of the bargaining provisions of the FW Act and applied to FWA for a majority support determination.

On 8 July 2010, Vice President Lawler of FWA issued a determination finding that a majority of employees covered by the proposed agreement wanted to bargain with Endeavour Coal.⁴⁰³

On 19 August 2011, after at least 12 meetings with Endeavour Coal, APESMA applied for good faith bargaining orders. The matter was heard in November 2011 and on 4 January 2012, Commissioner Roberts made orders against Endeavour Coal. In making the orders, Commissioner Roberts found that “Endeavour is ‘bargaining’ with APESMA with no real intention to negotiate an enterprise agreement”.⁴⁰⁴

Endeavour Coal appealed Commissioner Robert’s decision and order. On 22 March 2012, the Full Bench issued its decision.⁴⁰⁵ The Full Bench found that while in many respects Endeavour Coal complied with the formal requirements of the bargaining process by participating in meetings and responding to proposals put by APESMA, it was open to the FW Commission to find that Endeavour Coal’s conduct was not such that it demonstrated a genuine endeavour to negotiate an agreement with APESMA. In particular, Endeavour did not make any substantive contribution to the possible content of an enterprise agreement or put forward any proposals of its own. Identifying a technical error in the decision of Commission Roberts, the Full Bench went on to make its own orders which, in the most part, reflected the substance of those made by the Commissioner.

Endeavour Coal sought writs of certiorari to quash the decision of the Commissioner and the Full Bench. On 19 July 2012, Justice Flick of the Federal Court issued a decision quashing all but one of the orders made by the Full Bench on the basis that they went beyond the power of the FW Commission.⁴⁰⁶ Importantly however, the Court agreed with the Full Bench’s finding that it was open to Commissioner Roberts to find that Endeavour Coal had not been bargaining in good faith.

⁴⁰² Our present understanding of the state of litigation involving ResMed and the AMWU is as follows. Following the Full Bench decision referred to above, ResMed have applied to the Federal Court for judicial review of the Fair Work Commission decision. The AMWU have also made an interlocutory application in the Federal Court. Neither matter is yet concluded. The AMWU have applied to change their rules to put their coverage beyond doubt at ResMed. In response, ResMed have applied for representational orders to exclude the AMWU from coverage of employees in its workplace.

⁴⁰³ PR999054

⁴⁰⁴ *Association of Professional Engineers, Scientists and Managers, Australia, The Collieries' Staff Division v Endeavour Coal Pty Limited* [2012] FWA 13 (4 January 2012)

⁴⁰⁵ *Endeavour Coal Pty Ltd v. Association of Professional Engineers, Scientists and Managers, Australia, The Collieries' Staff Division* [2012] FWAFB 1891.

⁴⁰⁶ *Endeavour Coal Pty Limited v. Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764.

Following the decision of the Federal Court, APESMA and Endeavour Coal participated in a further 6 months of conciliation before Commissioner Spencer of the FW Commission. Ultimately, this led to an enterprise agreement being put to employees for approval and agreement was reached. Finally, on 5 November 2013, the *Appin Mine Staff Agreement 2013* was approved by the FW Commission.

Although ultimately successful in obtaining an enterprise agreement, three years after commencing bargaining, the Endeavour Coal case study is no less a powerful commentary on the inadequacies of the current GFB framework in dealing with employers who simply refuse to bargain.

Protected industrial action

The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their social and economic interests. These interests relate not only to better working conditions and collective demands of an occupation nature, but also to seeking solutions to economic and social policy questions and labour problems of any kind that are of direct concern to the workers.⁴⁰⁷

In the ordinary setting, employees have very little capacity to decline to work in response to a lawful and reasonable instruction from management. Where an employee refuses to perform work and their refusal is neither:

- Because the instruction is not lawful or reasonable;
- Based on a reasonable concern about an imminent risk to his or safety; or
- Participation in protected industrial action.

The worker faces civil proceedings under the FW Act and/or contract law (including the imposition of penalties) as well as termination of employment. Therefore, questions of what does and should constitute protected industrial action, and the means by which such action may be initiated, are important ones.

For employees and their representatives, obtaining legal sanction to participate in protected industrial action in pursuit of a collective agreement is subject to a myriad of technical and bureaucratic strictures. As argued by McCrystal in her book, *The Right to Strike in Australia*, it is highly doubtful that the degree of prescription relating to taking protected action under the FW Act is consistent with Australia's international labour standard obligations.⁴⁰⁸ Indeed, the restrictions imposed by our laws on the right to strike are clearly substantial. They have drawn pointed commentary from the ILO supervisory structure on a number of occasions, including describing the protected action ballot process as "excessive"⁴⁰⁹ and observing that many of the

⁴⁰⁷ ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), Geneva, 2012, at p59.

⁴⁰⁸ McCrystal, Shae, *The Right to Strike in Australia*, The Federation Press, Sydney, 2010 at pp 277-280.

⁴⁰⁹ *Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) edition, 2006, at [556]-[559].

consequences of “legitimate strikes”⁴¹⁰ that our legal system uses as trigger points to cancel lawful industrial action “...do not justify restrictions on the right to strike”.⁴¹¹

The process surrounding employees taking “protected industrial action”⁴¹² was made inherently more difficult with the introduction of the legislative requirement for a secret ballot of employees authorising the industrial action prior to it being taken. Forming part of the “Work Choices” amendments introduced by the Howard Government in 2006, the concept of the “protected action ballot” appears to be predicated on the dubious proposition that rank and file union members are generally more reluctant to engage in industrial action than their more radical union leaders and therefore instituting a secret ballot requirement will naturally lessen the prospect of industrial action occurring.⁴¹³

The question of whether there should be some form of a strike ballot in Australian labour law is a far less controversial one than the question of what form the strike ballot provisions should take. Pursuant to Article 10 of its Constitution, the ILO has published *Labour Legislation Guidelines* to assist those involved in formulating and reviewing labour legislation to reflect ILO conventions. These explicitly deal with the issue of strike ballots, as follows:

“The requirement to hold a strike ballot before calling a strike is intended: to ensure that labour relations, including industrial action, are carried out in an orderly fashion; to reduce the likelihood of wildcat strikes; and to ensure democratic control over an important decision for the workers concerned. Often, whether or not the legislation sets out this requirement, provision is made in trade union rules for the holding of strike ballots.

In countries where the right to strike is a collective right, and therefore subordinate to a trade union decision, there is often a legal obligation for a union to hold a strike ballot before a strike is called and for a specific majority of the workers concerned to approve the strike. Provisions of this type are in accordance with the principles of freedom of association *where they are not such as to make the exercise of the right to strike very difficult or even impossible in practice*. In particular, legislative provisions on this subject should ensure that:

- the quorum and the majority required are reasonable and not such as to make the exercise of the right to strike very difficult or even impossible in practice;
- account is only taken of the votes actually cast in determining whether there is a majority in favour of a strike.”⁴¹⁴ (emphasis added)

The current law goes beyond the requirements of industrial democracy (that in any event are independently met by the requirement and practical necessity that Registered Organisations function democratically). It relevantly provides as follows:

Section 443

⁴¹⁰ Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labor Conference, 101st Session, 2012, Report III (Part IA), pp.59-60.

⁴¹¹ *Ibid.*

⁴¹² The legal concept of “protected industrial action” was first introduced with the *Industrial Relations Reform Act 1993* amendments to the *Industrial Relations Act 1988* (Cth).

⁴¹³ See for example the observations in *McCallum, R “The Mystique of Secret Ballots: Labour Relations Progress v Industrial Anarchy”* [1976] 2 *Monash University Law Review*.

⁴¹⁴ [Labour Legislation Guidelines](#), Social Dialogue, Labour Law and Labour Administration Department, International Labour Organisation, Geneva, 2001 at Ch. 5.

- (1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:
 - (a) an application has been made under section 437; and
 - (b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.
- (2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).

The complex rules governing the taking of protected industrial action⁴¹⁵ could scarcely be described as:

...a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.⁴¹⁶

There are a number of pre-conditions that must be satisfied before union members are entitled to take protected industrial action. These are:

- (i) That the nominal expiry date of any existing collective agreement binding the union members at a single enterprise has passed.⁴¹⁷
- (ii) The union⁴¹⁸ (called the ‘bargaining representative’) is genuinely trying to reach agreement for a proposed single enterprise agreement⁴¹⁹ (protected industrial action is not available in support of multi enterprise agreements).
- (iii) The union is not pursuing a pattern-bargaining claim, non-permitted matters or unlawful claims and the industrial action does not relate to a demarcation dispute.⁴²⁰
- (iv) A protected action ballot order has been issued by the FW Commission⁴²¹ and a majority of employees to be covered by the proposed enterprise agreement have endorsed the forms of industrial action proposed by the union in the ballot.⁴²²

⁴¹⁵ Procedures, which in theory, are open to ‘non-union’ employees as well as unionists.

⁴¹⁶ FW Act, s436 – “Objects of this Division”.

⁴¹⁷ FW Act, s 417.

⁴¹⁸ For present purposes it is assumed that the bargaining representative is a union, though the FW Act does not confined bargaining representatives to registered unions.

⁴¹⁹ FW Act, s 413.

⁴²⁰ FW Act, ss 409(3), (4) and (5).

⁴²¹ FW Act, ss 437, 443 and 445.

⁴²² FW Act, ss 459(1).

- (v) The forms of industrial action proposed by the union and endorsed by employees commence within 30 days after the declaration of the ballot result.⁴²³ If any form of industrial action endorsed by employees does not commence within this period, the right to take that action lapses, unless the FW Commission grants an extension of up to another 30 days from the ballot declaration date.⁴²⁴

- (vi) Prior to the taking of protected industrial action, the union gives the employer three clear working days (excluding weekends and public holidays⁴²⁵) written notice of the intention of employees to take industrial action and the nature of that action.⁴²⁶

Once these criteria have been met, employees are entitled to take protected industrial action. The FW Act refers to this action as 'employee claim action'.⁴²⁷

The complexity of the requirements governing the taking of protected industrial action contains a number of openings for interference to be run by objecting employers, even when all the preconditions described above appear to have been met.

The main areas exploited by employers in this regard are the point of a union seeking approval for a ballot of its members to be held; and secondly, at the point at which the union issues a notice of its intention to take specified industrial action.

The case study below, dealing with the litigation surrounding a bargaining dispute between EnergyAustralia Yallourn Power Station and its operator employees, represented by the Construction, Forestry, Mining and Energy Union ('CFMEU') is a salient example of how employers are able to exploit the complexities of the rules surrounding protected industrial action.

Case study: the Yallourn Power Station dispute 2012-2013

For the larger part of 2013, 75 CFMEU members employed at the Yallourn Power Station in the Latrobe Valley in Victoria were engaged in a bitter bargaining dispute with their employer.

Following months of fruitless negotiations, on 14 February 2013, the CFMEU gave notice to EnergyAustralia that its members employed at the Yallourn Power Station would be engaging in protected industrial action on 20 February 2013⁴²⁸ in pursuit of furtherance of their claims in respect to a new enterprise agreement.

⁴²³ FW Act, s 459(1)(d).

⁴²⁴ FW Act, s 459(3).

⁴²⁵ This notice period applies even if the employer's enterprise is a 24 hour day, seven days a week operation.

⁴²⁶ FW Act, s 414.

⁴²⁷ FW Act, s 409.

⁴²⁸ The ballot order issued by the Fair Work Commission required an extended notice period of 7 calendar days, over the statutory default minima of 3 working days.

The notified industrial action included a number of “bans” limiting the megawatt output of individual generators during specified periods of time. The notified action was based on a question approved in an earlier protected action ballot application that was not contested by the employer.

However, on 18 February 2013, EnergyAustralia brought on an urgent application in the FW Commission pursuant to s418 of the FW Act to stop or prevent its employees and the CFMEU from engaging in, or organising the proposed industrial action. One of the principal grounds advanced was that the section 414 notice notifying the commencement of the industrial action was “hopelessly ambiguous” in that it was not clear when the notified industrial action would cease. Therefore, based on the ‘defensive’ principle set out in *Dauids Distribution*⁴²⁹ the employer could not properly organise its operations in order to respond to the protected action.

In the same application, EnergyAustralia also alleged that the s414 notice was defective and that the proposed industrial action was not protected, because the notice did not relate to industrial action that was endorsed by a protected action ballot of employees. This ground of opposition relied on a semantic argument about the precise meaning of the term ‘bans’.

That is, the protected action ballot question (approved overwhelmingly by CFMEU members) endorsed “*bans limiting the output of individual generators*”, whereas EnergyAustralia contended that the action being notified by the CFMEU on 14 February 2013 could not constitute ‘bans’ because it involved ‘positive acts’ on the part of employees, and not simply a refusal to do something. The “positive acts” contended by the EnergyAustralia, simply involved the operator employees inputting a lower megawatt production level into the computers that controlled the power generators.

Somewhat surprisingly, the semantic argument concerning the meaning of ‘bans’ initially received a respectful hearing in the FWC, notwithstanding the CFMEU submission that the term ‘ban’ was satisfied because the employees were “banning” any direction by the employer to work inconsistently with the decision to limit output set out in the s414 notice.

As with most section 418 applications, the EnergyAustralia application came on urgently and late in the day. Following several hours of hearing, Commissioner Bissett granted an interim order to EnergyAustralia pending a final determination of the application.⁴³⁰ However, in a subsequent decision issued on 21 February 2013, Commissioner Bissett found against EnergyAustralia in its s418 application and rescinded the interim order issued on 19 February 2013.⁴³¹

On Friday 22 February 2013, EnergyAustralia lodged an appeal of Commissioner Bissett’s decision and sought an urgent hearing. As a result, an appeal Bench was constituted the following Monday 25 February 2013.

⁴²⁹ 91 IR 198

⁴³⁰ PR534233

⁴³¹ [2013] FWC 1202

The Full Bench heard the appeal and in a unanimous decision in transcript decided to refuse permission to appeal.⁴³² Subsequently, the Full Bench issued written reasons for its decision, in which it dismissed each of the grounds of appeal, including some arguments that were not raised at first instance before Commissioner Bissett.⁴³³

Following its failure in the FW Commission, EnergyAustralia sought an urgent injunction in the Victorian Supreme Court on 6 March 2013 on largely the same grounds ventilated before Commissioner Bissett and the Full Bench.

The interlocutory application was heard by Justice Hollingworth of the Supreme Court of Victoria on 8 March 2013. On 13 March 2013, the Court granted the application by EnergyAustralia and ordered the CFMEU and its members to not engage in the challenged industrial action pending the determination of the proceedings alleging tortious interference in the contracts of employment of CFMEU members employed by EnergyAustralia by the union.

Therefore, notwithstanding that four members of a specialist industrial tribunal had already found that the impugned industrial action was legally protected by the FW Act, the Victorian Supreme Court decided that the protected action proposed by the CFMEU was not a ban as it involved 'positive acts' by employees and was therefore outside of the protection conferred by the FW Act.⁴³⁴

Following the issuing of the injunction by the Victorian Supreme Court, the CFMEU was forced to seek a further protected action ballot in which the questions posed (which by this stage were specifically crafted by senior counsel) would meet the Supreme Court definition of a 'negative ban' involving restrictions on the output of individual generators. The protected action ballot order was granted by Commissioner Lewin on 25 April 2013, notwithstanding the vigorous opposition of EnergyAustralia and its senior counsel over two days of hearing that spilled over into the Anzac day public holiday.⁴³⁵

Following the recommencement of protected industrial action after the second protected action ballot of employees was conducted, the dispute at Yallourn Power Station escalated to the point where EnergyAustralia locked out 75 CFMEU operators from 21 June 2013 until 30 September 2013.

Over the course of the 15 weeks of the lockout, there were intensive negotiations both under the auspices of the FWC and directly between the parties. Eventually in late September 2013, there was a breakthrough in negotiations with an in-principle agreement reached that delivered most of the claims sought by the CFMEU and its members. During the whole of the 15 weeks of the lockout neither the CFMEU nor the employer sought to terminate the lockout on grounds of serious economic harm, or damage to the economy.

⁴³² Fair Work Commission - Transcript 25 February 2013 - C2013/3258 Appeal by EnergyAustralia Yallourn Pty Ltd

⁴³³ [2013] FWCFB 3793

⁴³⁴ *EnergyAustralia v CFMEU* [2013] VSC 105

⁴³⁵ [2013] FWC 2748 - s437 application by the CFMEU

As part of the settlement of the dispute with the CFMEU, EnergyAustralia withdrew its Supreme Court application on 15 November 2013, following the approval of the new enterprise agreement by employees. The FWC subsequently approved the new enterprise agreement on 28 November 2013.⁴³⁶

A new Bill threatens to further restrict the right to strike

The *Fair Work Amendment (Bargaining Processes) Bill 2014* will, if passed, impose further restrictions on the taking of protected industrial action by workers. The restrictions imposed by the Bill operate at the point at which a workers' bargaining representative (usually a union) makes an application for a protected action ballot order. However, the restrictions function so as to impact on the conduct of bargaining from its inception.

The requirement that a participant in bargaining be "genuinely trying to reach agreement" is one of the few restrictions on the right to strike that has not been a moveable feast in the political cycle over the last two decades. It appears not only in section 443 (extracted above), but also in section 413 which is concerned with the mutual requirements upon *employers and unions* before industrial action may be considered to be "protected" and thus attract the limited immunity from suit contained in section 415. This mutual function of the concept of "genuinely trying to reach agreement" has been consistent since the inception of protected industrial action during the term of the IR Act.

The *Fair Work Amendment (Bargaining Processes) Bill* proposes to break with history and principle by relevantly amending section 443 as indicated by the mark ups below:

Section 443

- (1) The FWC must only make a protected action ballot order in relation to a proposed enterprise agreement if:
 - (a) an application has been made under section 437; and
 - (b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

(1A) For the purposes of paragraph (1)(b), the FWC must have regard to all relevant circumstances, including the following matters:

- (a) the steps taken by each applicant to try to reach an agreement;
 - (b) the extent to which each applicant has communicated its claims in relation to the agreement;
 - (c) whether each applicant has provided a considered response to proposals made by the employer;
 - (d) the extent to which bargaining for the agreement has progressed.
- (2) ~~The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).~~ Despite subsection (1), the FWC must not make a protected

action ballot order in relation to a proposed enterprise agreement if it is satisfied that a claim of an applicant, or, when taken as a whole, the claims of an applicant:

- (a) are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates; or
- (b) would have a significant adverse impact on productivity at the workplace.

No amendment is proposed to be made to the mutual requirement in section 413 concerning “genuinely trying to reach agreement”. The result is that “genuinely try to reach agreement” will become a different and higher standard for unions seeking a protected action ballot than it will be for an employer seeking to lock out its workforce. It is difficult to reconcile this result with the Coalition’s pre-election Industrial Relations policy position that:

*“Workers and business must be genuine in their attempts to bargain so that realistic improvements in employment conditions can occur for everyone”.*⁴³⁷ (emphasis added)

The content of this new higher standard upon unions seems, among other things, to approximate a de-facto way of achieving what was sought by Item 56 of Schedule 51 of the *Fair Work Amendment Bill 2014* (reversing the *JJ Richards* decisions) without the necessity of securing its passage, noting that the former Bill has been stagnant in the Senate for a considerable period.

The individual “matters” referred to in the proposed section 443(1A) are said in the accompanying explanatory memorandum to be “drawn from the principles in” the decision of a Full Bench of FWA in *TMS v. MUA*.⁴³⁸ This is a contestable statement and contestable basis for reform, when the following matters are considered:

- (1) The Full Bench in *TMS* (Watson VP, Hamberger SDP and Roberts C) made important statements of principle before descending into what matters it considered, on the facts before it, were relevant to the determination of the appeal it was considering. Those statements included:

“...the concept of genuinely trying to reach agreement involves a finding of fact applied by reference to the circumstances of particular negotiations.”

“It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied.”

“We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached.”

The amendment proposed demonstrates a deliberate ignorance of these principles.

- (2) To the extent that the decision in *TMS* did descend into detail about what could be “normally expected” of bargaining representatives applying for a protected action ballot, it has not been followed by subsequent Full Bench decisions: *JJ Richards & Sons v. TWU* [2010] FWA 9963, *John Holland v. AMWU* [2010] FWA 526, *Farstad Shipping*

⁴³⁷ The Coalition’s Policy to Improve the Fair Work Laws, Liberal Party, May 2013, at p 34

⁴³⁸ [2009] FWA 368. This was an appeal decision which considered, among other matters, whether a union was “genuinely trying to reach agreement”.

(*Indian Pacific*) v. MUA [2011] FWAFFB 1686), *Esso Australia Pty Ltd v. AMWU & Ors* [2015] FWCFCB 210

- (3) To make access to protected industrial action beholden to some externally derived notion of the extent to which bargaining has “progressed” is to reward employers for frustrating the progress of bargaining, which is contrary to the stated objects in the Fair Work Act to “enable” and “facilitate” bargaining.⁴³⁹

The practical effect of the proposed new subsection (1A) is not to be understated. For unions, it creates a sizeable burden to document every single interaction that occurs in bargaining so as to be in a position to leave open the option to pursue a protected action ballot at some future point in time. For employers, it creates a corresponding regulatory burden should they wish to leave open the option of opposing a union’s application, should one be sought at some future stage in bargaining. These burdens arise because section 443 is concerned not only with whether a union is genuinely trying to reach agreement, but whether it *has been*.

The point of difference between unions and employers is that unions will *always* face this burden, should they wish to leave the option of a protected action ballot open, even where they are confident or assured that an employer will not oppose such an application. This is because section 443 requires the FW Commission to reach a *positive state of satisfaction* as to whether the union “has been, and is, genuinely trying to reach agreement”. This means the union is, in all cases, cast with the burden of establishing a jurisdictional fact, and ensuring there is sufficient evidentiary material put before the FW Commission, as is necessary to reasonably satisfy the FW Commission, that this requirement is being and has been met.⁴⁴⁰ The amended content of this requirement is such that this process will now necessarily include an examination in *all* cases of matters that, on the current law, need not be so examined.

The amendments to section 443(2) introduce a merit test which will be applied to the claims made in bargaining by unions (but not employers). We strongly contest this on the basis that it is flagrantly inconsistent with the principle of free functioning unions and the right to strike, as embodied in the *Freedom of Association and Protection of the Right to Organise Convention* and the *International Covenant on Economic, Social and Cultural Rights*, both of which are binding on the Australian Government.

It is important to appreciate that this merit test is cast such that it will be applied *both* on a stand alone basis *and* on an “all in basis”. The former could effectively defeat the latter: if the FW Commission is satisfied that a claim of the applicant is manifestly excessive or would significantly reduce productivity, the ballot application fails – notwithstanding the fact that other claims made, or concessions given, would moderate the impact of the individual “problematic” claim that had been identified.

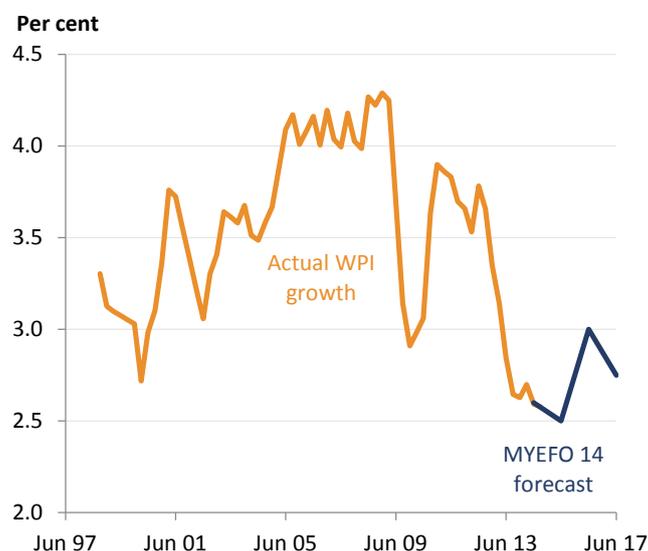
Further, it is to be noted that judgment of “excessiveness” involves a comparison between what is *claimed* and the status quo in the workplace *and* the industry. Claims which therefore seek to advance living standards in real terms, or which have an element of ambit in them, create a risk that the protected action ballot order will not be granted. It not only encourages perhaps overly cautious claims, but in so doing, threatens to further entrench already historically low levels of

⁴³⁹ s. 171

⁴⁴⁰ See for example the discussion in *Corporation of the City of Enfield v. Development Assessment Commission* [2000] HCA 5 and *NAAV v. Minister for Immigration* [2002] FCAFC 228.

wage growth as measured by the Wage Price Index. Wages growth is also forecast to remain around record lows for the next several years.

Figure 43: Wage Price Index is at record lows and is expected to stay low



Source: ABS 6345 and MYEFO 2014-15.

The judgement of “excessiveness” by reference to the status quo also exacerbates the difficulties faced by low paid workers in industries where there have been longstanding and significant impediments to achieving collective agreements. For those workers, the status quo against which their claims will be assessed as “excessive” is the minimum wage and the NES. These are workers that the FW Act in other respects asserts itself to be particularly concerned with assisting in bargaining.⁴⁴¹ The façade of this assistance is further compromised by the prospect of removing from those workers the only economic leverage available to them to assist them in achieving their objectives. This introduces an element of incongruity (if not black comedy) into the bargaining framework of the FW Act: “The lowest paid workers should be better off overall, but only a little bit”.

“Strike first, talk later”

The catchphrase “strike first, talk later” is a disingenuous misrepresentation of the state of the law that has spawned an entirely unnecessary and oppressive legislative reform proposal contained in Part 7 of the *Fair Work Amendment Bill 2014*. The ability to take strike action to compel an employer to bargain has been a feature of the industrial relations system for as long as protected industrial action itself has been such a feature⁴⁴². It is part and parcel of requiring that the party that is seeking to take protected action is “genuinely trying to reach agreement”. To reward employers with immunity from industrial action where they are deliberately non-

⁴⁴¹ See generally Division 9 of Part 2-4.

⁴⁴² *WorkChoices* s.444, *WR Act* s. 170MP, *IR Act* s. 170PI.

responsive to bargaining claims runs directly counter to the purposes and objectives of industrial relations system as expressed in our introductory chapter and within the text of the FW Act.

Collective bargaining disputes and arbitration

The role and powers of the FW Commission in respect to the resolution of industrial disputes between parties to collective bargaining, remains an important issue of productivity and fairness in the workplace, notwithstanding the legislative emphasis upon the parties directly involved in resolving their own issues.

There are two distinct aspects to this question. The first concerns the proper role of the tribunal in respect to bargaining disputes, during which the ‘interests’ of the parties are still in play.

The second aspect concerns the ongoing role (if any) of the FW Commission in dealing with disputes that might emerge in respect to the application of a concluded enterprise agreement, or more generally, in relation to employment related grievances that are processed through the dispute settlement procedure of an agreement. Both aspects have been the subject of controversy during the operation of the FW Act and are a point of serious disagreement between particular employer interests and the union movement.

The position advanced by the ACTU is that the framework of dispute resolution in the context of a system of collective bargaining must primarily be guided by pragmatism and common sense, albeit within the confines of what our international obligations permit. In particular, it is important that the power of the FW Commission to arbitrate in respect of both ‘interest’ disputes and in circumstances where a dispute exists over a bargain that has already been struck, is approached from the perspective of how to make the system work better, rather than some pre-determined position that denigrates any substantive role for an ‘external’ industrial tribunal in dispute resolution.

In particular, we believe that the arbitration pendulum has, at a practical level, swung too far in the direction of non-intervention since the introduction of enterprise bargaining in the early 1990’s. This is manifested in two features of the legal architecture of the FW Act:

- ‘Interest’ arbitration⁴⁴³ of collective bargaining disputes is practically unattainable, unless one party (as in the case of Qantas in 2011) is able to inflict massive damage on the economy, or a significant part of it; and
- The question of whether the FW Commission is able to arbitrate on a dispute arising from the operation of an enterprise agreement is a largely matter for bargaining itself, leading in practice, to many major corporations imposing an effective veto on access to arbitration during the term of agreements.

Whilst the FW Act does introduce some changes to the legal formula dictating access to arbitration of industrial disputes,⁴⁴⁴ the broad approach to the arbitration of industrial disputes

⁴⁴³ Forsyth, Anthony “Why Australian needs interest arbitration” Workplace Law and Corporate Law Research Group, Monash University.

⁴⁴⁴ In particular, see below our discussion of s423 of the FW Act.

has not departed significantly from the legal architecture of the WR Act. Putting aside the possibility of both bargaining parties willingly submitting to arbitration of their dispute under s240 of the FW Act, access to arbitration is clearly confined to circumstances where the FW Commission cancels bargaining under one or more specific grounds which are loosely informed by international obligations. A power is also conferred on the Minister to unilaterally terminate industrial action thus triggering arbitration (which is clearly not referable to or consistent with international obligations).

The nexus between bringing industrial action to an end and triggering of compulsory arbitration is embedded in our system. At an international law level, this directly engages two principles:

- That workers and employers organisations shall have the right to organise their activities and formulate their programs⁴⁴⁵; and
- Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers negotiations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.⁴⁴⁶

In reviewing laws of Australia and other jurisdictions as part of its regular surveys, the ILO's Committee of Experts on the Application of Conventions and Recommendations has dealt with a number of national laws where this nexus exist. Its position may be summarised as follows:

- Arbitration at the request of one party is *generally* contrary to the principle of voluntary negotiation. A negotiated agreement, however unsatisfactory, is preferred to an imposed solution and therefore the parties should always retain the option of returning voluntarily to the bargaining table;
- Arbitration to end a strike is acceptable only if it is at the request of both parties, or if the strike is one which may permissibly be brought to an end. A strike that may permissibly be brought to end is one which:
 - Involves public servants that exercise administrative authority in the name of the State;
 - Involves essential services, the interruption of which would endanger the life, personal safety or health of the whole or part of the population; or
 - That is causing an acute national or local crisis.

The FW Act provides that FWC can terminate protected industrial action in three main circumstances under sections 423, 424(1)(c) and 424(1)(d) of the FW Act. Each of these applications is theoretically available to either employers or employees, though in practice have generally been more accessed by employers. If the FW Commission does terminate industrial action in accordance with one of the abovementioned provisions it must then proceed to arbitrate the issues in dispute and issue a workplace determination⁴⁴⁷ once the mandatory 21 day negotiation period has passed without agreement.⁴⁴⁸ A workplace determination has the

⁴⁴⁵ Article 3 of C087

⁴⁴⁶ Article 4 of C098

⁴⁴⁷ FW Act s266(1)

⁴⁴⁸ FW Act s266(3)

same effect as an enterprise agreement,⁴⁴⁹ except that its terms are imposed on the bargaining parties.

Access to arbitration under relevant provisions of the FW Act are described under the headings below.

Significant damage to the Australian economy or part thereof – s424(1)(d)

For arbitral intervention to occur under this provision, the industrial action must have threatened, is threatening, or would threaten to cause significant damage to the Australian economy or an important part of it.⁴⁵⁰

To date under the FW Act, only the 2011 Qantas lockout has led to a termination of industrial action and the commencement of arbitration proceedings in accordance with s424(1)(d) of the FW Act.

Section 424(1)(d) of the FW Act, is in almost identical terms to s170MW(3)(b) of the WR Act that was the focus of the AIRC Full Bench decision in the famous Hunter Valley coal miners dispute of the late 1990's.

As has been observed by a major employer law firm, the “...bar is set very high for industrial action terminated on grounds of community or economic harm...”.⁴⁵¹ Indeed, that would appear something of an understatement, given the Full Bench determination in the Hunter Valley dispute and more immediately, the observations of the Full Bench in the Qantas decision of 31 October 2011. Particularly telling is the Qantas Full Bench's finding that whilst the combined union industrial action (which Qantas had estimated had caused in excess of \$70 million in lost production) did not meet the threshold required to invoke s424(1)(d); the Qantas lockout which would have led to \$20 million per day in (self-inflicted) damage did meet the threshold.⁴⁵²

Clearly, the legislative test set out in s 424(1)(d) concerning the scale of industrial action justifying arbitral intervention can be met in only very rare and exceptional circumstances. In practice, the necessary preconditions could only be contrived by a major corporation with the resources and strategic location in the economy to inflict massive and immediate damage to the economy. This appears to be the reason why the few other cases which have led to a termination of industrial action under the FW Act have instead centred on the other available tests under the FW Act, namely “serious economic harm” to either party to the dispute⁴⁵³ or the test dealing with industrial action that is, or is threatening to “*endanger the life, the personal safety or health, or the welfare, of the population or of part of it*”.⁴⁵⁴

⁴⁴⁹ FW Act s279.

⁴⁵⁰ FW Act s424(1)(d)

⁴⁵¹ Gosternick, V. and Tuck, J. “Six key lessons for employers from the Qantas dispute” *Corrs in Brief* 4 November 2011 available at www.corrs.com.au/publications/corrs-in-brief.

⁴⁵² *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (“the Qantas Case”) [2011] FWAFB 7444 at pars 7 – 11.

⁴⁵³ FW Act s423(2)

⁴⁵⁴ FW Act s424(1)(c)

Harm to personal safety, or the welfare of the population – s424(1)(c)

For an order to be obtained under this section, the industrial action must have threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.⁴⁵⁵

In particular, there have been two significant decisions leading to the termination of industrial action, both in the health sector in Victoria and both relying upon the “endangering” personal safety, health or welfare test. The first involved the decision *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Workers’ Union*.⁴⁵⁶ The decision in the *Ambulance Officers’* case was granted in respect to proposed 4 hour stoppages which had not yet commenced but were merely threatened, in as much as the union had issued notices pursuant to s414 of the FW Act giving notice of its members intention to take industrial action.⁴⁵⁷

The other decision is more recent and concerned an industrial campaign of selective industrial action by Nurses employed by the Victorian Government. In granting the application to terminate the industrial action taken by members of the Australian Nurses Federation (‘ANF’), the Full Bench seemed to endorse a low threshold for the test of “endangering” personal safety, health or welfare, whilst acknowledging the efforts of the employer and union to minimise such effects.⁴⁵⁸ It has been observed that given the approach to the relevant test adopted by the Full Bench in the *Nurses Case* there is a strong prospect that practically any effective (as opposed to merely symbolic) industrial action taken by employees in the public health sector will be exposed to ready termination under s424(1)(c) of the FW Act.⁴⁵⁹

Significant economic harm to a bargaining party – s423

The criteria for an order under this power, is that the industrial action is causing, or threatening to cause, ‘significant economic harm’ to the employer or the employees covered by the proposed enterprise agreement.⁴⁶⁰ To satisfy this provision, the economic harm must be ‘imminent’⁴⁶¹ and the industrial action must be ‘protracted’.⁴⁶²

⁴⁵⁵ FW Act s424(1)(c)

⁴⁵⁶ [2009] FWA 44

⁴⁵⁷ Ibid at par 10

⁴⁵⁸ [2011] FWAFB 8165 at paragraph [57].

⁴⁵⁹ Nolan, J, “*The implications of the Qantas dispute: the future for employer and employee protected industrial action – speedier resort to arbitrated disputes?*” Presentation to the Third Annual Labour Law Conference held by Union Lawyers and Industrial Officers, New South Wales, Sydney 23 February 2012.

⁴⁶⁰ FW Act s423(2)

⁴⁶¹ FW Act s423(5)

⁴⁶² FW Act s423(6)

There has in addition been one successful application under s423(2) of the FW Act for termination of industrial action because of the significant economic harm it was causing employees, but interestingly, it was the employer who brought the application. The matter concerned an industrial dispute involving soft-drink manufacturer Schweppes and the union representing production employees, United Voice. The application to terminate the industrial action was founded upon the economic harm being incurred by employees as a result of an indefinite lockout their employer had imposed upon them. As observed by presiding member Senior Deputy President Kaufman, it was “...*ironic that it is the action of Schweppes that Schweppes contends is causing, or is threatening to cause, serious economic harm to the Schweppes’ employees*”.⁴⁶³

The first application by Schweppes for termination of all industrial action failed, primarily because FWA regarded the evidence of the key employee site representative opposing the termination as a “powerful” factor against the exercise of the discretion to terminate the industrial action.⁴⁶⁴ However, some six weeks after the initial decision of FWA under s423(2) both the employer and the union jointly argued for the termination of the industrial action in reliance upon the lockout imposed by Schweppes. By the time of this renewed application, 155 employees had sustained 58 days of lost wages as a result of the employer lockout.⁴⁶⁵

In acceding to the application to terminate the industrial action, FWA seemed to place particular importance upon the joint position of the parties that affected employees were suffering a degree of economic harm sufficient to justify intervention under s423(2).⁴⁶⁶

The decisions relating to the *Schweppes* industrial dispute suggests that the ‘serious economic harm’ test under s423(2) - whilst not practically unattainable in the same way as s 424(1)(d) - still represents a major challenge for applicants. First, the decisions stand for the proposition that evidence of ‘serious economic harm’ must be objectively ascertainable by reference to the situation of individual employees or employers affected. In other words, reliance by applicants upon material that is merely inferential and predictive in nature (such as that advanced by Schweppes in the form of the evidence of economist Ian Harper) is unlikely to meet the requisite evidentiary standard implied in the legislation.⁴⁶⁷

Second, whilst the criteria listed in ss 423(4),(5) and (6) guide FWA in the exercise of powers, a decision to terminate the industrial action is ultimately a discretionary exercise for the FWA member.⁴⁶⁸ In other words, the *Schweppes* case dispels the possibility that an application under

⁴⁶³ *Schweppes Australia Pty Ltd v United Voice - Victorian Branch (No.1)* [2011] FWA 9329, at par [57]

⁴⁶⁴ *Ibid*, at par [76].

⁴⁶⁵ Fair Work Australia, matter no. B2012/461, transcript of proceedings, 10 February 2012 at PN507.

⁴⁶⁶ *Ibid*, at PN 530.

⁴⁶⁷ *Schweppes* at paragraph [73].

⁴⁶⁸ *Ibid*, paragraph [48].

s423(2) is simply a “tick the box” exercise. Indeed, it is likely that the motives and conduct of the party making an application will be a significant factor in whether the application is granted.

Too high a bar?

There is a mismatch between the key international obligations that have informed these provisions of the FW Act which might at face value indicate that the bar for arbitration is too low. However, the practical reality is that the capacity to obtain access to interest arbitration of industrial disputes (in all but the most exceptional cases) is largely unattainable for employees due to the very high threshold established under ss423 and 424 of the FW Act – unless of course, the employees concerned are health workers engaged in effective protected industrial action.

The current provisions relating to access to arbitration do not contain the right balance and are complex and unwieldy. They inherently favour the interests of very large corporations and disadvantage employees with lesser bargaining power. They also operate within a framework that prohibits effective multi employer bargaining and unduly restricts the permissible subject matter of agreements, meaning some cases that could conceivably meet the threshold never arise.

The ability of employees such as those employed by Cochlear, ResMed or Endeavour Coal to apply for and obtain an arbitrated settlement of their intractable industrial disputes is next to zero. The net effect of the arbitration provisions in the FW Act is that arbitration is used to shield and protect the position of employers in a difficult bargaining context, but not employees. There is a need to review the provisions relating to access to arbitration in order to provide an appropriate level of protection for employees seeking to negotiate a collective agreement with their employer – particularly, in a first agreement context.

The position we advocate is *not* one of ready recourse to the compulsory arbitration of collective bargaining disputes, but a recalibration of the tests contained in the FW Act to provide more flexibility for the FW Commission to interpose itself in the bargaining environment in appropriate situations. In other words, the legislative framework needs to shift the emphasis from damage to the economy per se, to other important criteria such as:

1. The maturity of the bargaining relationship and in particular, whether the bargaining involves an actual or virtual first agreement context. Consistent with international norms, where a first agreement context is in play, there should be easier access to tribunal intervention, including formally arbitrating interest claims, provided of course that any arbitrated settlement respects any matters already agreed and that there remains throughout a discretion in the Tribunal to allow the parties to continue or resume negotiations for a period where it is satisfied that the parties are committed to reaching an agreement and there is some prospect of them doing so.
2. The extent to which the parties have conducted themselves in accordance with their good faith obligations, and in particular, whether the claims or issues advanced are consistent with reasonable responses, given the relevant industrial context. This consideration would be concerned to prevent ‘surface bargaining’ – the practice of deliberately pursuing an unacceptable bargaining stance or agenda with the aim of avoiding the making of an enterprise agreement per se. It may be the case that it is not amendment of the conciliation and arbitration powers per se that provide the desired reform, but rather a more direct requirement within the good faith bargaining

framework to make reasonable efforts towards making an agreement along with a less convoluted route to achieving the “serious breach declaration” which is the necessary prerequisite to a bargaining related workplace determination⁴⁶⁹.

3. The damage that a continuing industrial dispute is causing, or likely to cause, to the long-term relationships between employers and employees. This is a critical productivity issue given that industrial disputes that lead to clear “winners” and “losers” are likely to engender a negative and retributive workplace culture, where “getting square” becomes an underlying dynamic of work relationships. The moderating influence of the FW Commission as a conciliator with the flexibility to recommend or dissuade parties from adopting particular stances or tactics would be a critical tool in reducing the likelihood of the “baggage” from a particular bargaining round going on to define the dynamics of the relationship in future.
4. Whether there is any reasonable expectation that the dispute will be solved by further negotiation. Clearly, a proper consideration in determining whether arbitral intervention should occur in practice is whether there is a real prospect of the parties reaching agreement themselves. In circumstances where this is highly unlikely, the intervention of the industrial tribunal is a necessary circuit breaker – provided that both parties want an enterprise agreement and, as above, provided that any arbitrated settlement respects any matters already agreed and that there remains throughout a discretion in the FW Commission to allow the parties to continue or resume negotiations for a period where it satisfied that the parties are committed to reaching an agreement and there is some prospect of them doing so.

Within the framework discussed above, compulsory arbitration of the matters dividing the industrial parties will remain a last resort, but would not be so unattainable as to not exert a moderating influence on the negotiating parties.⁴⁷⁰

Importantly, there is also a need for the FW Commission to more actively use and explore its conciliation powers.⁴⁷¹ Those powers include the power to make a recommendation or to express an opinion⁴⁷², neither of which are exercised frequently in a bargaining context. Conciliation and arbitration under the FW Act should not be construed as radically different forms of intervention, but as part of one continuum. That is, active conciliation and mediation of collective bargaining disputes should always precede any recourse to arbitration and in turn, a realistic prospect of arbitration imposing a result on the bargaining parties should always be an influence on the parties to conciliation.

⁴⁶⁹ See FW Act s. 269, , 234, 235.

⁴⁷⁰ See for example, Lansbury, Russell “Back to the future with arbitration?” University of Sydney Business School, 24 November 2011.

⁴⁷¹ s240 of the FW Act prevents the Fair Work Commission from acting on its own volition in relation to bargaining disputes. This could be fixed by a relatively simple legislative amendment.

⁴⁷² FW Act s. 595(2)

Greenfield Agreements

The Fair Work Review Panel made four recommendations in relation to greenfields agreements. The first, Recommendation 27, was that good faith bargaining requirements apply to the negotiation of greenfields agreements.⁴⁷³ The second, Recommendation 28, was that employers intending to negotiate a greenfields agreement take all reasonable steps to notify all unions with eligibility to represent relevant employees.⁴⁷⁴ The third, Recommendation 29, was that s 240 of the Act should be available to be utilised to resolve disputes over greenfields agreement negotiations.⁴⁷⁵ The fourth, Recommendation 30, was that when an impasse in negotiations is reached, a specified time period has elapsed, and conciliation by the FW Commission has failed, the FW Commission may conduct ‘last offer’ arbitration upon application by a party or on its own motion.⁴⁷⁶

Each of these Recommendations has merit, save for the last. The difficulty with the form of arbitration proposed, and the form of arbitration subsequently proposed in the *Fair Work Amendment Bill*, is that it is devoid of a true examination or resolution of the interests of the parties and the triggers for its initiation are arbitrary. Further, it is to be recalled that Panel acknowledged that its recommendation concerning arbitration was made in response to a perceived or notional risk, rather than an assessment of evidence about the current operation of the FW Act⁴⁷⁷. The PC Issues paper takes the issue no further, nor do the assertions in the Explanatory Memorandum to the *Fair Work Amendment Bill*.

With the resources of the public sector behind it, the furthest that Explanatory Memorandum goes is to note that greenfields agreement negotiations are only one of several factors which could be responsible for project delays or why some projects may not be economically viable.⁴⁷⁸ It is disingenuous to lay the large proportion of blame which is currently asserted at the feet of unions for any delays in concluding a greenfields agreement or for additional costs associated with them. This is particularly so when the evidence, particularly in relation to the time taken to negotiate a greenfields agreement⁴⁷⁹, relied upon in the EM is speculative and anecdotal. Further, the Explanatory Memorandum provides that organisations making greenfields agreements tend to be large, often multinational or joint venture operations.⁴⁸⁰ We submit that these large businesses are the best equipped, or at least should be the best equipped, to handle agreement negotiations. They are the kinds of businesses which are most likely to employ a number of experienced human resources personnel who have the necessary skills to competently engage in bargaining. Further, the ancillary costs associated with negotiating greenfields agreements, such as travel and accommodation,⁴⁸¹ should be factored into any commercial venture as part and parcel of doing business, and are most likely to have the least impact on the types of businesses negotiating greenfields agreements.

⁴⁷³ Report of the Fair Work Act Review Panel, “Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation”, 2012, p 172

⁴⁷⁴ *Ibid.*, p 172

⁴⁷⁵ *Ibid.*, p 172

⁴⁷⁶ *Ibid.*, p 173

⁴⁷⁷ At p 171

⁴⁷⁸ Explanatory Memorandum, p xiv

⁴⁷⁹ Explanatory Memorandum, p xii

⁴⁸⁰ Explanatory Memorandum, p xvii

⁴⁸¹ Explanatory Memorandum, p ix

In our view, there is simply no cause to take greenfield agreements effectively out of the mainstream system and provide unique “remedies” to unproven causes. This is not to say that arbitration should never be available in Greenfield contexts. Rather, we believe the approach recommended above in relation to bargaining arbitration more generally – involving flexible modes of intervention by the FW Commission having regard to the considerations there listed – is largely suitable to greenfields bargaining. In that setting, arbitration remains a last resort, but any arbitration is on the merits rather than on picking a winner as between two proposals in toto. Arbitration of the merits of greenfields agreements would appropriately involve consideration of the conditions applicable on projects of a similar scale or nature. Further, the agreements should be of limited duration so that conditions adapted to the operation in practice can be negotiated in the usual way.

The “problem” in the offshore resources industry

An industry that has consistently been singled out for commentary in the debate concerning appropriate arrangements for Greenfields agreements has been the offshore oil & gas industry. The commentary is poorly informed.

Despite employer groups making various unsubstantiated claims, we contend that circumstances in that industry are unremarkable and do not suggest that significant changes are required the agreement making process, let alone changes that would result in depriving unions of the capacity to negotiate those agreements. In filtering the hyperbole concerning this industry, we consider it important to not lose sight of the fact it is a highly profitable one involving considerably well resourced international and national scale corporations, such as BHP Billiton, with a 2014 profit of \$8.8 Billion⁴⁸²; and Chevron, with full-year 2014 earnings of \$19.2 billion⁴⁸³.

The ACTU and a number of our affiliates made submissions to the Senate Education and Employment Legislation Committee Inquiry into the *Fair Work Amendment Bill 2014* and relevantly opposed elements of that Bill that would have had the effect of allowing the employer, at the end of a three month negotiation period, to avoid having to make a genuine agreement with Unions and thereby permit the employer to simply apply to the FW Commission for the approval of the Greenfields agreement. The MUA submission relevantly stated:

The concern the MUA has over the proposal is that it appears to enable employers to effectively walk away from the negotiating table and simply wait until the 3-month negotiation period had lapsed before proceeding to have the agreement approved by the FW Commission. The assertion that this provision will enhance good faith bargaining cannot be sustained. Whilst good faith bargaining may ensue for three months under this proposal, following that period, the employer is free to walk away and have the Fair Work

⁴⁸² BHP Billiton (24-2-2015) “Results For Announcement to the Market” http://www.bhpbilliton.com/home/investors/news/Documents/2015/150224_BHPBillitonInterimResultsfortheHalfYearEnded31December2014.pdf

⁴⁸³ Chevron (30 January 2015) Chevron Reports Fourth Quarter Net Income of \$3.5 Billion and 2014 Earnings of \$19.2 Billion at <http://investor.chevron.com/phoenix.zhtml?c=130102&p=iro-l-news&nyo=0>

Amendment Bill 2014 agreement approved without any understanding having been reached.⁴⁸⁴

Standing together with the MUA and numerous other affiliates, the ACTU strongly opposes legislation that would have the effect of allowing employers to set the terms and conditions of employment without their being a genuine agreement with unions and their members. It ought not be lost on the PC that the defensive stance into which the union movement was forced by this *Fair Work Amendment Bill* (and indeed this aspect of the present inquiry) was a response to a less than credible campaign, as a supplementary submission by the MUA to the to the relevant inquiry pointed out:

The Australian Mines and Metals Association (AMMA) has had significant success in creating the perception within the media and the community that workers in the offshore oil and gas industry, and, in particular MUA members, enjoy unreasonable wages. AMMA has done this as part of a campaign to change Australia's industrial relations laws. Its strategy is to portray the wages of offshore oil and gas workers as a threat to future projects, and hence the economic and social well being of all Australians. Research undertaken by BIS Shrapnel in 2013 found that the claims AMMA was making about the wages of MUA workers in the offshore oil and gas industry were inflated by more than 40 per cent. The same research also found that the wages of maritime workers made up less than one per cent of the cost of building projects like the \$54billion Gorgon project, and that competitiveness issues on that project were largely due to poor management. Given AMMA's claims about the levels of wages in the sector, and their impact on the cost of building projects, are false, its assertion that wages could impact on the investment decisions for future projects should be discounted by the Committee.⁴⁸⁵

Industry and pattern bargaining

The PC has identified an "overarching concern" as the extent to which bargaining arrangements allow employees to genuinely craft arrangements suited to them- a broad issue for stake holders in this inquiry⁴⁸⁶. The current restrictions on agreement content and the form of bargaining parties wish to engage in, highlight the FW Act's current obstacles for parties "crafting agreements suited to them".

Briggs, Buchanan and Watson identify in their research that pattern bargaining is often initiated by employers.

"Pattern agreements flow down supply-chains. Enterprise agreements amongst assemblers commonly refer to the requirements of 'Toyota Production System', 'Ford

⁴⁸⁴ MUA Submission (23-2-2015) Senate Education and Employment Legislation Committee Inquiry into the *Fair Work Amendment (Bargaining Processes) Bill* 2014 at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/fairwork/Submissions

⁴⁸⁵ Maritime Union of Australia, Supplementary Submission to Senate Education and Employment References Committee Inquiry into the *Fair Work Amendment Bill*, 8/5/2014.

⁴⁸⁶ Issues Paper 3: Bargaining

Production System' or 'Holden Production System'. Within the construction industry, identical agreements are crafted by employer associations and passed down from head-contractors to sub-contractors"⁴⁸⁷.

The PC issues paper also notes some employer groups have identified a role for pattern agreements⁴⁸⁸.

The FW Act also recognises, albeit in a limited way⁴⁸⁹, that multi-employer bargaining is an effective and efficient form of bargaining, see for example the provisions for multi-employer bargaining in "genuine" new enterprises, low paid bargaining and single interest employer authorisations, and low paid workplace determinations. These forms of bargaining conceptualise a role for multi-employer bargaining under the FW Act however the scope is limited.

The presumption seems to be that if workers are given the same tools to apply to the job of multi-employer bargaining – such as protected industrial action, good faith bargaining orders, majority support determinations and access to bargaining dispute resolution – the economy will come to a standstill. The hysteria extends to the point of the Minister – not just the FW Commission – being provided with a veto on what types of business structures amount to a "single enterprise"⁴⁹⁰, which is the criterion for each of these tools either being available or locked away. All of this fails to appreciate the benefits that might be brought by multi-employer bargaining, the trace levels of industrial action in the economy and the fact that our international obligations necessitate a different outcome.

It is important to appreciate that in the modern economy, many industries operate on the basis of joint production. Enterprise bargaining at the workplace in such situations is highly inefficient – multi-employer agreements would be a preferred option not only ensuring equity to the workforce but in providing less complex project governance arrangements and to protect the interests of less powerful contractors in the supply chain. These issues are examined more fully, by way of case study concerning the construction industry, in Appendix 7. Once the efficiencies of integration are fully understood, it seems incongruous that the construction industry in particular has in recent times been subject to a regulatory environment that frowns on, and in some cases positively prohibits, multi-employer agreements.

Pattern Bargaining is defined at s.412 of the FW Act. The definition reflects a decision of Munro, J⁴⁹¹ that pattern bargaining cannot be constituted merely by a claim for similar matters. A charge of pattern bargaining can only arise in the context of prosecuting such matters. The s.412 provisions add a layer of complexity and potential for frustration in circumstances where all parties have been negotiating a pattern bargain and an employer chooses to withdraw arguing s.412(1) as a bargaining tool. It does however recognise that seeking the same terms and conditions in negotiations with multiple employers, while maintaining a preparedness to negotiate, is legitimate.

⁴⁸⁷ IWages Policy in an Era of Deepening Wage Inequality; Ibid, p.10

⁴⁸⁸ Ibid; p.3

⁴⁸⁹ See ss.172(3) and 242-265 of the Fair Work Act 2009

⁴⁹⁰ FW Act s. 247

⁴⁹¹ AIRC (2000). *Australian Industry Group and Automotive Food, Metals, Engineering, Printing and Kindred Industries Union*, Print T1982, October 16.

Industry Wide Bargaining

The FW Act contains no facilitation or support for industry parties negotiating arrangements which have industry impact. This is a serious omission and once which attempts to squeeze economy-wide or industry-wide issues into a format digestible to the individual employer and an agreement made under the Act.

An issue such as training, including apprenticeships, is essential for industry-wide or economy-wide productivity. Good training means that workers work smarter, with more skills. But training needs can't be achieved by an individual employer in the short term. Apprenticeship completion rates are showing small signs of improvement however securing the long term and sustainable supply of the skills Australia requires is an industry-wide problem requires industry-level solutions.

Enterprise-level solutions are exactly that, limited to the enterprise –they value competition within an industry at the expense of the greater good. If training is bargained for with an employer, often “workplace-specific” training is on the agenda, not training for a broad skillset that will be useful to the worker and the wider economy once the job or the project is done.

One employer will train its workers to increase that employer's profits. The more short term the employment of the worker by that employer, the less interested the employer will be in the formation of skills that will be transferable outside that employer's business. Project work in the mining sector is a prime example of this, but its not the only example. Labour hire work, casual work and other precarious employment reduces skill-sets, a missed opportunity for productivity growth.

A broad industry approach delivered the restructuring of award classifications and skilled based training in the metal and engineering industries. ⁴⁹². The FW Act's focus on enterprise bargaining and its void regarding industry structures and processes risks winding back the gains. The implication of agreements with only job-specific training is a depletion of the amount of trained workers in the economy, so that other sectors' are deprived of potential productivity increases.

⁴⁹² The restructuring of the Metal Industry 1984 was undertaken jointly with industry employers and Unions to catapult, in the workplace context , skills acquisition into the place previously occupied by a narrow task based approach.

15

Collective Bargaining: (2) Barriers to fair, efficient and effective agreement making in the Public Sector

This chapter principally concerns matters concerning the employment of State public sector workers which are either the subject of the Federal or a State workplace relations system. Particular considerations relevant to Federal Public Sector workers are discussed where relevant herein, however they are covered more comprehensively in the submission of the CPSU PSU Group.

This chapter is largely responsive to the public sector bargaining issues raised in Issues Paper 5. With some exceptions this chapter is designed to answer the question posed by the PC on page 9 of Issues Paper Five:

How should WR arrangements in state and federal public services (and any relevant state-owned enterprises) be regulated. In particular to what extent should WR provisions vary with the public and private status of an enterprise?

There are aspects of the New South Wales, South Australian, Western Australian, and Tasmanian state systems which are superior to the Federal regulation. Each of those State regimes provides ready access to arbitration following an impasse in bargaining and enjoys a less complex regulation of industrial action.

The New South Wales system provides a superior framework, however, as we address in detail below under the heading “Statutory Limits on Bargaining in NSW”, the State of NSW have capriciously limited the jurisdiction of the NSWIRC to hear and determine certain terms and conditions of NSW government employees. The ACTU is deeply concerned by the manner in which the NSW system has been co-opted by the New South Wales Government.

The different position in each State reflects the historical, legislative and political framework that applies to the regulation of public sector terms and conditions of employment.

Since the decline of the conciliation and arbitration power as a foundation of the current industrial relations system there is no means for a union to initiate a jurisdictional change. The State Government, not relevant unions, have complete control over whether to refer power or not. In those circumstances there seems little point engaging in a hypothetical discussion on a matter that is presently within the absolute control of the State.

We therefore do not propose any change from the status quo of the existing demarcation of State and Federal regulation of State public sector workers other than at the margin due to either:

- the uncertainty of determining the jurisdiction that covers statutory corporations in some States; or
- The difficulties arising from the implied intergovernmental immunity

This chapter addresses itself to the contents of a good workplace relations system for public sector workers, rather than just seeking recommendations on which Parliament should enact such a system.

Convergence between private and public sector employment

The public sector component of Issue Paper 5 is based on a false assumption that there is divergence between the regulation of public and private sector in the Australian workplace relations system

At page 9 it states:

“Reforms to the WR system applying to the private sector may be accompanied by complementary measures (for example in administrative law, codes of conduct and long held work cultures) to realise the benefits for the public sector”

It is hard to escape the negative connotation of the sentence in parenthesis, particularly the reference to “long held work cultures”. The PC seems to have swallowed whole the apocryphal myth of the lazy public servant protected from the rigours of private sector discipline by arcane bureaucratic discipline procedures and life long employment.

This myth needs to be dispelled. If anything the experience of public sector workers over the last twenty years has been a perennial reduction in staff and resources in circumstances of providing services to more and more people. The work culture of public sector workplaces is characterised by vocational zeal for the public good.

There is little difference between the codes of conduct and work culture of any large employer and public sector employment.

Public sector employment statutes

Notwithstanding the convergence between public and private sector employment there remains essential differences in the dynamic of public and private sector employment.

The risk to effective public administration and service delivery presented by corruption, nepotism and malfeasance means that public sector employers are rightly beholden to a range of employment regulations that private employers are not.

Federal public sector employees are engaged under the *Public Service Act 1999* if they are APS employees or under their agency’s enabling legislation if they are not APS employees⁴⁹³. The *Public Service Act* places obligations on employees to adhere to the APS Code of Conduct⁴⁹⁴ and to adhere to APS values⁴⁹⁵.

One of the objects of the Act is:

⁴⁹³ *Public Service Act 1999* (Cth), s6(1)

⁴⁹⁴ *Ibid*, section 13

⁴⁹⁵ *Ibid*, section 10

To establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public ⁴⁹⁶.

One way in which the Act serves that objective is through a clear framework supporting promotion based on merit and impartial decision-making in relation to employees' employment. This includes the availability of promotion appeals ⁴⁹⁷ and independent oversight over allegations of any breach of the APS Code of Conduct ⁴⁹⁸. These functions are performed through the independent, statutory office of the Merit Protection Commissioner.

The recent National Commission of Audit recommended the abolition of that Office and also recommended that promotional appeals not be available for lower level positions in the APS ⁴⁹⁹. The availability of promotion appeals and independent oversight of Code of Conduct investigations guards against favouritism and unfair decision-making. This is necessary to maintain public confidence in the APS. Undermining the structures which support these basic principles would be at odds with recent developments in public sector governance, that have seen the clarification and strengthening of accountability measures through the introduction of the *Public Governance, Performance and Accountability Act 2013* and the *Public Interest Disclosure Act 2013*.

State employment statutes commonly deal with matters such as delegation of authority, selection and appointment requirements, disciplinary processes and appeal mechanisms – all of which support good and transparent governance within public agencies.

State employment statutes that deal with these matters include:

- *The Government Sector Employment Act 2013(NSW);*
- *Public Administration Act 2004 (Vic)*
- *Public Sector Act 2009 (SA);*
- *State Service Act 2000(Tas);*
- *The Public Sector Management Act 1994((WA);*

Many of these statutes commonly deal with inter-agency employment matters such as recognition of service, secondment, employee loan arrangements and machinery of government changes.

⁴⁹⁶ Ibid, section3(a)

⁴⁹⁷ *Public Service Regulations 1999* (Cth), Division 5.2

⁴⁹⁸ Ibid, Division 5.3

⁴⁹⁹ National Commission of Audit, *Towards Responsible Government, The Report of the National Commission of Audit –Phase Two*, Canberra, Commonwealth of Australia, March 2014, p.xxi

There are sound reasons why these matters should be dealt with in a consistent manner across a public sector workforce and why they should be enshrined in law outside of the bargaining cycle of Award and Agreement making.

In recognising the role of these State employment statutes, we do note however a trend for their operation to increasingly favour managerial prerogative at the expense of employee protection.

Public Sector regulation should differ from private sector regulation

The standing of the Crown as employer, legislator and policy determiner further supports the need for differing systems of regulation of employment in the public sector.

Government has the unique ability to amend the legislative and regulatory framework to suit its agenda as an employer. It also possess an unparalleled ability to unilaterally remove conditions and impose restrictions on bargaining.

There is a deep disparity between the power of Crown employees and the power of their employer. The economic power and resources available to the Crown means it has a relatively unlimited capacity to engage in lengthy disputes with its employees, to initiate and fund Court and Tribunal proceedings and engage in strategic delay (for example, bargaining with APS agencies had already been progressing for 15 months at the time of writing, with no agency concluding an agreement). Further, the relevant governmental decision makers who lie outside the barrier of the enterprise or agency whose employees are bargaining are practically (if not also legally) beyond the reach of dispute resolution functions that could otherwise be more useful in assisting an agreement being reached.

A tribunal with more robust powers is required when bargaining against the Crown

The New South Wales, South Australian, Western Australian and Tasmanian systems all have a tribunal vested with superior arbitral powers.

The capacity of the New South Wales Commission to arbitrate decisions is broader (in a general sense) than the Federal tribunal but the jurisdiction of the NSWIRC is arbitrarily limited to prevent it from making awards with terms and conditions for state public sector workers in the manner elaborated in the section below entitled “statutory limits of bargaining in NSW”

This places Victorian public sector workers and federal public sector workers at a significant disadvantage against the significant resources and sovereign power of the Crown. The powers of intervention in the FW Commission are often insufficient counterweight to the power of large, well resourced employers. Moreover, there is a real risk that “soft touch” approaches through conciliation are fruitless if central policy prohibits agencies – the employer – from agreeing to conciliated outcomes.

The rationale for the previous Federal industrial relations systems based on conciliation and arbitration was to allow parties access to arbitration in place of the dislocation caused by strikes and lockouts. In the current federal system the tribunal is more a bystander in a contest between bargaining parties with power to grant procedural rights.

The only capacity vested in the FW Commission to arbitrate is the power to make a workplace determination. This power can be used by the FW Commission for a “bargaining related workplace determination” which is provided on the basis of a “serious breach declaration” following a series of failures to comply with good faith bargaining orders⁵⁰⁰ or an “industrial action workplace determination” which follows the termination of industrial action which has either caused or threatened to cause significant economic harm under s423, or endangering life, personal safety or health under s424. The practical output of this is that in order to progress bargaining claims, bargaining representatives are forced to escalate to more disruptive industrial action in order to either force concessions or to move towards a workplace determination.

The capacity of many public sector workers to compel concessions is limited. The good faith bargaining framework does little to assist, and their right to take protected industrial action is blunted in many cases because public sector industrial action inevitably gives rise to claims for suspension or termination of the industrial action either because it “causes or threatens significant economic harm” under s423 or “threatens or endangers the life, personal safety or welfare of the population or part of it” under s424 of the FW Act. For example, child protection workers or prison officers quickly fall foul of the “threats to the welfare of the population or part of it” which essentially denudes them of a right to strike which the FW Act is designed to confer.

To be blunt, there is more than a suggestion that public sector bargaining takes the course it does precisely because governments take a conscious decision to exploit the limitations of the existing system to achieve delay – not only procedural delays but also substantive delays brought about by engineering circumstances that lead to offers being rejected. Taking the current round of APS bargaining as an example:

- Of the 19 agencies that have made offers, most involve wage rises of less than 1% and cuts to conditions;
- The agencies with which the union is required to negotiate are under an instruction that they seek must external approval for any discussions over wages;
- It is a policy requirement, binding on negotiating agencies, that they refuse to negotiate particular “core” conditions and remove content from existing agreements;
- The union was forced to take steps toward seeking a majority support determination (which ultimately could have involved ascertaining the views of nearly 160,000 employees) in order to cajole some agencies to bargain at all.

Public sector bargaining under the FW Act would be better facilitated if the power to issue bargaining orders was supplemented by broader powers to arbitrate bargaining disputes beyond the power to make workplace determinations following the termination of protected action. As raised in Chapter 14, the preferred model is not one where arbitration is possible as of right, but rather the FW Commission should have more flexibility in its involvement in bargaining disputes wherein active conciliation and the more real prospect of arbitration influences the course and dynamic of bargaining. As also raised in Chapter 14, the requirement to bargain in good faith needs to move from the procedural to the substantive.

⁵⁰⁰ See s268(1) but note well that no serious breach order has been granted since the Fair Work Act came into operation

It should be noted that, in earlier times, there was a more direct route to arbitration for public sector workers based on impasse - one of the four considerations we refer to in Chapter 14. Following the *Industrial Relations Reform Act 1993*, the AIRC could arbitrate following the termination of a bargaining period once there was an impasse in bargaining for workers “whose wages and conditions were regulated by a paid rates award” (a proxy for public sector employment⁵⁰¹) where there was “no reasonable prospect of the negotiating parties reaching agreement”⁵⁰².

A note on the ILO Public Sector convention

The PC should note that the ILO recognises the unique nature of workplace relations between a Sovereign Government and its employees. The *Labour Relations (Public Service) Convention 1978* (No 151) which Australia is yet to ratify proceeds on the basis that public sector workers require a multiplicity of methods to deal with dispute over terms and conditions.

Article 8 of that Convention states:

“The settlement of disputes in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the *parties* involved.”

The ACTU considers that the ratification of this convention could be followed by the use of the external affairs power to found federal legislation that allows dedicated conciliation and arbitration for public sector workers if the option canvassed in Chapter 14 was not considered appropriate.

The problem of federal regulation of State public sector workers

In Issue Paper 5 the PC refers (at point 5.5) to this problem on page 8:

“FWA coverage of public sector workers differs between states, territories and different levels of government, States have referred their industrial relations powers to the Commonwealth in varying degrees, and there remains constitutional limitations about the extent to which federal laws can govern certain state

⁵⁰¹ A capacity for a public sector specific right of arbitration could be founded on the implementation of the *Labour Relations (Public Service Convention)* see below

⁵⁰² See s170MW (7) and s. 170MX of the *Industrial Relations Act 1988* as amended by the *1993 Reform Act 1993*.

government employees. The recent Full Federal Court decision in *Fire Fighters' Union of Australia v. Country Fire Authority*⁵⁰³ demonstrates the continuing uncertainty about the constitutional limitation”

This refers to the limited capacity of the Federal Parliament to regulate the employment of State public sector workers by virtue of the constitutional limitation first identified in *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31

The *Melbourne Corporation* limitation has recently been articulated by the Full Federal Court as prohibiting a federal law that has a “practical effect” of a “significant curtailment or interference” with the exercise of a State’s constitutional power.⁵⁰⁴

At present the problems that arise from the limitation are most keenly experienced by public sector workers in the State of Victoria. The regulation of the workplace relations of public sector workers in Victoria have been referred to the Commonwealth (with significant limitations we will discuss below) since 1996.

The effect of the limitation on the regulation of the employment of State public sector workers has had its classical expression in *Re AEU* (1995) 184 CLR 31.

In that case the majority found the limitation had two limbs.

- One limb related to the number and identity of persons it wishes to employ or dismiss:

It seems to be critical to [the] capacity of a State is the government’s right to determine the number and identity of persons whom it wishes to employ, the term of appointment of such persons, and, as well, the number and identity of persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment in those respects would, in our view, constitute an infringement of the implied limitation (at 232)

- The second limb to the high levels of government:

....also critical to a State’s capacity to function as a government is its ability to not only determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants, and advisers, heads of department and high level statutory office holders, parliamentary officers and judges would clearly fall within that group. The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well...(at 233).

The *Re AEU* iteration of the immunity has been used by Victorian (and other) state governments to strike out matters that have been agreed between the parties.

In *Parks Victoria [2013] FWCFB 950* the Full Bench examined the second reading speech and Explanatory Memorandum of the Referral Act and found (on a “purposive” interpretation of the statute) the intention of the Victorian Parliament was to limit the reference to exclude the *Re AEU*

⁵⁰³ *United Firefighters’ Union of Australia v. Country Fire Authority* [2015] FCAFC 1, para 207 page 62 from hereon referred to as the UFU Appeal

⁵⁰⁴ UFU appeal:, para 207 page 62 from hereon referred to as the UFU Appeal

matters. It also found the terms of the implied intergovernmental immunity as expressed in *Re AEU* and the referral act were co-extensive.

On the basis of the statutory analogue of the “number and identity” limb of *Re AEU* the Full Bench refused to make a workplace determination with provisions restricting the use of seasonal, fixed term and casual employees, provisions requiring vacancies to be filled on merit and a requirement to invite internal applications to fill vacant or new positions before advertising externally – even though the State had agreed to include those provisions in the bargaining leading up to the workplace determination proceeding.

The *UFU Appeal* decision casts significant doubt on the application on the extent of (at least) the number and identify limb of *Re AEU* in an era where the majority of the terms and conditions of Victorian public sector workers are determined by enterprise bargaining.

UFU Appeal

The decision was an appeal from a decision of Murphy J who found certain parts of an agreement freely entered into between the UFU and the Country Fire Authority (CFA) under the enterprise bargaining regime in the *FWA* offended the implied intergovernmental immunity as it was expressed in *Re AEU*

In the UFU appeal the Full Federal Court pointed to the manifest difference between the former Award making power of the AIRC, which was the subject of the decision in *Re AEU* which imposed outcomes on the State, and the FW Act enterprise bargaining regime under which the FW Commission approved bargains that had been freely made by the bargaining parties.

The kernel of the UFU Appeal decision is contained at paragraphs 207 and 208 of the decision:

...The relevant question is whether those provisions imposed some special disability or burden on the exercise of the powers and fulfilment of the functions of the State of Victoria or the CFA which curtailed the State's capacity to function as a government. In circumstances where the CFA voluntarily agreed to make the enterprise agreement, we do not consider that the provisions offended the implied limitation, in particular we do not consider the State's governmental functions of the Commonwealth imposing on the State of Victoria or the CFA a significant “impairment”, “interference”, “curtailment”, “control” or restriction” so as to attract the implied limitation. In our view, the voluntary nature of the agreement is inconsistent with those concepts, which lie at the heart of the doctrine.

Both the CFA and Attorney General for Victoria also argued that an exception to the Melbourne Corporation principle should not be carved out in respect of enterprise agreements which have been voluntarily entered into by a State or State agency because that would be inconsistent with the constitutional underpinnings of the principle, which should not be avoided by a contractual arrangement. We consider that this argument should also be rejected, primarily because it reverses the relevant question. In our view, the correct question is not simply whether the State of Victoria has voluntarily given the Commonwealth any power. Rather the question is whether the relevant provisions of the FW Act which provided for the making of voluntary enterprise agreements and their approval by the FWA validly applied to the States without offending the Melbourne Corporation principle. For the reasons we have given, we consider the statutory scheme of the FW Act did not involve a significant impairment of the type found to exist in *Re AEU*, which involved the imposition of a binding award in an arbitrated context and in the context of a different statutory regime. We accept that holding a State or its agency to its “determination” for the limited period of an enterprise agreement which had been voluntarily made by the parties has a different quality to the imposition by the Commonwealth of an arbitrated outcome on a State or its agencies which has opposed that outcome.

This decision means that State Governments, or agencies, that are voluntarily entering into agreements (which may have offended one of the limbs of *Re AEU*) are less restricted by the

Melbourne Corporation principle than if the same terms and conditions were imposed on the State or the agency by an award of a tribunal.

This decision reflects an unusual common sense approach by the Federal Court Full Bench. It remains to be seen whether this approach will be taken up by the High Court.

The position in Victoria is further complicated by the existence of the Victorian referral which makes the statutory position of State public servants worse than the common law position on the implied immunity as recently expressed in the UFU Appeal, particularly where agreements are being entered into between the State of Victoria and its employees.

The nature of each of the State referrals (including the Victorian referrals) are discussed below.

The patchwork of referrals presently operating between the States and the Federal systems

Since *WorkChoices* the footprint of the Federal industrial relations system has relied on the corporations power to regulate national system employers and employees. State sector workers remain in the province of the State in NSW, South Australia, Queensland, Western Australia and Tasmania

Table 20: The FW Act and Coverage of the State, Territory and Local Public Sector

State or Territory	Who is covered by the FW Act	Who is covered by State Laws
NSW	Private sector employees and employees of constitutional corporations	State public sector workers and local government employees
Queensland	Private sector employees and employees of constitutional corporations	State public sector workers and local government employees
SA	Private Sector employees and employees of constitutional corporations	State public sector workers and local government employees
Victoria	All employees have been covered by the federal system since 1996	
WA	Employees of constitutional corporations (with some additional areas where employers and employees have other connections with the federal system)	All other employers, for example: employees of state and local governments, partnerships; sole traders and charities
ACT	All employees	
NT	All employees	

Most areas of Crown employment within those States are incontrovertibly within the State system. There is a problem for some statutory corporations where it is uncertain whether they are constitutional corporations and therefore within the footprint of the FW Act.

What constitutes a “trading or financial corporation” under 51(20)

The law with respect to what constitutes a trading corporation for the purposes of s51 (20) of the constitution is vexed. The unpredictability and uncertainty as to the meaning of trading and financial corporation adds to compliance costs and lack of clarity for both employees and employers.

The case law does not provide a predictable metric to determine whether the relative or absolute amount of trading places a statutory corporation in a State or the Federal jurisdiction. If the level of trading increases from one financial year it could transplant a statutory corporation from one system to another.

The High Court was alive to the difficulties around the definition of trading or financial corporation for the purposes of s51 (20) in its consideration of the *Workplace Relations Act 1996* in the *Workchoices decision*⁵⁰⁵. The joint judgement of all justices (other than Kirby J) contained the following invitation:

“The challenge to the validity of the legislation enacted in reliance on the corporations power does not put in issue directly the characteristics of corporations covered by s51 (xx). It does not call directly for an examination of what is a trading or financial corporation formed within the limits of the Commonwealth.

There was no occasion to debate in argument, and there is no occasion now to consider, what kinds of corporation fall within the constitutional expression "trading or financial corporations formed within the limits of the Commonwealth". Any debate about those questions must await a case in which they properly arise.”⁵⁰⁶

Until recently decision no High Court litigant has taken up the invitation to give better definition to what constitutes a constitutional corporation.

There is currently an appeal to the Full Court of the Federal Court by way of a special case in *CEPU v. Queensland Rail and Another* (B63/2013) where one of the contentious issues is whether Queensland Rail is a trading corporation within the meaning of s51(20). A decision is pending in the matter.

The purposive approach to characterising a corporation as “trading or financial”

There are a series of decisions in lower Courts which take into account the purpose for which a corporation was formed in a consideration of determining whether or not a corporation is a “trading or financial” one.

⁵⁰⁵ New South Wales v. Commonwealth 156 IR 1

⁵⁰⁶ Ibid

There has been a debate in the lower courts and tribunals whether the purpose for which a corporation was established is a definitive factor in determining whether or not the corporation was a trading or financial corporation.⁵⁰⁷

For example in *Aboriginal Legal Service v. Lawrence [No 2]*⁵⁰⁸ a majority of the Western Australian Court of Appeal held that the Aboriginal Legal Service (“ALS”) was not a trading corporation. In the leading judgement Steyler J found the provision of legal services to indigenous people did not have a “trading” character for a combination of eight reasons⁵⁰⁹. His Honour found the ALS:

- provided “public welfare services” and existed for ‘no other purpose”. This was not however, determinative;
- did not engage in any other activity of any significance;
- all its income and property had to be used to promote its objects and could not be distributed to its members;
- did not earn or intend to earn profits;
- was a public benevolent institution.
- did not compete for clients;
- Looking at its funding arrangements, it had successfully tendered for the funding contract with the government but that tender was not based on prices;
- Its services were largely rendered gratuitously to clients.

On that basis his Honour found that although “ordinarily, the provision of large scale legal and allied services for reward would have a trading character, it was not so with ALS. It lacked a “commercial aspect”⁵¹⁰. The judgment of Steyler J was adopted by Pullin J (with Le Miere J dissenting).

There are many State owned corporations that have been sucked into Federal system even though they have more in common with the Aboriginal Legal Service than with Rio Tinto. Many of these corporations are formed for the purposes of implementing State Government policy rather than trading or making a profit.

It is not good policy to wait for developments in the common law of Australia to give more clarity around the meaning of “trading or financial corporation” for the purposes of s51 (20).

In circumstances where the workplace relations of a State’s employees has not been referred to the Commonwealth it would make sense if the jurisdiction of the Federal Act include a more limited definition of “trading or financial corporation” to exclude State government entities that have not been formed for the purposes of trade. This would involve federal government exercising a choice to not legislate to the fullest extent of its powers, but rather cede some ground in the interests of certainty.

⁵⁰⁷ E.g.; *AWU v. Etheridge Shire Council* (2008) 171 FCR 102, *Shire of Ravensthorpe v. Galea* [2009] WAIRC 01149 (2 November 2009), *Auswest Timbers Pty Ltd v. DSE* (2010) 241 FLR 360,

⁵⁰⁸ (2009) 178 FCR 252.

⁵⁰⁹ See *ibid* 337–8 [70]–[72]

⁵¹⁰ *ibid* 338 [74].

1996 Victorian Referral

On 11 November 1996, the Victorian Government announced its decision to refer to the Commonwealth various matters of industrial law. Later that month the Parliament of Victoria enacted the *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*. Federal provisions dealing with Victorian industrial law commenced operation on 1 January 1997,

Not all Victoria's industrial law matters were referred to the Commonwealth. Victoria retained law making powers over workers' compensation, occupational health and safety, apprenticeships, long service leave and some public sector matters.

These exclusions have been drafted having regard to the *Melbourne Corporation* limitation as expressed in *Re AEU* and the *In Victoria v The Commonwealth* (1996) 187 CLR 416;

Between 1996 and 2005 there were amendments to the Victorian referral dealing with the application of minimum terms and conditions. Federal awards were given the status of common rule.

Before the 2007 Federal Election, the Federal Labor Party announced its Forward with Fairness policy, promising that if elected it would rely on all its constitutional powers to legislate national industrial relations laws.

The 2009 Victoria Referral

In June and July 2009, the *Commonwealth Fair Work (State Referral and Consequential and Other Amendments) Act 2009 (Cth)* came into force. That Act facilitated the creation of a national workplace relations system by allowing the Commonwealth to receive industrial relations matters referred to it by the States. All States and Territories, apart from Western Australia, signed a multilateral inter-governmental agreement by 11 December 2009.

The basic effect of a state's referral is to extend the definitions of 'national system employee' and 'national system employer' in ss 13 and 14 respectively of the FW Act beyond their scope under the Commonwealth's existing legislative powers.

Victoria and the Commonwealth made an interim bilateral IGA in 11 June 2009 and the state enacted legislation effecting a text-based referral effective from 1 July. Victoria made a second referral through passage of the *Fair Work (Commonwealth Powers) Act 2009 (Vic)*. The second referral was considered necessary because the initial referral related to legislation – the *Workplace Relations Act 1996 (Cth)* – that was primarily predicated on the conciliation and arbitration power whereas the *FWA* is primarily predicated on the corporations power. In the absence of a new referral, the Victorian Government was concerned that the reorientation of constitutional foundations in the legislation meant Victorian employees who are not employed by a constitutional corporation would be excluded from the Fair Work regime.

The second referral is text-based and gives the Commonwealth the authority to legislate with respect to Victoria's entire private sector workforce. The second referral also contains exemptions similar to the ones made in the previous referral, mostly relating to core government functions, such as the number, identity, appointment and redundancy of public sector employees, and issues related to essential services employees and the police. The exclusions

mean that there are significant gaps in the protections afforded to Victorian public sector workers under the FW Act.

As we have seen from the *Parks Victoria* case the Victorian referral holds back the both limbs of *Re AEU* from the Commonwealth reference. This means that the statutory position of referred Victorian public sector workers is worse off when making enterprise agreements than if they were reliant on the Australian common law position reflected in the UFU appeal decision.

The problems arising from federal regulation of trading corporations and the immunity

The jurisprudence on the meaning of the term “trading corporations” together with the patch work of different referrals in Australia leads to added compliance costs for state owned corporations in those States other than Victoria that have either made no referral (such as Western Australia) or have only referred constitutional corporations and private sector employers (SA, Queensland and New South Wales).

The uncertainty of the extent of the implied intergovernmental immunity and the extent of its application to State sector workers in the Federal system is unacceptable.

The opacity of the language of the High Court in *Re AEU* decision has led to years of disputation as to the extent of the power of the Federal law to regulate Victorian public servants.

This uncertainty has been compounded by the UFU appeal which suggests the *Re AEU* expression of the limits of the immunity may be limited to circumstances where terms and conditions are imposed on the States. This uncertainty will not be settled until the High Court has ruled definitively on the matter.

As a matter of policy it is not ideal that the basic minimum standards available to private sector employees through the NES are not available as of right to public sector workers in the Federal system because of the implied intergovernmental immunity,

In those circumstances it is appropriate that the Victorian Government;

- modernise the Victorian referral consistent with the UFU appeal decision; and
- enact legislation so that those parts of the NES which the Federal parliament cannot legislate by reason of the Melbourne Corporation principle are available to State employees who are employed by a national system employer (e.g. basic redundancy entitlements).

The unique problem of the assessment of productivity in the public sector

Issue Paper 5 makes the following observation about the necessity of differentiating between reforms aimed at productivity increases in the private sector against those in the public sector⁵¹¹

Reforms might need to take into account of the fact that outputs and productivity improvements are less easily measured and consequently less transparent than the public sector. Accordingly, arrangements in the WR system aimed at improving productivity in the private sector might not always be easily transferable to the public sector.

We agree with this statement.

The standard economic definition of productivity is defined as “a ratio between the output volume and the volume of inputs”. In other words, it measures how efficiently production inputs, such as labour and capital, are being used in an economy to produce a given level of output.

Assessment of productivity entails a comparison of inputs and outputs. Such an assessment is straight forward in a private sector environment like manufacturing where the outputs are capable of empirical measurement. In general such an assessment is more difficult for service industries.

The difficulty of measuring productivity in private sector service industries is compounded in measuring productivity of services in the public sector. The assessment of productivity of public sector workers and the existence of a metric for the measurement of their productivity is a matter of controversy.

The term ‘productivity’ is often referred to in discussions about Australia’s economic prosperity, with ‘productivity’ being defined as “the efficiency with which an economy transforms inputs (such as labour and capital) into outputs (such as goods and services).”⁵¹² Improvements in productivity are seen as a way to provide economic and social prosperity for the nation as a whole. However, while economists provide a cogent analysis of productivity on a nation wide level, the definition of a worker’s or workplace productivity is proving much more elusive.

A productivity assessment is straight forward in a private sector environment like manufacturing where the outputs are capable of empirical measurement. In general such an assessment is more difficult for service industries in which qualitative aspects of the output produced are less tangible.

This difficulty is compounded in the provision of services by the public sector in which outputs have a significant qualitative aspect and the economic impact of outputs is diffuse, non-immediate and separated from the point of production. For example: how does one assess the productivity of a child protection officer? Is it the number of children in protection? The number

⁵¹¹ Page 9 paragraph 1

⁵¹² Australian Bureau of Statistics, 2010, ‘Productivity’, *Measures of Australia’s Progress*, cat. no. 1370.0, viewed 25 February 2015.
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Productivity%20and%20progress%20%285.5.1%29>

not in protection? The social and economic circumstances of the client? Is it the long term economic impact of effective child protection policies?

Comparable examples are extensive and pertain to both direct service delivery by agencies and the development of policy, legislation, and regulation.

In recent times the Office of National Statistics in the United Kingdom has attempted to measure productivity for part of the public sector.⁵¹³ The report concludes there is no agreed measure of productivity for public sector work.

The Commonwealth Department of Finance and Deregulation's *Report of the Review of the Measures of Agency Efficiency* notes that while there is currently no agreed way of measuring productivity in the public sector, there are indicators that Australia is reasonably efficient in comparison with other jurisdictions. The report notes that Australia compares favourably with other countries in terms of input and output efficiency according to the European Central Bank methodology – seventh in a study of 23 industrialised OECD countries in 2000.⁵¹⁴

The productivity of public sector workers is vexed on both a micro and macro level, due to the unique character of the sector:

- **Complex and long-term goals:** Productivity measurements involve assessing direct outputs, and as David Hetherington notes in the recent paper *Social innovation, public good: new approaches to public sector productivity*⁵¹⁵, politicians have embraced the adoption of direct output measures because it allows them to make tangible electoral promises against which they can be judged – for instance, reducing waiting lists for services. The issue with measuring public service productivity in this way, Hetherington argues, is that these outcomes are only a “narrow and interim measure of the desired final outcome.”⁵¹⁶ Public sector services are usually aiming to achieve long-term and complex goals, for instance better child welfare outcomes, or a well-educated society. Achievement of these goals cannot necessarily be measured over the short-term as productivity measurements are usually reported, rather, they need to be measured over the course of a generation. Similarly, public sector objectives are complex and so cannot necessarily be readily broken down into discreet, easy-to-measure outcomes. Measuring productivity through direct outcomes is incompatible with the long-term and complex goals that are unique to the public sector.
- **Interconnectedness of the sector:** the current measure of what are called “productivity outcomes” in the public sector fails to recognise the interaction and interconnectedness between government agencies. Public service delivery depends on a matrix of actors, but as Hetherington notes, burdening public sector agencies with direct productivity outcomes may distort the behavior of those agencies leading to unintended consequences for others. Disadvantaged people in our society may

⁵¹³ Atkinson T (2005) *Atkinson Review: Final Report: Measurement of government output and productivity for the National Accounts* (2005, Palgrave MacMillan, Basingstoke)

⁵¹⁴ Commonwealth of Australia, Department of Finance and Deregulation, (2011) ‘Review of the Measures of Agency Efficiency report’, p 18.

⁵¹⁵ Hetherington D (2013) ‘Social innovation, public good: new approaches to public sector productivity’ (Per Capita Research Paper, Per Capita Australia Ltd).

⁵¹⁶ *Ibid.* 6.

interact with government agencies through their lives (child protection, housing, corrective services, and federal agencies such as Centrelink) – all of which should be working together towards the best outcomes for those citizens. Productivity targets encourage agencies (and sections or departments within agencies) to primarily strive to achieve their productivity targets, which may inhibit cooperation to achieve the best possible outcomes. An example of this is the false dichotomy between so called ‘front line services’ and ‘back room functions.’ Governments tend to cut ‘back room’ staff while asserting that it will not have an impact on the ‘front line’ – in reality, much of the administrative workload that the ‘back room’ workers used to perform is pushed onto ‘front line’ workers, which can be at the expense of service delivery outcomes to clients. Similarly, we have seen governments around Australia introduce mandatory sentencing laws and fund extra police and increase prison budgets as part of a ‘tough on crime’ agenda, while not recognizing the flow-on effect this law has to other areas such as parole, probation, and post-release welfare support services, which do not tend to receive the additional resources they require to deal with the effects of these laws.

- **Societal good:** The recent FWA report entitled ‘*An overview of productivity, business and competitiveness and viability 2011*’⁵¹⁷ points out that official productivity estimates do not measure the well being or living standards of the community. The report states that “productivity measures alone are not a good measure for evaluating public policy because productivity is not the sole determinant of community wellbeing and that policies aimed at improving productivity can have positive or negative impacts on the non-productivity determinants of community wellbeing”.⁵¹⁸ The House of Representatives Standing Committee on Economics report *Inquiry into raising the productivity growth rate in the Australian economy* also makes this point.⁵¹⁹ The Committee notes that community wellbeing has many dimensions that include environmental capital (amenity, biodiversity and air quality), social capital (social attachments, community involvement and safety) and per capita income (consumption and saving, funding of social activities and funding of institutions, such as law and order), and that “productivity only directly contributes to improvements in wellbeing by increases in per capita income.”⁵²⁰ The Committee agrees that productivity improvements can be important in ensuring that aspect of community wellbeing; however “the ultimate objective of government policy is community wellbeing and not productivity.”⁵²¹ Therefore, when it comes to evaluating policies to improve productivity, “it is important to understand what impact the policies will have on all factors that affect community wellbeing.”⁵²² For instance, is a ‘productivity saving’ on occupational health and safety investigators good for

⁵¹⁷ Dr. Samantha Farmakis-Gamboni and Kelvin Yeun, ‘[an overview of Productivity, business competitiveness and viability](#)’ Fair Work Australia (2011) Research Report 1/2011 Melbourne Australia.

⁵¹⁸ Ibid at p 145

⁵¹⁹ Commonwealth House of Representatives, Standing Committee on Economics (2010), ‘Inquiry into raising the productivity growth rate in the Australian economy’ http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=economics/productivity/report.htm

⁵²⁰ *ibid.* p. 141

⁵²¹ *Ibid.*, p. 142.

⁵²² *Ibid.*

environmental and social capital aspects of community well being? How can we measure the value of community safety, or public health?

Public services outcomes should not be measured in the same way as private sector outcomes because they are inherently different. Public services are unpriced, consumed collectively by the community, delivered in cooperation by a matrix of actors, and are aimed at improving community wellbeing over the long-term. An assessment of productivity of the workers who implement public policy requires a sophisticated and multi faceted approach.

Governments have tended to adopt a fallacious notion of public sector productivity and efficiency, epitomized by the adoption of the blunt instrument of the 'efficiency dividend'.

The 'efficiency dividend' reduces the administrative budgets of government agencies by a certain percentage each year on the assumption that 'efficiencies' will be found to do the same work with fewer resources. As noted by the Centre for Policy Development in their recent report *False Economies: Unpacking Public Service Efficiency*: "While the efficiency dividend may have provided budgetary savings and spurred administrative imagination, evidence shows that it has had a number of unintended negative outcomes and is not effective in achieving efficiencies while maintaining the delivery of quality public services."⁵²³ Even with the simplistic application of productivity outcomes to the public sector, if productivity is a measurement of inputs and outputs, then surely a reduced level of output in the form of public services means that the efficiency dividend measures have failed to improve productivity in the sector.

The Centre for Policy Development suggests that instead of an emphasis on measuring productivity in the public sector, perhaps the emphasis could be put on innovation in the sector over the long term. A focus on innovation would require sufficient resources to enable the implementation of new ideas – the opposite of the constraints placed on government agencies by the 'efficiency dividend.' The Centre for Policy Development notes that: "in surveys on public sector innovation award entrants, a lack of resources was the most commonly identified obstacle to innovation."⁵²⁴

Governments have also endeavoured to tie wage rises to simplistic notions of productivity that are incompatible with the raison d'être of the public sector. The CPSU commissioned a report conducted by the National Institute of Labour Studies that analyses the academic and other research on public sector pay and productivity.⁵²⁵ It questions the value of assessments of productivity and the attachment of wage rises to this concept in the public sector.

The current wages policy of many State governments is to bargain around so called 'cash at bank productivity' which amounts to wage rises secured by the removal of terms and conditions. The policies of the Federal Government are similarly flawed, and have led to agencies suggesting the following as "productivity improvements":

⁵²³ Christopher Stone (2014) 'False Economies: Unpacking public service efficiency' (Centre for Policy Development). [Cpd.org.au/2014/06/False-economies](http://cpd.org.au/2014/06/False-economies)

⁵²⁴ Christopher Stone (2014) 'False Economies: Unpacking public service efficiency' (Centre for Policy Development). [Cpd.org.au/2014/06/False-economies](http://cpd.org.au/2014/06/False-economies) p. 51.

⁵²⁵ Hancock, Healy, Mavromaras, Sloane and Wei, National Institute of Labour Studies Brief Report to the CPSU (2011) Public Sector Pay and productivity, (2011, Flinders University, Adelaide).

- Staff reductions;
- Abolishing allowances;
- Reductions in personal/carer's leave;
- Longer working hours;
- Delayed pay rises.

It is a failure of the FW Act bargaining system that employers can refuse wage rises on the basis of a barren conception of so called "productivity", which has the effect that agreements can only be secured by assent to trade offs of conditions for wage rises.

It follows that productivity in the public sector is a complex issue. Employers in the public sector cling to a notion of productivity that is either not consistent with the standard economic notion of productivity or not reflective of the contested nature of the assessment of productivity in the public sector. The current fashion amongst public sector employers for bargaining associated with "efficiency dividends" (which are cover for the removal of terms and conditions) and so called productivity bargaining do nothing to promote the efficiency or effectiveness of the public sector.

A robust argument can be made that productivity (in the sense of a raw assessment of inputs against outputs) of itself may be a poor measure for the efficient delivery of services in the public sector. Perhaps the bigger point is that assisting the universally accepted drivers of improved productivity - such as investment in the skills and experience of personnel, improving decision-making in management and improving supervisory skills, strengthening accountability, better systems and focusing on innovation and service improvements - will help rather than hinder irrespective of the measures adopted. Accordingly, the central policies which dictate bargaining should value these stimulants accordingly and promote genuine engagement with them.

Any measure of productivity in the public sector must take a holistic view, incorporating the unique character of the public service and that its aims are geared towards better outcomes for our society. The PC should look with scepticism on employer demands for "one size fits all" amendments to either State or Federal workplace relations statutes that focus on "productivity bargaining" or making "increases in productivity" as a condition precedent to the making of collective instruments which are either awards of a tribunal or agreements.

The PC should recommend the FW Commission conduct an enquiry into the complexities of productivity in the public sector with the view to developing a more appropriate measurement for productivity in the sector.

Statutory Limits on Bargaining in NSW

On 26 March 2011 a Conservative coalition government was elected in New South Wales with a large majority in the lower house. As the PC would be aware a new election will be held in New South Wales shortly after the date for the filing of submissions to this enquiry.

The public sector has borne the brunt of the O'Farrell/Baird government's fiscal policy with over 21.5 billion estimated to be cut from employee and program spending from 2011/12 to the end of the current forward estimates.

Industrial relations legislation has been a principal tool in giving effect to the government's fiscal policy.

The pernicious manner in which these laws operate is relevant to this enquiry. These laws construct a workplace relations system which disempowers the collective bargaining capacity of employees and bestows unique rights upon the State, as compared to other employers, to place regulatory limits on the rights of NSW public sector workers.

The suite of legislation, subordinate legislation and policy by which the limitations on the rights of public sector workers are imposed is through:

- Industrial Relations Act 1996
- Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011
- Industrial Relations Amendment (Public Sector Conditions of Employment) Regulation 2011
- State Revenue and Other Legislation Amendment (Budget Measures) Act 2014
- NSW Public Sector Wages Policy 2011
- Managing Excess Employees Policy

The combined effect of this suite of legalisation is to prohibit unions from achieving pay increases above those set by Government policy, to prescribe the manner in which all Awards are to be determined, and to the limit the matters upon which Awards can bestow enforceable entitlements upon employees.

The New South Wales State, being both legislator and employer, has overreached its authority and conferred upon itself powers exercised by no other employer in Australia.

The setting of wages and conditions should be either as agreed between the parties or set by an independent umpire such as the NSW Industrial Relations Commission where employers do not unilaterally determine the limits of wage increases.

The exceptionalism of the NSW government as employer/legislator is unjustified and serves the agenda of the government while stripping away wages, conditions and industrial rights of its workforce.

The NSW Public Service should be regulated to achieve an even playing field for both employer and employee, free from the political influence of the government.

The following outlines the statutory limits imposed by the NSW government on its workforce.

Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011

The Amendment Act became law on June 2011. On the day of its assent subordinate legislation was passed under that Act by the making of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011*.

The Public Service Association of New South Wales (PSANSW) challenged the constitutional validity of the legislative provisions. The central provision of the proceedings⁵²⁶ was s 146C (1) of the Act. The High Court found the legislation to be constitutionally valid.

The key provision of the legislative change is Section 146C:

146C Commission to give effect to certain aspects of government policy on public sector employment

- (1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
 - (a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and
 - (b) that applies to the matter to which the award or order relates.
- (2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.
- (3) **An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section (emphasis added).**

What 146C means

Section 146C(1) removes all discretion held by the NSW Industrial Commission to consider any subject matter which is dealt with in a Government Policy that has been declared by the regulations. It mandates that “the Commission must... give effect to any policy on conditions of employment of public sector employees”.

The broad scope of the power to set policy on any aspect of the conditions of employment means that there is no capacity for the PSANSW to enter into any type of binding agreement or Award with the Government in relation to matters determined by declared government policies.

The Government has conferred on itself the capacity to unilaterally determine which conditions can be dealt with through either bargaining or arbitration.

Section 146C (2) provides the minister with wide ranging authority to expand the scope of the current arrangements by two mechanisms:

- allowing the constraints on the Commission to be set out in a regulation; and
- by enabling a limitation to a term and condition by reference to this regulation in a government policy

⁵²⁶ *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment & Ors* [2012] HCA 58

Section 146C(3) gives any regulation setting out a policy the power to override and render inoperative provisions of an Award or Order that is inconsistent with the terms of that regulation or policy.

Industrial Relations (Public Sector Conditions of Employment) Regulation 2011

Pursuant to the above provisions, the Government issued the *Industrial Relation (Public Sector Conditions of Employment) Regulation 2011* (the 2011 Regulation) on the same day the legislation became law.

The key elements of the regulation are as follows:

4 Declarations under section 146C

The matters set out in this Regulation are declared, for the purposes of section 146C of the Act, to be aspects of government policy that are to be given effect to by the Industrial Relations Commission when making or varying awards or orders.

5 Paramount policies

The following paramount policies are declared:

- (a) Public sector employees are entitled to the guaranteed minimum conditions of employment (being the conditions set out in clause 7).
- (b) Equal remuneration for men and women doing work of equal or comparable value.

Note. Clause 6 (1) (c) provides that existing conditions of employment in excess of the guaranteed minimum conditions may only be reduced for the purposes of achieving employee-related cost savings with the agreement of the relevant parties.

Clause 9 (1) (e) provides that conditions of employment cannot be reduced below the guaranteed minimum conditions of employment for the purposes of achieving employee-related cost savings.

6 Other policies

- (1) The following policies are also declared, but are subject to compliance with the declared paramount policies:
 - (a) Public sector employees may be awarded increases in remuneration or other conditions of employment, but only if employee-related costs in respect of those employees are not increased by more than 2.5% per annum as a result of the increases awarded together with any new or increased superannuation employment benefits provided (or to be provided) to or in respect of the employees since their remuneration or other conditions of employment were last determined.”

The principal feature of the regulation is the limiting of increases in remuneration or other conditions of employment to 2.5% per annum.

Under these laws the New South Wales Government can dictate the remuneration and conditions of employment without its employees having any means to either fairly bargain or to seek the intervention of an independent arbitrator

There is nothing to prevent the regulation from being amended to a rate below 2.5%. Similarly there is no compensation envisaged in the event the price level exceeds 2.5%.

The legislation allows increases above the 2.5% cap but in very limited circumstances. Any such increase is contingent on the identification of employee related cost savings that fully offset the increase in employee costs.

Clause 6(1) (b) constrains the timing of the awarding and payment of increases in excess of the 2.5% cap. It also enables employees to be short changed where the full value of savings achieved need not be passed on to employees as a remuneration increase.

Clause 6(1) (d) requires all matters the subject of proceedings to be resolved and prevents further claims to be made during the term of the Award.

Clause 6(1) (e) constrains the capacity of the NSW Commission to order back dating of payment.

The strictures imposed by the Act and Regulations led to the PSANSW accepting salary increases of 2.5% on behalf of public sector workers in 2011 and 2012.⁵²⁷

The result of these measures is that bargaining for any wage rises above the cap is limited to trade offs on existing conditions rather than incorporating discussion of a more holistic approaches to productivity or innovation that may result in more lasting and long term benefit to society

Further Regulatory Amendments

In March 2012 the Federal Government passed legislation to increase the mandatory employer contribution rate to an employees' superannuation fund (pension account). The Act set out a series of incremental increases from the then rate of 9% through to 12% commencing 1 July 2013, completing 1 July 2019.⁵²⁸

On 1 May 2013, the NSW Government announced its intention to absorb the first incremental increase of 0.25%, and all increases thereafter, into the 2.5% wages cap. In response, the PSA opposed the enforceability of this position within the terms of the regulation as it was then constructed.

On 17 June 2013 in *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors (No 1)* [2013] NSWIRComm 53, the Full Bench of the Commission ruled in favour of the PSA, deciding that increases of up to 2.5% were available to employees as the remuneration cap pertained only to costs awarded by the Commission itself, and not to employee related costs compelled by Commonwealth Government legislation.

On 6 May 2014 in *Secretary of The Treasury v Public Service Association & Professional Officers' Association Amalgamated Union of NSW* [2014] NSWCA 138, the Court of Appeal in the Supreme Court of New South Wales upheld the Governments appeal of the Commission's June decision and ordered the subsequent direction issued by the Commission on 17 December 2013, that the full 2.5% be paid, to be quashed. Consequently on 17 June 2014, the State Revenue and Other Legislation Amendment (Budget Measures) Act 2014 was passed by both houses our parliament under the pretext of a Budget supply bill. Schedule 5, Part 5.2 Clause 6 of this Act contains the regulatory amendments previously disallowed by the upper house pertaining to superannuation.

⁵²⁷ Insert links to decisions

⁵²⁸ <http://www.comlaw.gov.au/Details/C2012A00022>

Diminution of Entitlements Pertaining to Employees Made Redundant

On 22 June 2011 the Coalition Government announced a new policy in relation to management of excess employees (Memorandum M2011-11).⁵²⁹

The 2011 policy contains a number of features that constitute a significant departure from the earlier policies regarding the management of displaced employees. The features of the 2011 policy include that:

- (1) The policy removes reference to redeployment being the principal means of managing excess employees.
- (2) An employee is to be declared excess by their agency immediately they no longer have a substantive position and must, upon being declared excess, be given two weeks to choose between accepting an offer of voluntary redundancy or pursuing redeployment (clause 4.1).
- (3) An excess employee must be made one (and one only) offer of voluntary redundancy with the voluntary redundancy package comprising 4 weeks' (or 5 weeks') notice, severance payment of 3 weeks per year of service up to a maximum of 39 weeks and an additional payment of up to 8 weeks' pay (clause 5). No provision is made for job assist payments or job search leave.
- (4) Excess employees who decline the voluntary redundancy offer are entitled to a three months' retention period during which they may be placed in any suitable position without advertising and are to be provided with priority access to redeployment opportunities. Redeployment means permanent placement in a funded position (clause 6).
- (5) An excess employee who accepts a temporary secondment or assignment during the retention period will continue to be employed for the remaining period of the secondment or assignment (clause 6.2.1). Access to priority assessment or direct placement without advertising will only apply during the retention period.
- (6) If an excess employee is placed in a position at a lower grade, they are to be entitled to salary maintenance at their former grade for a period of three calendar months (clause 6.4).
- (7) If an excess employee is not redeployed at the end of the three months' retention period, they will be forcibly retrenched. The severance payment upon forcible retrenchment is the statutory minimum payment under the Employment Protection Regulation 2001 plus 4 weeks' (or 5 weeks') salary in lieu of notice (clause 7).

The PSANSW challenged this policy in the Industrial Court.⁵³⁰

⁵²⁹ Excess Employee policy

The PSANSW case sought declaratory relief in relation to contracts of employment of public sector employees who had been declared excess, to determine:

- Whether government policies relating to the management of excess employees formed part of the contracts of public sector employees who had been declared excess; and
- Whether the services of any of the employees may only be lawfully dispensed with in accordance with s 56 of the *PSEM Act*.

The Industrial Court found in favour of the Association's application, finding the arrangement to be 'unfair' under s 105 of the Industrial Relations Act 1996. Subsequently the Government responded to this judgment by introducing The *Public Sector Employment and Management Amendment Bill 2012*. This bill effectively nullified the outcome of the judgment as it may have applied to similar cases in the future.

Significantly, it amended s 56 to remove the requirement that excess officers could not be retrenched while there was 'useful Work' available in a department. This removed the common obligation on employers in a redundancy situation to any take steps to mitigate the impact of the abolition of a position by genuinely exploring alternative employment.

The key amendment is set out below:

56 Excess officers of Departments

- (1) If the appropriate Department Head is satisfied that the number of officers employed in the Department or in any part of the Department exceeds the number that appears to be necessary for the effective, efficient and economical management of the functions and activities of the Department or part of the Department.
 - (a) the Department Head is to take all practicable steps to secure the transfer of the excess officers to on-going public sector positions, and
 - (b) the Department Head may, with the approval of the Commissioner, dispense with the services of any such excess officer who is not transferred to an on-going public sector position.
- (2) An officer does not cease to be an excess officer merely because the officer is engaged (on a temporary basis) to carry out other work in a public sector agency.
- (3) In this section: on-going public sector position means a position in a Department, or in any other public sector service, that is not temporary.

To compound the injustice the government also inserted in the *PSEM Act* a new section 103A which states:

Division 2 of Part 9 of Chapter 2 of the *Industrial Relations Act 1996* (Unfair contracts) does not apply to contracts of employment of members of staff of any public sector agency that are alleged to be unfair for any reason relating to excess employees, including the following:

- (a) when and how members of staff become excess employees,
- (b) the entitlements of excess employees (including with respect to redeployment, employment retention, salary maintenance and voluntary or other redundancy payments),
- (c) the termination of the employment of excess employees.

The effects of these changes were worsened upon the commencement of the *Government Sector Employment Act 2013* which replaced the *PSEM Act* as the underpinning legal structure for public sector employment in the state on 24 February 2014. The jurisdictional exclusion of

⁵³⁰ *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Director of Public Employment* [2011] NSWIRComm 152

excess employees from the unfair contract provisions of the Industrial Relations act was maintained under section 74 of the Act.

Not acceptable

The PC in its Issue Paper 5 asked the question “to what extent should workplace relations provisions vary with the public and private enterprise”. Sensible variance does not accommodate allowing a State sector employer to unilaterally impose wage outcomes and terms and conditions on its employees by abusing its power as an employer and legislator. This approach treats public sector employees in New South Wales as second class citizens and offends Australia’s international obligations in relations to freedom of association and collective bargaining⁵³¹. No public sector workers in Australia should be the subject of targeted legislation which specifically restricts their capacity of to bargain or seek awards for certain terms and conditions or prohibits the pay rises open to them through those avenues.

⁵³¹ The CPSU, ACTU and PSANSW has filed a Complaint to the Freedom of Association Committee of the International Labour Organisation complaining that the legislation discussed here offends ILO conventions

16 Collective Bargaining:

(3) While an Agreement is in Operation

Collective agreements that are made under the FW Act do not permit the bargaining parties to have recourse to their bargaining rights in order to advance new claims, until the nominal expiry date of the existing agreement has passed. In other respects, agreements do enable workplaces to continue to evolve during their nominal term. The question of how much change is permitted and what checks and balances exist on the change process are of considerable importance in ensuring the “bargain” remains a fair one.

Dispute settlement under agreements

Before Work Choices, workers had a range of ways of ventilating disputes that arose during the life of an agreement. This included, for a time, a capacity to take protected industrial action in support of matters not dealt with in an existing agreement⁵³². This possibility was described by the Federal Court in the following terms:

“Assuming the policy behind s 170MN is to encourage parties to adhere to the bargain they have struck, then the policy would not, in my view, be defeated by permitting the parties to negotiate effectively in respect of matters that were not the subject of a relevant certified agreement. The policy is sufficiently protected if s 170MN(1) is construed as prohibiting parties to a certified agreement from resorting to industrial action to undo the matters they have agreed upon in the certified agreement, if its nominal expiry date has not passed. If the parties so desired, they could agree that a certified agreement made by them was intended to cover the whole field of relevant employment, thereby excluding the possibility of industrial action during the currency of the agreement.”⁵³³

In order to avoid this result, most employers took the advice of the Court and made agreements which purported to be “entire agreements”, included promises not to take industrial action, and provided for the parties submit their disputes to the AIRC for conciliation and/or arbitration in accordance with the compulsory requirement that certified agreements (as they were then known) contain dispute resolution terms. The outcome was an almost endless stream of cases in the AIRC concerning whether a particular dispute was “about the application of the agreement”, which was a jurisdictional prerequisite under the law of the day that had to be met before the AIRC could perform the dispute resolution functions the aggrieved party was urging it to⁵³⁴. The effect had been that parties were left by the terms of their agreements with no right to take industrial action in respect of new matters and left by the terms of the legislation with no access to arbitration to resolve disputes about those new matters.

⁵³² *Emwest Products Pty Ltd v. AMWU* [2002] FCA 61.

⁵³³ *Ibid.* at [55]

⁵³⁴ WR Act s. 170LW

WorkChoices made it unlawful to strike during the life of an agreement under any circumstance, removing the incentive for employers to agree to submit disputes to arbitration. As a result, many Work Choices agreements referred disputes to the FWC for conciliation but not arbitration (which was the model clause provided by the statute); other agreements simply stated that the CEO's decision was final.⁵³⁵

Under the FW Act, agreements must contain a term that allows the FWC (or an independent third party) to 'settle' disputes about matters arising under the agreement or the NES⁵³⁶. The new model clause provides for disputes to be referred to the FWC for conciliation and arbitration. Although the majority of agreements use the model clause,⁵³⁷ the ACTU remains concerned that a significant proportion of agreements may not provide workers with access to independent arbitration of workplace disputes.

Since the Full Bench of FWA decision in *Woolworths*⁵³⁸ it has become clear that the term "settle" does not import the necessary implication that a dispute settlement procedure must provide for the arbitration of unresolved disputes. Accordingly, the current minimum requirement for the inclusion of a dispute settlement procedure in enterprise agreements is that such provisions provide for conciliation or mediation of disputes by an independent third party, but not their arbitration, unless specifically provided for in the enterprise agreement.

There does not appear to be any rational policy basis for not requiring the compulsory arbitration of disputes that are properly raised in the context of a dispute settlement clause. After all, enterprise agreements made under the FW Act are legally enforceable statutory instruments, for which breaches are punishable by a civil penalty regime.⁵³⁹ Also, enterprise agreements are statutorily 'closed' for a nominal term not exceeding four years.⁵⁴⁰ The practical effect of this closed character is that employees are legally prevented from taking industrial action in pursuit of grievances or new claims for at least the nominal term of the agreement.

Accordingly, there is a strong public policy case to suggest that the interests of all the parties to an enterprise agreement are best served by providing for an effective, fair and final process for dealing with disputes or grievances arising under the agreement. However, the insistence of many large corporations⁵⁴¹ that dispute settlement provision in agreements not provide for arbitration as the last step in the dispute procedure, means that often the disputes or grievances raised by employees simply remain unresolved and fester, in the face of intransigence by an employer who knows that their application of the agreement is effectively legally unchallengeable unless a clear breach is established.

⁵³⁵ See House of Representatives (Cth), Fair Work Bill 2008 Explanatory Memorandum [783].

⁵³⁶ FW Act s186(6)

⁵³⁷ Information provided to ACTU by DEEWR

⁵³⁸ [2010] FWAFB 1464

⁵³⁹ FW Act s539

⁵⁴⁰ FW Act – Part 2-4 generally; FW Act s417

⁵⁴¹ For example, the enterprise agreements binding the subsidiaries of multinational mining giants Glencore PLC and Rio Tinto Ltd and its employees almost without exception preclude arbitration as a final step in the disputes procedure, except with the explicit consent of the employer – which is always refused.

The issue of a compulsory arbitration clause in enterprise agreements may not appear a top order issue, but we contend it is an essential part of a properly functioning collective bargaining system. Arbitration as a final step process allows for employee grievances over the application of the agreement to be dealt with relatively quickly, cheaply and by persons who have an understanding of industrial issues. The refusal of certain employers to accept arbitration as a mandatory clause in enterprise agreements amounts to workers having to accept the proposition of ‘do as we say, not what you think the agreement means’. It is a remarkable position, given that recourse to arbitration of employee grievances once a collective agreement has been struck is regarded as a natural aspect of collective bargaining in Canada or the United States.⁵⁴² It is also a fundamentally unfair result in circumstances where legislation has eliminated recourse to bargaining rights.

“No extra claims” clauses

A ‘no extra claims’ clause is usually agreed upon by the parties as part of the broad range of outcomes that are negotiated during bargaining, and as a concession that they constitute the full and final settlement of all matters. As a consequence it places certain restrictions on what can be pursued during the life of the agreement.

As we argue in chapter 14, enterprise agreements should be able to contain the full range of matters that are negotiated and agreed to by the parties, including a commitment to not make any future claims against the other.

Reference is made in the PC Issues paper to the Toyota decision. It should be noted that the Toyota dispute arose because the company sought to make wholesale reductions to the terms and conditions of employment for its employees covered by the Agreement, without agreement from the other parties covered by the agreement. The scope of this proposal extended well beyond merely seeking ‘desired flexibility’ as suggested by the PC issues paper.

The Full Court in *Toyota* defined a ‘claim’ as ‘a proposal...to materially change the terms and conditions of employment other than in a manner already provided for in the agreement’. For a claim to be an extra claim, the new rights or obligations created must be inconsistent with those provided for by the enterprise agreement. Where an agreement is expressed to ‘cover the field’, this may include the introduction of new rights or obligations about which the agreement is silent. (compare by way of example the outcome in *DL Employment Pty Ltd v Australian Manufacturing Workers’ Union* [2014] FWCFB 7946 with that in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v Fonterra Australia Pty Ltd* [2015] FWC 1486).

Toyota confirms that (on the basis of the construction of cl.4 of that Agreement), it did not prevent Toyota from pursuing a ‘proposal’ that the Agreement be varied under Subdiv A of Div 7 of Pt 2-4 of the FW Act. The Full Court make it clear that ‘it is a conclusion which relates only to so much of the no further claims term as would stand in the way of Toyota and its employees taking advantage of the provisions of the FW Act that deal with the subject of the variation of an

⁵⁴² Bukarica and Dallas (2012) at p45

enterprise agreement. In other respects, there has been no challenge to the validity of that term, and nothing we have said should be understood as going beyond that context’.

The prevalence of no extra claims clauses has significantly declined in recent years (Agreement Making in Australia under the Workplace Relations Act 2007-2009 at Table 3.29). One explanation for this is the decrease in industrial disputation and subsequent industrial action, which such provisions were historically intended to deal avoid. That said, they are still a relatively common feature of Agreements and serve as *‘the only practical means of keeping such a party to his or her bargain’* (at para 55 of the Toyota Decision).

Consultation on workplace change

Each agreement is required to contain a term that requires employers to consult about major workplace change that will have significant effects on employees⁵⁴³. A model term is provided, which applies by default if an agreement contains no consultation term. The model term is based on standards developed by the AIRC. However, it regrettably limits the obligation to consult to one which arises only after a “definite decision” has been made by employees. Accordingly, the scope to persuade an employer to adopt a different course of action is limited and discussion is centred around ameliorating the “significant effects” upon employees of “major changes”, rather than involving them directly in the decision as to what changes if any are to be made and the reasons for and against.

There is nothing preventing parties to agreements from agreeing to consultation provisions which extend beyond “major change” and “significant effects” of “definite decisions” – any HR practitioner will expound the virtues of employee engagement in workplace change and continuous improvement. Where such clauses contemplate consultation over, for example, changes to work practices or organisation, pursuing such changes in accordance with consultative process is contemplated by the agreement and does not constitute an *extra claim*, unless implementing the change involved would conflict with other explicit terms of the agreement⁵⁴⁴. This provides considerable scope for flexibility during the term of an enterprise agreement.

⁵⁴³ FW Act s. 205.

⁵⁴⁴ MFESB v. UFU [2005] AIRC 205.

17 Individual Arrangements

At the most fundamental level, there is an element of hypocrisy involved in adapting an industrial relations system so as to create a framework for the making of individual statutory arrangements. The industrial relations system owes its existence to a recognition of the fact that the making of individual agreements - “freedom of contract” - results in labour market outcomes for employees which are not socially desirable or acceptable (such as poverty and exploitation). But our system is not a fundamentalist system - there are some compromises embedded within it.

Our system evolved over time to establish, indirectly and then directly, “cut off points” whereby the nature of work performed by employees or their incomes is used as proxy to identify that it is not necessary for those employees to benefit from particular rights or protections it provides to others, in order for those employees to obtain socially acceptable outcomes in the labour market through individual negotiation. Notably however, the meeting or exceeding of those “cut off points” does not result in the entirety of those rights and protections being switched off.

The curious thing about statutory individual arrangements is that they offend both the fundamental view and the compromise view: they have been crafted so as to result in the removal of rights and protections that would otherwise be in place; and they have been made available without any reference to the cut off points otherwise embedded in the system. The predictable thing about individual statutory arrangements is that they have been and are more prevalent in industries where workers are the lowest paid.

The common law is not a safety net

Every employment relationship is underwritten by a contract of employment. Aside from certain matters relating to discrimination in hiring decisions⁵⁴⁵ the FW Act has no work to do unless or until a worker has entered into a contract of employment – the contract of employment is the trigger point for the various rights and protections offered by the Act to operate.

Contracts of employment are made between two legal “persons”, one of whom must be a natural person. It can be made between two natural persons but few employers of labour are. At a practical level then, it is a contract between a collective of capital interests and an individual worker. The content of a contract of employment at common law is at large save for the doctrine of illegality, which relevantly regulates little short of criminality and slavery. Its content is made up not only of what it said or written to constitute it, but what the law implies where it is otherwise silent.

Subject to contrary intention evinced in the contract itself, the law implies duties upon parties to a contract of employment. In Australia, these duties, with the exception of the duty of co-

⁵⁴⁵ See FW Act s. 342

operation, are not mutual and fall to the employee perform. A failure to comply with these duties is a breach of contract. They include:

- *The duty to obey.* This duty requires the employee to obey lawful and reasonable directions from their employer which are within the scope of the employment and not inconsistent with the contract. It is the essential duty which, in practical or economic terms, denies the employee the leverage to “renegotiate” the terms of their employment: they cannot refuse to comply with directions in order to secure better pay or conditions from their employer, without breaching their contract (a matter which could give rise to right in the employer to terminate the contract, depending on the severity of the breach).
- *The duty to exercise reasonable care and skill.* This duty requires employees to be competent in the skills they are hired to utilise. The common law places the burden of initial proficiency upon the employee, requiring them in effect to be ‘job ready’.
- *The duty of fidelity.* This duty requires employees to act in the interests of their employer. It manifests itself in numerous obligations such as to avoid conflict of interests, to not work for another employer in competition with the first employer, to not use the employer’s information or their employment to benefit themselves and to not refrain from conduct which may damage the reputation of their employer. To an extent, the duty therefore requires employees to subordinate their interests to those of their employer, even when they are not actually at work.
- *The duty of trust and confidence.* This obliges employees not to engage in conduct that destroys the confidence between employee and employer. It includes a prohibition on acts that are fundamentally incompatible with employees’ duties under the contract (even if they are not explicitly prohibited by the contract) and with the maintenance of the relationship between employer and employee.

Implied duties upon the employer are generally limited to the duty of cooperation (which, as mentioned above, is mutual) and the duty to take reasonable care for the safety of the employee. By any measure, this is a very one sided dynamic even ignoring the imbalanced power relationships that are at play in the formation or any variation of the contract. The common law does not provide a meaningful safety net for employees. In modern Australia, this in part because the common law does not see itself as fulfilling that role.

This was illustrated recently in significant litigation⁵⁴⁶ concerning whether the common law of Australia recognised that the duty of trust and confidence was a mutual duty which obliged both parties to not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage relationship of trust and confidence between them. The law requires that a term will not be implied in law unless it is “necessary”. The criterion of necessity is a high bar and “is not satisfied by demonstrating the reasonableness of the implied term”⁵⁴⁷. The judgment in that case makes numerous references to the undesirability of the common law doing what is in the province of the legislature:

“The common law in Australia must evolve within the limits of judicial power and not trespass into the province of legislative action. This Court and, to a lesser extent, intermediate appeal courts have a law-making function. That function can only be exercised as an incident of the adjudication of particular disputes. The first point of reference in its exercise is “the web of established legal principle”^[39]. As Brennan J said in *Dietrich v The Queen*^[40]:

⁵⁴⁶ *CBA v. Barker* [2014] HCA 32

⁵⁴⁷ *Ibid.* at [36].

"There must be constraints on the exercise of the power, else the courts would cross 'the Rubicon that divides the judicial and the legislative powers'".

A judicial announcement of an obligation of mutual trust and confidence, to be applied as an incident of employment contracts and applicable to employers and employees alike, involves the assumption by courts of a regulatory function defined by reference to a broadly framed normative standard. Broadly framed normative standards are familiar to courts required to apply, in common law or statutory settings, criteria such as "reasonableness", "good faith" and "unconscionability". However, the creation of a new standard of that kind is not a step to be taken lightly."⁵⁴⁸

"in its intersection with the law of unfair dismissal, the implied term would intrude a common law policy choice of broad and uncertain scope into an area of frequent, detailed and often contentious legislative activity^[222]. Commonwealth and State unfair dismissal legislation has produced, and has over time reproduced and adjusted, "a particular and carefully calibrated balancing of the conflicting interests involved namely, between preserving the expectations of employees on the one hand and enabling employers to create jobs and wealth, on the other hand"^[223]. Gleeson CJ observed^[224]:

"Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship."

Common law obligations in contract, like common law obligations in tort, ought not to be developed by courts other than in a manner that is sensitive to their interaction with legislation^[225]. "⁵⁴⁹

"The history of the development of the term in the United Kingdom is not applicable to Australia. There is a background of approving references to the implied term in decisions of Australian State and federal courts^[92]. The strength of those approving references, however, depends upon the analysis underpinning them. In *South Australia v McDonald*, decided in 2009, the Full Court of the Supreme Court of South Australia observed that, with the exception of two first instance decisions, none of the Australian authorities to that date had "addressed in any detail the basis for the implication of the implied term."^[93] In that case, the Full Court concluded that the extensive statutory and regulatory context in which the contract in question operated rendered the implied term unnecessary^[94]"⁵⁵⁰

The need for a cautious approach to the implication is underlined by the observation in the fourth edition of Deakin and Morris's *Labour Law*, that "[i]n its most far-reaching form [the development of the implied term] could be said to mark an extension of the duty of co-operation 'from the restricted obligation not to prevent or hinder the occurrence of an express condition upon which performance of the contract depends to a positive obligation to take all those steps which are necessary to achieve the purposes of the employment relationship ...'."^[101] That extension was said to reflect a broader functional view, essentially a tribunal's view, of good industrial relations practice, embracing not only the material conditions of employment such as pay and safety, but also the psychological conditions which are essential to the performance by an employee of his or her part of the bargain^[102].

⁵⁴⁸ At [19]-[20]

⁵⁴⁹ At [118]

⁵⁵⁰ At [35]

The complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as a matter more appropriate for the legislature than for the courts to determine. It may, of course, be open to legislatures to enshrine the implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. It is a different thing for the courts to assume that responsibility for themselves.

It depends upon a view of social conditions and desirable social policy that informs a transformative approach to the contract of employment in law. It should not be accepted as applicable, by the judicial branch of government, to employment contracts in Australia.”⁵⁵¹

Plainly, the common law sees it as the job of the legislature to develop the broad framework of rights, based on fairness and other policy considerations, that are to govern employment relationships. This view is not compatible with the common law acting as a safety net or remedying any omissions or flaws in the existing safety net.

Who falls outside the safety net now?

There are numerous exemptions to particular provisions of the FW Act. Most of them are based on a view about who “needs” protection and who doesn’t, while few (such as the exemptions from unfair dismissal based on length of service) are based on concessions to employers. Whilst no employee is completely excluded from the NES, some are excluded from the award system.

Employees may be excluded by the award system in a number of ways. Firstly, the FW Act contains a prohibition on modern awards being:

“...expressed to cover classes of employees:

- (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under the laws of the Commonwealth or the States); or
- (b) who perform work that is not of a similar nature to work that has traditionally regulated by such awards”.⁵⁵²

The provision above is accompanied by a legislative note which provides: “for example, in some industries, managerial employees have traditionally not been covered by awards”. In most broad terms, the employees generally understood to be covered by such exclusion are managers and professionals (but not all managers and professionals).

Secondly, although the Award Modernisation process required that the AIRC make a modern award titled the “Miscellaneous Award” to cover employees not covered by any other award, it too contains limitations embrace a similar category of people:

“The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology

⁵⁵¹ At [39]-[41]

⁵⁵² FW Act s. 143(7).

specialists.”⁵⁵³

Thirdly, Awards cease to apply to employees that they are expressed to cover while they are “high income employees” as defined⁵⁵⁴. A high income employee is a person who earns \$133,000 per annum and who is covered by a “high income guarantee”, under which an employer undertakes in writing to pay an award covered employee (who is not covered by an enterprise agreement) that amount or more over 12 months (pro-rata provisions for part time workers also apply).⁵⁵⁵

Employees are also excluded from the unfair dismissal provisions if their earnings exceed \$133,000 and they are not covered by an award or an enterprise agreement.

Each of those exclusions are self evidently based on a policy decision about who does not need the benefit of the protections and rights they are excluded from. That is, there is an assumption that senior employees who are capable of exercising power in the market by reason of the demand for their skills or as evidenced by the degree of their incomes, whilst deserving of some universal and in any event socially entrenched conditions (i.e. the NES), do not otherwise require a safety net of conditions tailored to their industries of work because they will be able to negotiate acceptable arrangements. If these are the class of people judged to not be prejudiced by freedom of contract – the “freedom” to act individually, then one would rationally expect the system would curtail any individual agreement making stream to them alone.

Collective protections versus individual protections

It is to be recalled that industrial relations system provides both collectivism and minimum standards as the vehicles for employees to attain fairness in the labour market. That is, the judgement was made from the inception of the system that doing one in isolation is insufficient. Since the inception of enterprise bargaining and to date, during all periods other than those covered by the early period of *WorkChoices*, collective agreements were tested by an independent authority to ensure that the bargain struck was one that did not disadvantage employees as against the safety net. Since the FW Act, the requirement has been that the independent authority (FWA and later the FWC) be satisfied that the employees are better off overall.

If once accepts that both minimum standards and collectivism are necessary for a fair bargain, one would accept that if an individual agreement making strand were in contemplation (which in our view, never should have been in contemplation), a lot more would be done on the minimum standards side of the ledger to make up for the absence of collectivism. But this is not what occurred.

Individual Bargaining under Workchoices

Individual statutory contracts, known as AWAs, were first introduced by the Workplace Relations Act.

⁵⁵³ At clause 4.2

⁵⁵⁴ FW Act s. 47(2)

⁵⁵⁵ FW Act s. 329-330.

AWAs operated to the exclusion of the relevant award or enterprise agreement and, following the implementation of WorkChoices, could apply for a period of up to 5 years.

The “no disadvantage test”, which ensured that AWAs did not on balance disadvantage an employee compared to the relevant award, was abolished under WorkChoices and replaced with five minimum standards known as the Australian Fair Pay and Conditions Standard (AFPCS). These five standards were: a minimum hourly rate, 4 weeks’ annual leave per year (2 weeks of which could be ‘cashed out’), 10 days sick/carer’s leave, a 38 hour working week (which could be averaged over a 12 month period in order to avoid payment of overtime rates for additional hours worked); and 52 weeks’ unpaid parental leave. Other award entitlements were no longer ‘protected’ by law. Consequently an AWA could be made that stripped away basic award conditions, such as penalty and overtime rates, allowances and consultation rights.

The absence of unfair dismissal protections for workers of businesses with less than 100 employees and the introduction of 'operational reasons' as an insurmountable ground for dismissal enabled businesses to dismiss employees that refused to accept an AWA and replace them with employees on lower wages and conditions.

In addition, workers could be compelled to accept an AWA that removed entitlements as a condition of employment or promotion⁵⁵⁶. There was clearly no real choice on the part of an employee seeking a job whether or not to accept an AWA. The existence of a collective agreement under these arrangements offered very little protection against coercion or undue pressure being applied to individual employees to accept an AWA. WorkChoices permitted employers to undercut bargained entitlements by systematically implementing AWAs with individual employees.

Once an employee had signed an AWA, the employee’s ability to participate in industrial action surrounding negotiations for a new collective agreement was restricted. An AWA employee could not participate in any industrial action or be included in the roll of voters for ‘protected action’ ballot until the nominal expiry date of their AWA has passed.⁵⁵⁷ The legislation also made it difficult for employees covered by an AWA to terminate the arrangement and ensured that in the event of termination, the employee became covered by the AFPCS until a new collective agreement came into operation.⁵⁵⁸

These provisions effectively prevented employees on AWA’s from terminating the arrangement in order to gain access to superior terms and conditions of employment contained in an existing collective agreement or participating in collective bargaining for a new agreement.

The rhetoric of ‘individual flexibility’ for workers was used to promote AWAs. However, in practice, AWAs provided employers with an extremely effective means of avoiding their legal obligations, undermining the safety net and exploiting vulnerable employees.

At the end of December 2007, the Workplace Authority estimated that around 880,000 employees (9.6%) were on AWAs.⁵⁵⁹ The majority of AWAs were made with employees in low paid sectors of the economy. The retail, hospitality and personal services sectors accounted for

⁵⁵⁶ *Workplace Relations Act 1996*, section 400(6).

⁵⁵⁷ *WR Act*, s 450; s 495. 467

⁵⁵⁸ *Ibid*, s399

⁵⁵⁹ Lodgement Data cited in the Report of the Fair Work Act Review Panel, “Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation”, 2012, p 119.

55% of all AWAs lodged⁵⁶⁰, which are sectors where the level of dependency on the award safety net has traditionally been and remains at high levels⁵⁶¹.

Analysis of a sample of 250 AWAs (out of 6263 lodged between 27 March and 30 April 2006) shows that all AWAs removed at least one protected award condition and 16% excluded all protected award conditions.⁵⁶²

Further data compiled by the Workplace Authority shows that 89% of the 1,748 AWAs lodged between April and September 2006 removed at least one protected award condition, 71% excluded four or more, 52% excluded six or more and 2% excluded all protected award conditions. The protected conditions that were removed by AWAs included:

- penalty rates (65%);
- annual leave loading (68%);
- shift work loadings (70%);
- overtime loadings (49%);
- State/Territory public holidays (25%);
- days off work as a substitute for working on a public holiday (61%);
- public holiday penalties (50%);
- rest breaks (31%);
- allowances (56%); and
- bonuses (63%).⁵⁶³

The rate at which conditions were being removed was substantially higher under WorkChoices AWAs than under pre-Work Choices AWAs and overtime and penalty rates were particular targets for removal. In the case of overtime pay, the rate at which it was removed through AWAs doubled from a quarter of AWAs in 2002-03 to over a half of AWAs in 2006.⁵⁶⁴

Employers commonly used AWAs to increase hours of work. The average AWA employee worked a 13% longer week than their peers employed under a collective arrangement.⁵⁶⁵ Often employees on AWAs worked longer hours for less pay. For example in New South Wales, female AWA employees worked 4.4% longer hours than their counterparts engaged under collective agreements, but earned 11.2% less.⁵⁶⁶

⁵⁶⁰ Workplace Authority, 'Lodgement Data: 27 March 2006–30 September 2007' (2007) p 5.

⁵⁶¹ ABS data (6306-May 2012) indicates that 63.9% of award dependent employees are engaged in the accommodation and food services, retail trade, Health care and social assistance and administrative and support services industries.

⁵⁶² Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", 2012, p 119.

⁵⁶³ The Hon Julia Gillard MP, AWA Data the Liberals claimed never existed, media release, 20 February 2008. Note that the media release relied upon Office of the Employment Advocate data examined between April and October 2006.

⁵⁶⁴ David Peetz and Alison Preston, 'AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data' (2007) p 4.

⁵⁶⁵ ABS cat 6306.0 (May 2006) p 33.

⁵⁶⁶ ABS cat 6306.0 (May 2006) Table 10.

It was also common practice not to provide any wage increase over the life of the AWA. 22% of AWAs in April 2006 contained no provision for a wage increase during the life of the agreement and this figure rose to 34% in April-September 2006.⁵⁶⁷

In industries where award wages were not a good reflection of market wages, the wage loss suffered by a typical worker can be inferred by comparing AWA wages to the wages payable to workers employed under collective agreements. In 2006, the median AWA worker earned 16.3% less per hour than the comparable worker on a collective agreement.⁵⁶⁸

In award-dependent industries, the removal of minimum conditions resulted in average wage outcomes for some workers that were even lower than the minimum award rate. For example, in the hospitality industry, average AWA earnings in 2004 and 2006 were 1.8% and 1.6% below average earnings of workers reliant on the award minimum respectively.⁵⁶⁹

Employees most negatively affected by AWAs included women, low-skilled workers, employees in small firms and workers with little bargaining power. Women on AWAs earned less than women on collective agreements in every state, by margins ranging from 8% to 30%⁵⁷⁰ and female casual workers on AWAs received average earnings some 7.5% below average award earnings.⁵⁷¹

In highly-unionised industries, employers successfully shifted large numbers of employees off collective agreements and onto individual arrangements in order to limit collective bargaining and reduce the influence of unions at the workplace. For example, between 1997 and 2007 Telstra increased the proportion of workers covered by individual AWAs from 10% to more than 50% of the workforce as part of a deliberate strategy to cut wages and conditions and reduce union membership. The practice continued even after the parliament introduced legislation to abolish AWAs.⁵⁷²

The experience of AWAs clearly demonstrates that the assumption of a level playing field where employees negotiate wages and conditions with their employers is a myth. Employees face a significant power imbalance that affects all aspects of the employment relationship. They were, and are, likely to be unaware of their rights in relation to individual statutory contracts especially their right to refuse to make an agreement, and are not always well placed to make an assessment of whether an arrangement disadvantages them.

Employees are generally reluctant to challenge their employer, either by opposing the making of an agreement at the employer's insistence, or else in seeking compensation for disadvantage suffered under the terms of an agreement. Unless an employee is supported by a union, has

⁵⁶⁷ David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 64.

⁵⁶⁸ Peetz and Preston, p 13.

⁵⁶⁹ David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 67.

⁵⁷⁰ Ibid, p 29.

⁵⁷¹ Ibid, p 67.

⁵⁷²P Ross and G Bamber, "Strategic Choices in Pluralist and Unitarist Employment Relations Regimes: A Study of Australian Telecommunications", *Industrial and Labor Relations Review*, Vol. 63, No. 1 (October 2009).

skills which are in demand or is an unusually confident and assertive individual, it is unlikely that an employee would have been able to negotiate fair terms and conditions of employment.

On the other hand, it is overwhelmingly employers who initiate the use of individual statutory agreements. Employers seek agreements that provide them with increased discretion to set the terms and conditions of work. They commonly provide inadequate compensation for the removal of monetary entitlements particularly where there is no external assessment of the sufficiency of the compensation, and generally offer no compensation for non-monetary disadvantage suffered by the employee such as the employee's increased subjection to the exercise of managerial discretion. Employers will apply pressure to employees to accept their preferred agreement especially if they are permitted to make 'take it or leave it' offers to new employees, and some employers may apply pressure amounting to coercion even though this would be unlawful.

Non-compliance with employment obligations and lack of enforcement by employees is particularly prevalent in industries where the employer is under competitive pressure to reduce labour costs such as sections of the manufacturing, hospitality and retail industries. Such non-compliance particularly affects vulnerable workers including young workers, women, those working in precarious employment, outworkers and employees working in workplaces without a union presence.

Individual Bargaining under the FW Act

The BOOT as it applies to IFAs made under the terms of a modern award or enterprise agreement plays a critical role in seeking to ensure that such arrangements do not disadvantage employees when compared to the modern award and/or applicable enterprise agreement.

When the FW Act was introduced, a number of important safeguards on the operation of IFAs were included. In summary IFAs:

- must be genuinely agreed to by both parties;⁵⁷³
- must pass the "Better Off Overall Test" (BOOT), meaning that the IFA must result in the employee being better off overall than they would have been had no agreement been made;⁵⁷⁴
- can only be made after the employee has commenced employment;⁵⁷⁵
- must be in writing and be signed by the employee and the employer. If the employee is under 18, the IFA must also be signed by a parent or guardian. The employer must ensure that a copy of the IFA is given to the employee;⁵⁷⁶ and
- may be terminated by either party giving written notice or immediately if the parties agree.⁵⁷⁷

The content of an IFA must also comply with the flexibility term contained in relevant modern award or enterprise agreement. The model flexibility term contained in all modern awards limits

⁵⁷³ s144(4)(b), 203(3).

⁵⁷⁴ s144(4)(c), 203(4).

⁵⁷⁵ s144(4)(d), Modern award clause 7.2.

⁵⁷⁶ s144(4)(e), 203(7).

⁵⁷⁷ s144(4)(d), 203(6).

the award provisions that can be varied by an IFA to the following matters: arrangements about when work is performed; overtime rates; penalty rates; allowances and leave loading.⁵⁷⁸

The terms that may be included in an IFA varying the effect of an enterprise agreement is a matter for bargaining. The FW Act requires all agreements to contain a flexibility clause that sets out which matters may be the subject of an IFA.⁵⁷⁹ If the enterprise agreement does not include a flexibility term, the model flexibility term in the Fair Work Regulations is taken to be a term of the agreement.⁵⁸⁰ The model agreement flexibility term contains the same matters as model award flexibility term.

The content of an IFA must also comply with the flexibility term contained in the relevant modern award or enterprise agreement. The model flexibility term contained in all modern awards limits the award provisions that can be varied by an IFAs to the following matters: arrangements about when work is performed; overtime rates; penalty rates; allowances and leave loading.

These safeguards were designed to address significant problems associated with AWAs made under WorkChoices and ensure that IFAs could not be used by employers to exploit vulnerable employees or drive down wages or conditions.

Unions did not support the introduction of IFAs, notwithstanding the formal safeguards that accompanied them. The concern was that, in practice, some or all of these safeguards would not be observed or effective. Indeed, over the period of operation of the FW Act it has become apparent that in spite of these safeguards IFAs are being used by employers in a similar fashion to AWAs – that is, to drive down wages and conditions and exploit vulnerable employees.

Unilateral termination is an important safeguard that was designed to prevent abuse of IFAs. IFAs are intended to be mutually beneficial. If an IFA is no longer meeting this objective, the parties to it should be able to terminate the arrangement. This is particularly important given that the process by which agreement is reached and the content of such agreements are generally not subject to scrutiny.

Employers commonly take advantage of the obligation on employees to comply with reasonable and lawful directions from their employer to impose variations to award conditions on their employees in the form of an IFA. The employee can either accept the arrangement on offer, effective immediately, or leave their employment. An arrangement made under such circumstances falls well short of what would be required to satisfy a court that a verbal contractual agreement had been made, free from duress or coercion. In practice, employees tend to 'agree' to employer-initiated IFAs because the option of negotiating any variation to the terms proposed by their employer is non-existent. Unilateral termination protects employees by providing them with a means of reversing unwanted or unfair arrangements and thus limits the capacity of employers to use their superior bargaining position to dictate working arrangements.

The notice period for IFAs made under an agreement or modern award was originally 28 days. The notice period contained in the model flexibility clause in modern awards was extended by the FW Commission in 2012 to 13 weeks in response to concerns raised by employers that the

⁵⁷⁸ Modern award clause 7.2.

⁵⁷⁹ 203(2)(a).

⁵⁸⁰ 203(4),203(5).

capacity for an employee to unilaterally terminate an IFA with 28 days limits the certainty of agreements and operates as a disincentive to use IFAs.⁵⁸¹

This change was made notwithstanding the fact that there is little evidence to support the contention that the four weeks' notice period acts as a disincentive for employers to enter into IFAs.⁵⁸² The most comprehensive source of data on IFAs to date is the report of the General Manager of FWA, published in November 2012.⁵⁸³ It found that less than one per cent of employers surveyed who were aware of, but did not make an IFA, cited the four week notice period as the reason why they had not entered an IFA. The most common reason, reported by just over half of employers, was that there had been no identified need to enter into an IFA.⁵⁸⁴ These findings are supported by the results of the AWRS discussed above.

The certainty afforded by a longer notice period must be weighed against other matters including the need to protect employees who through ignorance or for some other reason make an agreement that materially disadvantages them and enable unforeseen developments that render a flexibility agreement not only unaccepted to one of the parties but also substantially unfair can be addressed.

The operation of lengthy notice period has significant consequences for employees that are financially worse off under the terms of an IFA than under the relevant modern award of enterprise agreement. In circumstances where the arrangement was not genuinely agreed to or fails to meet the BOOT, the employer continues to reap the benefits of having made an unlawful agreement even after the employee becomes aware they are being disadvantaged and takes steps to terminate the arrangement.

The ACTU believes that 4 weeks is more than enough time for employers to make whatever changes are necessary to revert back to the terms and conditions set by the relevant modern award and/or enterprise agreement.

The notice provisions that apply to termination provide an interesting point of comparison. The minimum notice period that an employer is required to give in order to terminate an employee's employment varies from 1-4 weeks according to years of service. The inconvenience incurred by businesses when an IFA is terminated can hardly be any greater than the hardship experienced by employees that lose their job.

If IFAs were being used to provide employees with individualised flexibilities the uncertainty caused by the decision of one or more employees to terminate their arrangement and revert back to the status quo would be less significant. It is the fact that IFAs are being used by businesses to establish uniform work arrangements that explains why unilateral termination is such a concern to employer organisations. A large proportion IFAs are 'template' documents developed by workplace relations consultations, law firms or employer organisations or documents offered to groups of staff within a single enterprise, which are not responsive to the needs of particular individuals. This belies employer claims that IFAs are used to tailor unique employment conditions that accommodate the needs and wants of individual employees.

Template IFAs are systematically used by employers to reduce staffing costs (ie wages, overtime,

⁵⁸¹ Award Flexibility Decision, [2013] FWCFB 2170.

⁵⁸² Ibid, [171].

⁵⁸³ General Manager's Report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012, (2012).

⁵⁸⁴ Table 4.2.

allowances etc) and/or implement identical arrangements across groups of employees without having to negotiate a collective agreement. The fact that IFAs are not subject to formal approval processes makes them an appealing alternative to enterprise agreements and enables businesses to drive down wages and condition by targeting vulnerable employees one-on-one.

It is also clear that standardised IFAs are used in some workplaces to formalise existing work practices or policies and provide information about the terms and conditions of employment offered to employees of the business.

Tailoring of award/enterprise conditions to meet the needs of individual employees is extremely rare. In our experience, it is restricted to senior employees who are paid well in excess of the applicable award/agreement and are in an unusually strong bargaining position.

The General Manager' report contains an analysis of the extent to which IFAs are agreed to and the content of those arrangements. Sources used to inform the report include:

- a survey of 2650 employers across a range of locations, employer sizes and industries;
- a survey of 4500 employees from across Australia, sources from a range of industries;
- qualitative analysis of IFAs submitted to the general manager by employers; and
- submissions from interested parties.

The responses provided by survey participants confirm that employers are generally better informed than employees about the provisions of the FW Act with respect to agreement making and are well placed to control the agreement making process:

- 54% of all employers are 'aware that employers can have an IFA with an employee that varies the effect of the modern award or an enterprise agreement that applies to an employee', compared with 35% of employees.⁵⁸⁵
- Employers reported that most reviews, modifications and terminations of IFAs were employer-initiated (around 70%).⁵⁸⁶
- The drafting process is largely controlled by employers. 85-88% of employers are involved in drafting the content of IFAs compared with approximately 36-38% of employees.⁵⁸⁷
- Multiple IFA employers also commonly receive assistance from employer associations and external consultants, particularly in relation to IFAs that vary the effect of a modern award.⁵⁸⁸

More significantly, the research reveals that IFAs are being used in a manner that is expressly prohibited by the FW Act:

- The majority of multiple IFA employers (54%) admitted that they required all employees to sign IFA documentation to either commence or continue their employment.⁵⁸⁹
- For employers that had made an IFA with only one employee, around 35% indicated they had required an employee to sign the IFA to commence or continue employment.⁵⁹⁰ Such conduct

⁵⁸⁵ Figure 4.1, Table 4.1.

⁵⁸⁶ Table 4.4, Table 4.7

⁵⁸⁷ Table 4.3, Table 4.6.

⁵⁸⁸ Table 4.6.

⁵⁸⁹ Table 4.6.

⁵⁹⁰ Table 4.3.

is inconsistent with the requirement that the employer and individual employee must have 'genuinely agreed' to make the IFA, without coercion or duress.

- Participants in the employer survey were asked if they had assessed whether their employees were better off overall as a result of their IFA. The results show that a significant proportion of employers made no effort to comply with their legal obligation to do so. 18% of single IFA employers and 27% of multi-IFA employers reported that they did not assess whether the employee was better off overall.⁵⁹¹
- Participants in the employee survey were asked whether they considered themselves to be better off overall as a result of the IFA. Not surprisingly, a significant proportion (17%) reported that they did not consider themselves to be better off overall.⁵⁹²

These findings demonstrate that existing safeguards on the use of IFAs are relatively ineffectual as a means of protecting employees. The absence of external scrutiny in relation to the content of IFAs and the process of making them enables employers to pressure employees to accept substandard IFAs that reduce wages and conditions.

Issues Paper 3 makes the following observations regarding compliance with the BOOT:

Research by the FWC found that, in practice, there seems to have been only partial compliance with this requirement, with around one third of employers requiring an employee to sign an IFA to commence or continue employment (ibid 2012, pp. 41–48). Nevertheless, this practice did not necessarily disadvantage employees, as 83 per cent of employees on IFA said it made them better off (ibid 2012, p. 71).⁵⁹³

We assume that the PC did not intend to imply that it is the practice of compelling employees to sign an IFA that makes employees better off overall. While it is plausible that an employee might be compelled to sign an IFA that makes them better off overall, it is important to recognise that forcing employees to sign IFAs is completely inconsistent with the notion of freely negotiated and individualised arrangements.

Further, a non-compliance rate of 17% in relation to the BOOT should not be dismissed so readily, especially given that the level of disadvantage/financial loss incurred by individual employees is likely to be significant. Given that award dependent employees are already low paid, any reduction in terms and conditions of employment that results in the employee being worse off overall will cause severe hardship.

The ACTU believes that the findings contained in the report tend to understate the extent to which IFAs are being utilised to exploit employees. For obvious reasons, employers that are aware of their legal obligations may be inclined to disguise non-compliance. On the other hand, it is likely that a significant number of employees surveyed may be unaware that an IFA removes entitlements contained in a modern award or enterprise agreement.

Since the FW Act was enacted, there have been numerous reports of IFAs that clearly disadvantage employees compared to the relevant award or enterprise agreement.

⁵⁹¹ Table 5.5, Table 5.7.

⁵⁹² p 71.

⁵⁹³ p8.

For example in 2011, United Voice sued the Spotless Group over two suspect IFAs. Under one of the arrangements, employees agreed that if other workers were absent on sick leave, Spotless could contact them and direct them to work the shift, waiving their rights to the usual 7 days' notice and overtime rates of pay. They received no compensation, except 'the opportunity to earn a higher income'. The matter was settled and the union is party to a Deed of Release that prohibits discussion of the substance of the Deed or the circumstances surrounding the settlement. Nevertheless, the statement of claim outlining the allegations against Spotless is a matter of public record and provides evidence of the kinds of IFAs that exist.

Another specific example relates to offers made by Medibank Private to its employees to work from home on the condition that the employee agrees to forgo the entitlement to overtime rates under the terms of the relevant collective agreement.

As already noted elsewhere, it is also fairly common for employees with caring responsibilities who seek to exercise the right to request flexible working arrangements pursuant to section 65 of the FW Act to be required to sign an IFA that reduces wages and conditions of employment in order to obtain flexible working conditions.

Such arrangements clearly do not pass the Better Off Overall Test (**BOOT**). Yet employer organisations frequently assert that non-monetary entitlements such as arrangements that provide 'the opportunity to earn extra income' or that otherwise 'meet employee needs' can be used to offset the loss of financial entitlements such as penalties and loadings.

Anecdotal evidence suggests that the use of IFAs to remove award entitlements is prevalent in low-paid industries such as the cleaning, aged care, and disability sectors where workers are highly dependent on the award safety net. The ACTU understands that in these industries IFAs are commonly used to alter penalty rates, overtime pay and allowances or modify award provisions that regulate hours of work, for example by removing minimum engagement provisions or increasing the maximum number of days that an employee can work consecutively without payment of overtime.⁵⁹⁴

There have also been a number of high profile cases which demonstrate that unfair practices persist. An audit conducted by the Fair Work Ombudsman in 2011 to assess the level of award compliance in the Queensland Pharmacy Industry confirmed the use of what appeared to be a 'standardised' or template-driven IFAs being used by a small number of employers. As the report notes, the template approach raises questions as to whether the IFAs were produced following genuine negotiation.⁵⁹⁵ Moreover, such an approach does not demonstrate an appetite by the employer for flexibility, but rather a preference for all employees to be on identical conditions of employment chosen by the employer.

Further, there has been at least one prosecution under the general protections provisions of the Act that involved an IFA. The general protections provisions of the Act prohibit employers exerting undue influence or undue pressure on an employee in relation to a decision to make or terminate an IFA. Civil penalty provisions also apply to employers that coerce an employee to exercise a workplace right in a particular way or take adverse action against an employee because of a workplace right.

⁵⁹⁴ These observations are based on an analysis of IFAs compiled by United Voice.

⁵⁹⁵ Fair Work Ombudsman, 'Qld - Pharmacy Industry Audit Program Report 2011', (2012) 11.

In *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd*⁵⁹⁶, six employees were asked to sign IFAs that removed penalty rates for overtime, weekend and public holiday work. Five of the six employees signed the agreement. One of the employees signed only after the director threatened that there would be no work for him if he did not sign. Another employee had his shifts cut following his refusal to sign. The company also admitted that the information provided to employees failed to comply with the Act. The court fined the operators of the company a total of \$30 000.

While the penalties awarded in this case may have discouraged some employers from using heavy-handed tactics to persuade employees to accept an IFA, the ACTU remains concerned about the risk of coercion in non-unionised, award-dependent workplaces particularly with respect to vulnerable workers.

Sophisticated employers that wish to avoid their legal obligations tend to avoid using template agreements and apply pressure in more subtle ways for example by treating employees that refuse an IFA less favourably or informing other employees that the refusal is causing financial difficulties for the business.

The process by which an agreement is reached is generally not subject to external scrutiny and consequently all but the most egregious breaches remain undetected.

It is also the case that in some industries employers are using IFAs as an inducement to employees to resign their membership of unions and/or refusing to make flexibility arrangements with employees who are members on a union, in contravention of the general protections provisions.⁵⁹⁷

Lessons learned?

The 2012 Review Panel recommended that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.

The ACTU is strongly opposed to non-monetary entitlements being used to offset monetary entitlements. The BOOT is a fundamental safeguard that ensures employees have access to genuine flexibility without having to accept a reduction in wages and conditions.

The current legal authorities support the proposition that a purported IFA which contains a preferred hours arrangement (enabling an employee to trade off monetary benefits such as penalties and overtime in exchange for the flexibility to work their 'preferred hours) does not result in an individual employee being better off overall.⁵⁹⁸ In this respect the advice contained in the FWO's Best Practice Guide is incorrect.⁵⁹⁹

⁵⁹⁶ [2011] FCA 1064.

⁵⁹⁷ *Arkwood Organic Recycling Pty Ltd T/A Arkwood Organic Recycling v Transport Workers Union of Australia, Union of Employees* [2012] FWA 8916.

⁵⁹⁸ [2013] FWCFB 2170 [136]

⁵⁹⁹ FWO, Best Practice Guide: Use of individual flexibility arrangements, available at <http://www.fairwork.gov.au/about-us/policies-and-guides/best-practice-guides/use-of-individual-flexibility-arrangements>.

If the Panel's recommendation is adopted unfair arrangements that have been the subject of successful prosecution or out-of-court settlements under the existing provisions of the FW Act would become permissible.

Non-monetary benefits are difficult to quantify even on an individual basis and consequently the requirement that such benefits must be relatively insignificant and proportionate to monetary benefits foregone is unlikely to be effective in stopping employers pressuring employees to accept unfair individual arrangements that substantially reduce wages and conditions of employment.

Further, employers that can accommodate a request for flexible work arrangements without incurring any additional costs would be able to use their superior bargaining position to insist on the removal of monetary entitlements under the terms of an IFA. Examples of IFAs that would be permissible if non-monetary benefits are taken into account include arrangements that:

- Enable employees to work from home in exchange for a reduced rate of pay;
- Enable employees to vary their start and finish times if they agree to forgo overtime payments
- Enable employees to take annual leave in advance if they forgo payment of shift loadings on annual;
- Provide employees with access to a car park or meal voucher in exchange for the suspension of applicable allowances and penalties; and
- Provide part-time employees with a guaranteed number of hours per week in exchange for the suspension of minimum daily engagement provisions.

We anticipate that employer organisations will seek to justify the inclusion of non-monetary benefits in assessing the BOOT by reference to arrangements that appear reasonable in the sense that they do not involve significant financial loss for the employee. Employers will conveniently ignore the fact that qualifying the operation of the BOOT provides enormous scope for abuse. The use of AWAs and to a lesser extent IFAs, demonstrates that if the BOOT is modified to allow non-monetary benefits to be taken into account, employers will adopt practices that drive down wages and conditions and undermine collective bargaining.

The 2012 Review Panel also recommended that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s. 145(3) or s. 204(3) where an employer has complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.

The Fair Work Amendment Bill contains amendments that are loosely based on the Panel's recommendation. The Bill:

- requires IFAs to include a statement by the employee setting out why he or she believes that the arrangement meets his or her genuine needs and leaves his or her better off overall at the time the agreement to the arrangement; and
- provides a defence to an alleged contravention of a flexibility term where the employer reasonably believed that the requirements of the term were complied with at the time of agreeing to a particular IFA.

The ACTU is strongly opposed to these amendments.

Providing employers with a defence to prosecution clearly undermines the protection afforded to employees by the BOOT, particularly if the content of agreements is not subject to any of form of scrutiny at the time the agreement is made.

Currently, if an IFA is defective, the IFA remains on foot (until withdrawn from) but the FW Act deems that the flexibility term has been contravened.⁶⁰⁰ Prosecutions for breach of the flexibility clause can result in penalties being award against the employer and compensation being paid to workers, where the IFA did not in fact result in the worker being “better off overall”.⁶⁰¹

Under the proposed amendments, a successful defence would result in no exposure to penalty and no requirement to remedy any underpayment. Consequently employees that are compelled to accept an IFA that reduces their terms and conditions of employment, would have no resource under the law to recover payments lost as a result of entering into the IFA.

The proposed “genuine needs” statement is designed to work in tandem with a defence provision. The genuine needs statement is a defence mechanism for an employer which ensures that an employer has no obligation to ensure that an employee entering into an IFA has given informed consent to this course of action. There is no protection offered to an employee through the genuine needs statement, rather the genuine needs statement has the opposite effect, denying an employee the ability to assert that they were not fully informed of what they were agreeing to.

The requirement that IFAs include a testimonial from the worker about how it meets their needs and leaves them better off overall would enable employers to rely on that testimonial to demonstrate their “reasonable belief” for the purposes of the defence. In other words employers would be able to knowingly breach the provisions of the FW Act with impunity.

Costs and benefits

From an employee perspective there is very little benefit to be gained from entering into an IFA. It is open to employees to negotiate access to additional flexibilities either through an informal over-award arrangement or common law contract provided that the arrangement does not undermine the terms and conditions contained in the relevant enterprise agreement or modern award.

The key difference between these arrangements and IFAs is that the operation of the BOOT enables IFAs to include terms that are less beneficial provided that the employee is financially better off overall where as other arrangements must not derogate in any respect from specific entitlements contained in a modern award of enterprise agreement. For example it is possible to make an IFA that permits the employer to pay a higher flat rate of pay than the award rate which incorporates allowances, penalty rates and overtime provided that the employee is ultimately better off overall. To the extent that IFAs enable employees to make arrangements of this nature (that involve trading off minimum terms and conditions of employment) the benefit to employees is likely to be minimal.

Moreover, in practice, the capacity of employees to negotiate individual flexibility arrangements

⁶⁰⁰S145(2)(3)

⁶⁰¹ See Part 401 of the FW Act.

that leave them better off overall is limited. Many employers are either unwilling to accommodate requests for flexible hours and/or require that their employees sacrifice job security in exchange for the desired flexible. For example, it is common practice among retail employers to offer flexible working arrangements to employees on the condition that they move from permanent to casual employment.

We are not aware of any empirical research focusing on the extent to which individual agreements (as opposed to other forms of industrial regulation) actually lead to more flexible work arrangements. However, in our experience employers are generally unwilling to provide employees with employee-focused flexible work arrangements (such as flexible hours, working from home, time off in lieu, job sharing and part-time work arrangements) unless compelled to do so either through an award or collective agreement, even where the proposed flexibility could be implemented on a cost neutral basis.

Not surprisingly this reluctance on the part of employers has an impact on the extent to which employees seek to negotiate individual flexibilities and the content of those flexibilities sought. The 2012 Australian Work Life Survey Index (AWALI) survey reveals that a quarter of all workers and a third of full time workers are not content with current arrangements but have not requested flexibility. Many of these 'discontent non-requesters' say that flexibility is simply not available to them (either because they are not convinced their employer will allow it, or their job does not allow it, or flexibility is simply not possible).⁶⁰²

The flexibilities sought by employers typically relate to cost-cutting measures and/or an increased managerial control for example in relation to rostering.

Access to flexible work practices that benefit employees (such as banking of hours, flexible start and finish times, job sharing, arrangement for employees to change from full time to part-time employment and working from home) are much more likely to be obtained on a collective basis either through changes to the award safety net or collective bargaining. Indeed the prevalence of these work practices is a testament to Australian Unions and the capacity to improve living standards through collective action.

The enforcements arrangements in relation to IFAs are not satisfactory. As noted above, there is no obligation on the negotiating parties to inform anyone that an IFA has been made and consequently there is no way of systematically identifying unlawful IFAs at the negotiation stage.

In order to ensure that IFAs are not being abused it is necessary for those with enforcement powers to conduct large-scale audits to identify employers/employees that have an IFA in place and obtain a copy of the arrangement. This is a time-consuming and costly exercise regardless of whether the task is performed by the FWO or by union officials exercising entry rights pursuant to the FW Act. It is also an inefficient means of ensuring that IFAs are made in accordance with the legislative requirements as it is necessary to repeat the process at regular intervals in order to deter non-compliance.

The 2012 Review Panel recommended that the FW Act be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by

⁶⁰² Skinner N, Hutchinson C, Pocock B (2012), *The Big Squeeze: Work, home and care in 2012*, AWALI (2012), Center for work and life, University of South Australia.

electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.

In our view, notification alone is unlikely to achieve a satisfactory level of compliance. It is necessary for the content of proposed IFAs to be scrutinised and for this reason, we propose that parties should be required to obtain compulsory pre-approval advice from a relevant union or alternatively, where there is no union that is eligible to represent the employee and willing to provide such advice, an independent authority, such as the FWO.

Can individual statutory arrangements ever work?

The imbalance of power that exists in the employee/employer relationship necessitates industrial regulation that protects employees from exploitation and provides access to decent work. This requires minimum standards and collectivism. We doubt that it is possible to completely compensate for a lack of collectivism through higher standards. If one was to venture down this path, the protections that would need to be placed in order to enable employees to negotiate bespoke agreements in the absence of collectivism would at the very least include:

- a non-contestable safety net that establishes appropriate minimum standards that apply to all employees;
- a threshold test for agreements that ensures individual arrangements do not derogate in any respect from the conditions of employment that would otherwise apply to the employee concerned under the terms of a modern award or enterprise agreement OR otherwise undermine the safety net and fundamental right to collective bargaining; and
- genuine consent evidenced by compulsory pre-approval advice from a relevant union or alternatively, where there is no union that is eligible to represent the employee and willing to provide such advice, an independent authority.

In other words, in the absence of an iron clad and enforceable guarantee that the safety net in all respects remains in place and is improved upon, there is no incentive for employees to freely and genuinely agree to an individual arrangement. If experience is anything to go by, these guarantees would make such arrangements highly unattractive to the types of employers who historically have shown the greatest enthusiasm for them.

The 2012 Review Panel received a large number of submissions from employer organisations claiming that the use of IFAs is low because, in their view, IFAs do not provide meaningful flexibility. The Panel's Report notes that:

- Many employers and employer organisations submitted that IFAs should be able to be offered as a condition of employment.⁶⁰³
- Some employers also submitted that the model clause should permit flexibility on a greater number of matters⁶⁰⁴, or all matters pertaining to the employment relationship⁶⁰⁵ or changes to the NES.⁶⁰⁶

⁶⁰³ Ai Group, pp. 17, 68; AMMA, p. 10; AHA, 4.13.1; BCA, p. 48; CCIWA, pp. 14, 63; CAI, pp. 9–10; NFF, p. 30; PIAA, p. 5; Rio, p. 15; VECCI supplementary, p. 18.

⁶⁰⁴ MPMCANSW, point 7; NFF, p. 30; VECCI supplementary, p. 18; Ai Group, pp. 17, 68.

⁶⁰⁵ AHA, p. 28; BIG, pp. 7, 31–34; CCIWA, pp. 14, 64; MBA, pp. 68–70.

⁶⁰⁶ CCIWA, pp. 13, 63.

- The capacity for an employee to unilaterally terminate an IFA with 28 days notice was cited by many as a key disincentive to use IFAs.⁶⁰⁷
- Another key issue employers identified with IFAs was the lack of certainty as to whether they pass the better off overall test (BOOT).⁶⁰⁸ Some submitted that the model term lacks clarity about what can be varied⁶⁰⁹, and some argued that the application of the BOOT was an unnecessary restriction on IFAs.⁶¹⁰
- Finally, some employer submissions suggested that it should be permissible to use IFAs to implement identical arrangements across a group of employees.

The objections raised by employers in relation to IFAs relate to safeguards that are designed to prevent employers using IFAs to undermine the safety net and enable the employer and employee to freely negotiate the terms of an agreement to their mutual advantage. The only existing safeguard on IFA's that employer organisations have not objected to is the requirement that an IFA must be in writing and be signed by the employer, the employee and his or her legal guardian if the employee is under 18.

Clearly there are some employers that are reluctant to use IFAs unless it is possible to exploit the arrangement to undercut minimum terms and conditions of employment. As long as the purpose of an IFA is to enable the parties to enter into an arrangement that genuinely accommodates individual's needs and circumstances and ensure the employee remain better off overall, employer organisations will complain they are inflexible.

In 2015 the FWC published a Report on the Australia Workplace Relations Study (AWRS), a Australia-wide statistical dataset linking employer data with employee data. The Study has been designed to be representative of employers and employees covered by the FW Act. Among other things, the Report contains information about employer's reasons for not entering into an IFA.

The results of the survey confirm that there are a variety of factors that explain why employers do not use IFAs. The most commonly cited reasons are that employers prefer to use informal or undocumented arrangements instead (43.2%) and that no employees wanted a flexible work practice (39.9%).

Importantly, only a very small proportion of employers indicated that IFAs do not provide sufficient flexibility (2.6%), are not reliable long term (0.6%) or are concerned about the risk of penalties if used incorrectly (0.5%). Indeed, nearly a quarter (20.8) of employers that hadn't used an IFA believe there is sufficient flexibility in either award or enterprise provisions and 6.4% prefer to use common law contracts instead.

These findings suggest that one of the major reasons why IFAs are not being utilized is that there is simply no need for them. There is sufficient flexibility in other industrial instruments to enable businesses to operate effectively and tailor working conditions to individual employees in a way that does not detract from the safety net.

The survey results also indicate that a more significant impediment to the use of IFAs than the

⁶⁰⁷ AHA, 4.13.1. See also BHP, p. 5; CAI, pp.10–11; NFF, p. 30; WA Govt, p.7.

⁶⁰⁸ ACCI, p. 12.

⁶⁰⁹ CAI, pp. 5–6; MPMCANSW, point 7.

⁶¹⁰ NRA, p. 7; NFF, p. 30; PIA, p. 5.

existing safeguards is that 5.3% of employers are either unaware that IFA provisions exist or don't know understand how to use them.

The FW Act recognises that the most effective way of protecting employees from exploitative practices and ensuring access to decent work is to provide a guaranteed safety net of fair, relevant and enforceable minimum terms and prioritise to collective bargaining. The history of industrial regulation, both in Australia and internationally, demonstrates that a greater reliance on individual bargaining benefits employers over employees and, in the absence of adequate safeguards, results in workers being subjected to inhumane working conditions and living in poverty. For these reasons, unions are vehemently opposed to so-called reforms that promote individual bargaining at the expense of minimum standards, freedom of association and the right to collective bargaining.

The ACTU's position in relation to IFAs is that they serve no useful purpose. There is ample flexibility within the existing award safety net and scope to alter minimum terms and conditions of employment where necessary in accordance with the modern awards objective. If business requires even greater 'flexibility' this is something that should be negotiated collectively with the workforce and their union, to ensure that workers' interests are properly accommodated.

We recognise that common law contracts enable individuals to formalise arrangements that are in excess of award/agreement conditions and provide access to a broader range of remedies for breach. However, for the vast majority of employees, collective bargaining is a more effective means of securing fair wages and conditions.

What the umpire said

When the Modern Award flexibility provision was being developed, the AIRC gave consideration to each of the matters that may be included in a modern award and determined that the operation of IFAs should be restricted to the following matters:

- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

With respect to minimum wages, the AIRC noted that section 576J(1)(f) of the FW Act enables awards to include terms award annual wage and salary arrangements, including alternatives to the separate payment of wages or salaries and other monetary entitlements and concluded that:

In light of the fact that separate provision is made for flexibility in relation to the way in which wages, salaries and other monetary entitlements may be paid it is unnecessary to include terms about minimum wages in the model clause. Indeed it may be inappropriate to do so. It is difficult to see how the trading-off of minimum wages against other benefits could meet a genuine need for individual flexibility without at the same time weakening the function of the award as a safety net in an unacceptable way. There does not appear to be any sound basis for including award terms about minimum wages within the operation of the model clause. It follows also that award terms made under s.576J(1)(f), which is itself a flexibility provision,

should not be included in the operation of the model flexibility clause either. We should emphasize that by excluding minimum wages from the model clause we obviously do not intend to limit arrangements which increase wages. Our concern is to guard against minimum wages being traded off.⁶¹¹

For similar reasons the AIRC concluded that it was more appropriate to provide flexibility in relation to the following matters through the modern award safety net than include such terms within the scope of IFAs:

- Type of employment
- NES entitlements
- Superannuation.

The AIRC's view in relation to procedures for consultation, representation and dispute resolution was that to include such terms in the operation of the model clause would be likely to add complexity and unnecessary regulation rather than increase flexibility.

During the 2 year review of modern awards applications were made by a number of organisations to vary the scope of the model flexibility term. The Commission was not persuaded to make the proposed variations, noting that those organisations were unable to identify any particular issues which have arisen from the current scope of the model term save in respect of frequency of payment and minimum engagement periods.⁶¹²

The conclusion reached by the Full Bench in relation to minimum engagement periods recognises that some award entitlements are simply not amendable to variation in a manner that benefits employees and that including such provisions within the scope of an IFA is likely to result in employees being disadvantaged overall:

We are not persuaded that it is appropriate to include 'minimum engagement periods' within the scope of the model flexibility term. As we have noted these provisions relate to minimum wages and for many employees are an important aspect of the modern award safety net... Any variation to minimum engagement periods in modern awards should only be by application to vary the relevant modern award or by enterprise agreement. This will ensure that the variation is subject to appropriate scrutiny. It is not appropriate to permit such variations by IFAs, which are effectively self-executing. In our view, the inclusion of such terms within the scope of the model flexibility term would not be consistent with the modern awards objective.⁶¹³

For similar reasons, the FW Commission determined that frequency of payment of wages (ie weekly, monthly or fortnightly), was a matter that should be determined on an award-by-award basis having regard to the relevant award history and circumstances pertaining to each award rather than a matter for individual negotiation.

The ACTU strongly supports the FW Commission's approach. Under the FW Act, the FW Commission is tasked with responsibility for maintaining a fair and relevant safety net that takes into account the needs of employees as well as employers. The content of modern awards is

⁶¹¹ [2008] AIRCFB 550

⁶¹² [2013]FWCFB 2170

⁶¹³ Ibid, [141].

tailored to meet the needs of particular industries and provides flexibility in relation to a wide range of matters (as discussed above). The provision of ‘new’ flexibilities that are necessary for employers/employees in particular industries or occupations can be secured through changes to award provisions. The scope of IFAs made under the terms of modern award should, therefore, be limited to those matters that can conceivably be varied on an individual basis without undermining the modern award objective of providing a fair and relevant safety net.

The FW Act allows the content of flexibility terms in enterprise agreements to be either narrower or broader in scope than the model flexibility term.

Employees and unions engaged in bargaining commonly seek to restrict the matters that may be subject to an IFA, not because they wish to limit individual flexibility, but in order to prevent employers targeting vulnerable employees and utilising IFAs to undermine collective conditions.

These restrictions do not prevent employers and employees negotiating individualised salary packages or conditions of employment that are superior to those contained in an enterprise agreement or award through informal or contractual arrangements.

The sources of workers’ pay and conditions

According to the most recent ABS Employee, Earnings and Hours survey, there were 1 860 700 employees paid exactly at an award rate in May 2014, representing 18.8% of all employees. 41.1% of employees were paid according to a collective agreement and 36.6% paid according to an individual arrangement, with the remainder (3.4%) being OMIEs.

Table 21 shows the proportion of employees on different pay setting arrangements by gender. Men are more likely than women to have their pay set by an individual arrangement as opposed to reliant on an award or agreement.

	Award only		Collective agreement		Individual arrangement		Owner manager of incorporated enterprise		All methods of setting pay	
	(000's)	(%)	(000's)	(%)	(000's)	(%)	(000's)	(%)	(000's)	(%)
Males	789.4	42.4%	1,830.4	45.0%	2,037.4	56.2%	240.0	0.7	4,897.2	49%
Females	1,071.3	57.6%	2,239.7	55.0%	1,590.3	43.8%	100.3	0.3	5,001.7	51%
Total	1,860.7	100.0%	4,070.1	100.0%	3,627.7	100.0%	340.3	1.0	9,898.9	100%

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

Table 22 shows that the occupational groupings with the highest proportion of individual arrangements in place are Clerical/Administrative workers (23%) and Professionals (22%).

	Award only		Collective agreement		Individual arrangement		Owner manager of incorporated enterprise		All methods of setting pay	
	(000's)	(%)	(000's)	(%)	(000's)	(%)	(000's)	(%)	(000's)	(%)
Managers	64.8	3.5%	195.4	4.8%	537.5	14.8%	117.4	34.5%	915.1	9.2%
Professionals	143.4	7.7%	1049.8	25.8%	806.8	22.2%	73.5	21.6%	2073.6	20.9%
Technicians and trades workers	256.5	13.8%	347	8.5%	516.6	14.2%	55.9	16.4%	1176	11.9%
Community and personal service workers	394.2	21.2%	577.3	14.2%	172.9	4.8%	7.5	2.2%	1151.9	11.6%
Clerical and administrative workers	208	11.2%	604.2	14.8%	835	23.0%	41.8	12.3%	1689	17.1%
Sales workers	384.7	20.7%	569.7	14.0%	326	9.0%	15.3	4.5%	1295.7	13.1%
Machinery operators and drivers	101.9	5.5%	300.6	7.4%	202.3	5.6%	15.3	4.5%	620	6.3%
Labourers	307.3	16.5%	426.2	10.5%	230.7	6.4%	13.5	4.0%	977.6	9.9%
Total	1860.7	100.0%	4070.1	100.0%	3627.7	100.0%	340.3	100.0%	9898.9	100.0%

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

Table 23 shows that the prevalence of individual agreements in the Professional, scientific and technical services is significantly higher (15%) than in any other industry.

Table 23: Method of Setting Pay by Occupation

	Award only		Collective agreement		Individual arrangement		Owner manager of incorporated enterprise		All methods of setting pay	
	(000's)	(%)	(000's)	(%)	(000's)	(%)	(000's)	(%)	(000's)	(%)
Mining	1.3	0.1%	56.8	1.4%	110.1	3.0%	0.9	0.3%	169.1	1.7%
Manufacturing	109.9	5.9%	230.4	5.7%	335.0	9.2%	23.3	6.8%	698.6	7.1%
Electricity, gas, water and waste services	7.9	0.4%	69.3	1.7%	34.8	1.0%	2.1	0.6%	114.1	1.2%
Construction	93.8	5.0%	179.7	4.4%	338.0	9.3%	74.2	21.8%	685.7	6.9%
Wholesale trade	53.2	2.9%	52.0	1.3%	317.3	8.7%	23.1	6.8%	445.5	4.5%
Retail trade	320.3	17.2%	469.5	11.5%	307.3	8.5%	25.2	7.4%	1,122.3	11.3%
Accommodation and food services	316.9	17.0%	236.9	5.8%	166.2	4.6%	19.7	5.8%	739.7	7.5%
Transport, postal and warehousing	48	2.6%	229.7	5.6%	141.5	3.9%	19.5	5.7%	438.6	4.4%
Information media and telecommunications	8.3	0.4%	57.5	1.4%	91.3	2.5%	3.9	1.1%	161.0	1.6%
Finance and insurance services	20.1	1.1%	166.3	4.1%	202.9	5.6%	11.6	3.4%	400.9	4.0%
Rental, hiring and real estate services	39.2	2.1%	17.6	0.4%	109.7	3.0%	11.2	3.3%	177.7	1.8%
Professional, scientific and technical services	76.9	4.1%	87.4	2.1%	553.8	15.3%	59.3	17.4%	777.3	7.9%
Administrative and support services	227.9	12.2%	85.1	2.1%	285.4	7.9%	13.4	3.9%	611.8	6.2%
Public administration and safety	79.7	4.3%	497.5	12.2%	43.6	1.2%	1.4	0.4%	622.3	6.3%
Education and training	47.6	2.6%	788.5	19.4%	98.2	2.7%	3.8	1.1%	938.0	9.5%
Health care and social assistance	281.4	15.1%	730.7	18.0%	228.8	6.3%	21.6	6.3%	1,262.4	12.8%
Arts and recreation services	37.6	2.0%	69.7	1.7%	60.5	1.7%	3.1	0.9%	170.8	1.7%
Other services	91	4.9%	45.6	1.1%	203.5	5.6%	23.0	6.8%	363.1	3.7%
Total	1860.7	100.0%	4,070.1	100.0%	3,627.7	100.0%	340.3	100.0%	9,898.9	100.0%

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

The ABS categories do not distinguish between employees on individual arrangements that use awards as the basis for setting pay and those paid over-award.

As discussed elsewhere in this submission, the relationship between modern awards and other methods of setting pay is complicated. The aggregate data tends to conceal the extent to which individual arrangements replicate terms and conditions contained in modern awards. Indeed

research conducted by FWC confirms that for many employees, there is very little benefit (in terms of pay) to being on an individual arrangement.⁶¹⁴

Further, it is not possible to draw any conclusions about the extent to which the method of setting pay explains differences in employee earnings without controlling for other variables such as the number of hours worked, the employees skills, qualifications and experience and the industry in which the business operates.

⁶¹⁴ Buchanan J, Bretherton T, Frino B, Jakubauskas M, Schutz J, Verma G and Yu S (2013) *Minimum wages and their role in the process and incentives to bargain*, Research Report 7/2013, Fair Work Commission, December, Melbourne,

18 Employment Protections: (1) Unfair Dismissal

The purpose of the unfair dismissal ('UD') laws as currently found in the FW Act can be explained by reference to both international and domestically derived purposes.

The original introduction of Commonwealth laws conferring UD protections upon private sector employees relied heavily on Australia's international labour standard obligations as providing both a normative rationale for UD legislation, as well as a workable constitutional underpinning.⁶¹⁵ Australia's original UD and unlawful dismissal laws were enacted in large part to further Australia's obligations under the *Termination of Employment Convention 1982*. However, as a result of the High Court judgment in *Victoria v the Commonwealth*,⁶¹⁶ the constitutional basis for the early tranche of UD laws was significantly curtailed, leading to a narrowing of the categories of employees who were subject to the UD laws.

Nonetheless, adherence to international labour obligations, including the *Termination of Employment Convention 1982*, remains an important part of the FW Act provisions dealing with UD. Therefore, the conformity of the UD provisions with the overarching purpose of ILO Conventions, remains a valid basis upon which to judge the success or otherwise of these laws.

As to the domestically derived purposes, the Explanatory Memorandum ('EM') accompanying the *Fair Work Bill 2008* makes these plain. Amongst other things, the EM claimed the following standards were met in the new statutory framework:

"It provides genuine unfair dismissal protections for employees with a quick, flexible and informal process, an emphasis on re-instatement and a Fair Dismissal Code for small business."⁶¹⁷

And:

"unfair dismissal laws which balance the rights of the employees to be protected from unfair dismissal with the need for employers' particularly small business, to fairly and efficiently manage their workforce; ..."⁶¹⁸

These aspirations are reflected in the wording of the Objects of Part 3-2 of the FW Act expressed in s381 of the FW Act. Amongst the amendments introduced by the FW Act to achieve these objectives were the following:

⁶¹⁵ Riley, Joellen *Termination of Employment Digest – Country Profile – Australia* International Labour Organisation 2006.

⁶¹⁶ [1996] 187 CLR 416

⁶¹⁷ Explanatory Memorandum - Fair Work Bill 2009 paragraph 5.

⁶¹⁸ Ibid paragraph 13.

- Removal of the cap restricting access to the UD jurisdiction to employees of enterprises of 100 or more employees;
- Providing protection to casual employees provided they meet the test of being employed on a regular and systematic basis.
- A qualifying period of 12 months for small business employees and 6 months for all other employees;
- Implementation of a high income cap which would exclude high income earners, unless their employment was regulated by an award or agreement;
- Introduction of a Small Business Fair Dismissal Code to assist small business in dealing with the termination of an employee.⁶¹⁹

Underlying this formal legal framework is the human reality that the UD laws are intended to regulate. It has long been observed that an individual's job and workplace relationships are amongst the most important elements in his or her life, ranking only behind the closest personal family relationships.⁶²⁰ Work provides dignity, meaning and a sense of identity to employees, and conversely, unemployment can lead to depression, shame and social exclusion.⁶²¹ It is not surprising therefore, that termination of employment, particularly if felt by the employee to be unfair, arbitrary or capricious can have catastrophic effects on individuals and their families.

This is why an effective and equitable unfair dismissal regime is essential to a modern, advanced democracy such as Australia. In the last 30 years, Australia has moved beyond the notion that it is an employer's prerogative to hire and fire at will. Few would now disagree with the proposition that decisions as important as that to terminate someone's employment should be subject to valid reasons and reasonable standards and procedures and if the decision to terminate does not objectively meet these criteria, then the employee should have an accessible and effective remedy.

The UD provisions of the FW Act substantially meets this objective, but are far from optimal.

First, as we elaborate below, the balance in the UD laws still places too great an emphasis on managerial prerogative over issues of substantive fairness to employees in matters where 'operational reasons' are used to justify termination. In particular, the inability of employees to challenge the selection criteria used by an employer to select him or her for redundancy remains a serious defect in the UD laws.

Second, although reinstatement is intended as the primary remedy⁶²² in cases of unfair dismissal, the number of employees reinstated by the FW Commission is pathetically small compared to the other outcomes identified. For example, in reporting year 2013/2014, the FW Commission reported that, nationwide, only 34 employees out of a total of 1200 applications

⁶¹⁹ Ibid paragraph 197 onward.

⁶²⁰ See for example, Pope John Paul II on the occasion on the 90th Anniversary of the papal encyclical *Rerum Novarum* - "Laborem Exercens" 15 May 1980.

⁶²¹ Australian Bureau of Statistics: 4102.0 - Australian Social Trends, Sep 2011 - *Long Term Unemployment*
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20Sep+2011#HEALTH>

⁶²² *Fair Work Bill 2008* Explanatory Memorandum ('EM') at paragraph 1555.

that proceeded to arbitration were reinstated.⁶²³ Clearly, there is a systemic issue where the primary remedy identified in the FW Act is applied in only a very small minority of cases.

The ACTU believes that there are administrative and case management issues associated with the UD system that are contributing to the low number of reinstatements. These include:

- A telephone conciliation system that has an emphasis in concluding matters quickly and without further proceedings, including any opportunity for face to face conciliation or mediation.
- The sometimes excessive delays in listing matters for arbitration after conciliation has failed.
- The seeming inability of members of the FW Commission to rein in the legalism, costs and complexity in the UD system by too readily allowing legal representation of parties (principally employers) in proceedings.

The ACTU believes that these factors have contributed to large numbers of meritorious UD applications not proceeding to arbitration. We submit that the UD laws can operate more effectively and fairly via a mixture of relatively minor legislative reform and a review of administrative and case management arrangements utilised by the FW Commission.

“Operational reasons”:

The area of legislative reform would involve amendment to s389 of the FW Act to allow an employee to challenge an employer’s decision to terminate for reason of redundancy on the basis that the employer’s criteria for selection of the employee operated unfairly (having regard to the skills and attributes of the employee) or was applied unfairly to the employee (that is, capriciously or without proper justification). Whilst it is true that the general protections in Part 3-1 of the FW Act protect an employee from dismissal (including purported redundancy) on the basis of a number of specifically protected attributes, this protection does not extend to more general categories of unfair behaviour in selecting employees for redundancy.⁶²⁴

In providing a comprehensive defence to the employer on the basis of ‘genuine redundancy’ – the FW Act goes too far in protecting employer prerogatives by precluding examination of the method or application of selection criteria for termination. However, the ACTU is not contending for a radical change to the defence. The right of employers to decide to make a position or job redundant would remain and would reflect the position that existed between the introduction of Commonwealth UD laws in 1994 and the introduction of the first ‘operational reasons’ restriction introduced by the Howard Government in its 2006 ‘Work Choices’ amendments. What would change is that an employee would have the opportunity of challenging the decision to select him or her for redundancy, when it could be clearly shown that the employee was unfairly selected. The possibility of a growth in unmeritorious claims in respect to aspect of the UD laws would be precluded by the historic experience and jurisprudence of the AIRC. As Stewart has observed:

It had never been in fact possible for an employee to complain that a redundancy was unnecessary. The industrial tribunals, both at federal and State level, took the view that

⁶²³ Fair Work Commission website - Arbitrated outcomes <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

⁶²⁴ See for example, *Johnson v Blue Circle Southern Cement* [2010] FWA 5149 at paragraphs [45] to [48].

the employer's judgment as to the needs of their business should be respected: see eg *Quality Bakers v Goulding* (1995) at 333. But what a retrenched employee could do, at least before Work Choices, was challenge the procedure used to reach that decision, in relation to matters such as consultation, or selection for termination.⁶²⁵

Improving Fair Work Commission UD processes:

Statistics produced in the FW Commission 2013/2014 Annual Report reveal that 90% of UD applicants had to wait a period of 61 days from lodgement of the application until the first conciliation hearing⁶²⁶ (which is normally by way of telephone).⁶²⁷ This result compares to the FW Commission's own key performance indicator of 34 days.⁶²⁸

In relation to arbitration, the comparable statistic provided by the FW Commission indicates that 90% of applicants wait 146 days from lodgement to finalisation of the matter by way of arbitration.⁶²⁹ However, anecdotal evidence from ACTU affiliates indicates that in some cases the waiting period from lodgement to finalisation of a claim for arbitration can be far longer – and in some cases significantly more than a year.⁶³⁰

Clearly, the timeliness for processing UD applications is a major issue for affected employees and may be one reason why relatively few applications as a proportion of the total proceed to arbitration. In other words, regardless of whether an employee has the best case in the world, the prospect of waiting six months or more to obtain a ruling on the merits of a case can act as a serious disincentive to going to arbitration. It is difficult to see how the timeliness measures produced by the FW Commission are consistent with the “*quick, flexible and informal process*” described in the EM. This is not to discount the importance of negotiated settlements in appropriate cases and the need for the FW Commission to efficiently marshal its limited resources. Nor is it a criticism of FW Commission personnel. Rather, what is required are a number of practical measures to ensure that employees can fast-track their applications if they so choose and not be overly burdened by technical and legal processes that inherently favour those with the most resources at their disposal.

To this end, the ACTU proposes the following measures to improve the operation of the UD process:

⁶²⁵ Stewart, Andrew, *Stewart's Guide to Employment Law* Fourth Edition, The Federation Press 2013 at page 353.

⁶²⁶ Fair Work Commission *Annual Report* at page 43.

⁶²⁷ *Ibid* at page 40.

⁶²⁸ *Ibid* at page 43.

⁶²⁹ *Ibid*.

⁶³⁰ For example, the CFMEU Mining and Energy Division database of UD cases run to arbitration since the FW Act came into effect shows an average of 10 months from lodgement until final decision. In one case, *Fitzpatrick v Mt Arthur Coal* (U2013/2954) it has been 18 months since the employee lodged his unfair dismissal application and no decision has yet issued. In another matter, *Tate v Premier Coal* (U2014/12365) the employee lodged his UD application on 9 September 2014 and has his scheduled hearing date in May 2015 – more than 8 months after lodgment.

- In circumstances where an applicant is represented by a lawyer or registered organisation⁶³¹ the applicant should be given the choice of having the conciliation conducted by telephone or in person in the FW Commission. Where the applicant opts for face-to-face conciliation, the conciliation conference should be conducted by a member of the FW Commission and not a conciliator, as the latter does not have the power to require the attendance of the parties to the application.

It is the experience of a number of affiliates that face to face conciliation is often more successful in obtaining a negotiated settlement, or at least a practical agreement on how an arbitrated hearing is to proceed.

- As a general rule, telephone conciliators should not express a view (or worse, a purported legal opinion) as to the strength or weakness of an applicant's case in circumstances where the applicant is represented by a registered organisation or lawyer. This is because there should be an operating presumption in such circumstances that the applicant has had the benefit of advice from his or her own representative. Rather, the proper function of the telephone conciliator should be to ascertain whether a settlement is possible and on what terms, and to encourage a settlement where appropriate.

We are concerned about reports from affiliates that on occasions conciliators have provided wrong or unjustifiably pessimistic opinions as to prospects and that this has had the effect of discouraging applicants from pursuing legitimate claims. Whilst the active encouragement to settle matters is welcome, undue pressure on applicants to drop their claims or to settle on unsatisfactory terms is not an appropriate function of the UD conciliation system.

- When a matter has been unable to be resolved at conciliation and before standard directions for a hearing have been issued, there should be convened a short case conference to decide whether the matter proceeds to a formal hearing, or an "arbitration conference". The arbitration conference is an alternative to a formal hearing and ought to be conducted more quickly and informally than a traditional arbitration hearing. The arbitration conference would proceed on an inquisitorial rather than adversarial basis in which the FW Commission member controls the process by asking questions of the respective parties, rather than allowing the case to be framed by the respective advocates. Ideally, the decision of the Commissioner should be issued on the same day as the conference and should only be recorded in transcript. Reasons for decision should be expressed, but should be brief.

The process described is something like that envisaged in the EM and *Forward with Fairness*. The arbitration conference model should be particularly urged upon unrepresented applicants as a cost effective and practical way to have a claim determined quickly. The incentive that the arbitration conference model should offer parties is that the conference would occur within two weeks of the case management conference, wherever practical. Whilst it is noted that one concern about the arbitration conference model is the possibility of appeals being instituted on the basis of a denial of procedural fairness, we believe this concern is overstated, particularly given the new

⁶³¹ Which will be clear from the application form.

procedure adopted by the FW Commission in relation to separate preliminary hearings of unfair dismissal appeals dealing only with the question of permission to appeal.

- Related to the above measure, the FW Commission should strictly enforce the presumption against legal representation in matters before the FW Commission generally, but in UD proceedings in particular. The increasing legalism of the UD system has the effect of increasing the costs upon represented applicants (or their organisations) and also results in a serious imbalance in situations where only one party is represented. One way to address this issue would be to deny legal representation to both parties, where one party opts for an arbitration conference rather than a hearing.

Merit tests and exemptions

An applicant may make an application for an unfair dismissal remedy pursuant to s394 of the FW Act. The FW Commission must determine an application for unfair dismissal by reviewing the criteria set out in s385 of the FW Act and decide whether a dismissal was harsh, unjust and unreasonable. Amongst other things, the FW Commission must also have regard to whether a termination was consistent with the Small Business Fair Dismissal Code and/or whether the termination was a case of genuine redundancy.

The FW Commission in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, must then take into account the criteria advanced in s387⁶³² of the FW Act, beginning with whether the termination was for a valid reason relating to conduct or capacity.

The tests laid down in the legislation have been the subject of significant judicial and arbitral consideration over a significant period of time.⁶³³ The tests or criteria contained in the FW Act have provided a framework for consideration of unfair dismissal applications that is well understood and relatively flexible.

The tests can be broadly summarised as follows:

- Whether the dismissal was harsh or unfair because the employee was not actually guilty of the misconduct the employer acted on;
- Whether the dismissal was harsh or unfair because of the economic and personal consequences to the employee as a result of being terminated;
- Whether the dismissal was harsh or unfair because the employee was not afforded procedural fairness;
- Whether the dismissal was harsh or unfair because the outcome is disproportionate to the gravity of the misconduct to which the employer reacted (in other words, the punishment does not fit the 'crime'); or
- Whether the dismissal was harsh or unfair because the evidence or material before the employer did not support the conclusion that termination should necessarily result.

⁶³² s387 FW Act

⁶³³ See for example *Byrne v Australian Airlines Ltd*⁶³³ and also *Australia Meat Holdings Pty Ltd v McLauchlan*

In applying these tests, it has been held that the role of the FW Commission is not to stand in the shoes of the employer, but to conduct its own forensic analysis of the facts to determine if the conclusion reached by the employer can be properly supported by relevant facts and evidence.⁶³⁴

The tests in s387 of the FW Act generally provide a common sense and flexible approach to determining unfairness in employment termination. However, there has been a degree of rigidity and lack of clarity introduced into the framework of s387 by two FW Commission Full Bench decisions concerning the approach to be adopted in situations where an employer has failed in its jurisdictional defence of 'genuine redundancy' and the FW Commission is called to consider whether the decision was harsh and unfair.

In these circumstances, the FW Commission has found that the matters set out at s.387(a), (b), (c) & (e) of the FW Act are not relevant and are to be regarded as neutral factors. This is because these matters are only relevant where the dismissal is related to the *person's capacity or conduct*.⁶³⁵

The Full Bench in *UES* appears to be authority for the point that the only matters that can possibly be considered pursuant to s387(h) of the FW Act ("*any other matters that the FWC considers relevant*") are the criteria in s389 of the FW Act that were unmet.⁶³⁶ In other words, if the dismissal was held not to be genuine redundancy because the employer failed to meet its obligation to consult under s389(1)(b), *then the only matter* that can be considered in determining whether the dismissal was harsh, unjust or unreasonable was that failure to consult. This would mean a range of matters – the most obvious being the selection criteria used to terminate the employee – could not be considered in determining whether the dismissal was harsh, unjust or unreasonable.

In our view, such an interpretation is open to real doubt as it appears contrary to broad discretion reposed in s387(h).⁶³⁷ Interestingly, while not put in these terms, it appears that the Full Bench in *Ventyx* did not adopt such a restricted meaning of s.387(h) of the FW Act. In that case, the Full Bench found that the dismissal was not a genuine redundancy because of the employer's failure to meet its obligation to consult.⁶³⁸ The Full Bench then conducted a rehearing that considered criteria broader than the redundancy related criteria.⁶³⁹

Clearly, the criteria in s387 of the FW Act should be applied in a practical and common sense manner that keeps in mind the essentially beneficial purpose of the UD laws. This means that artificial constraints on the exercise of the FW Commission's jurisdiction in determining UD claims should be avoided and the current lack of clarity relating to the operation of the FW Act in circumstances where an employer's genuine redundancy defence has failed is addressed.

⁶³⁴ *King v Freshmore (Vic) Pty Ltd*, Print S4213 at pn 24 (Ross VP, Williams SDP, Hingley C, 17 March 2000).

⁶³⁵ *UES (Int'l) Pty Ltd v Harvey* [2012] FWA FB 5241 at [26] – [30], [42] – [48], *Ventyx Pty Ltd v Murray* [2014] FWC FB 2143 at [98] – [106], [142] – [146].

⁶³⁶ At [28] – [29], [47] – [48].

⁶³⁷ A view shared by Associate Professor Andrew Stewart, *Ibid* (2013) at page 354.

⁶³⁸ *Ventyx* at par [137].

⁶³⁹ *Ibid* at [154].

Exclusions from UD protection

The current exemptions to unfair dismissal laws are in two categories. One category relates to types of employees, the other relates to qualifying periods.

The following types of worker are not covered by the UD laws:

- contractors;
- employees who resign and were not forced to do so by their employer;
- employees employed for a specified time, task or season that has come to an end;
- trainees at the end of their training arrangement;
- employees who were demoted with no significant reduction in status or pay.

The following qualifying periods apply:

- To have access to the jurisdiction in any regard, an employee must have been employed with their employer for at least 6 months to make an application for an unfair dismissal remedy;
- An employee must have worked for an employer either for 6 months in the case of a large business or 12 months in the case of a small business to gain access to the jurisdiction;
- In the case of a casual employee, have regular and systematic employment on the same basis and a reasonable expectation of continuing work;
- An employee engaged for a specified task, period of time or season, in some circumstances, may have access to the jurisdiction if all of the criteria set out above have been met.

The exemptions as cited above are generally appropriate with the following qualifications.

First, it is the view of the ACTU that the differential qualifying period for employees engaged by “small business” and other employers is unjustified and inequitable. It is clear from article 2 of the *Termination of Employment Convention 1982* that any qualifying period of employment inserted into national laws intended to give effect to the Convention must be of “reasonable duration”. The existing qualifying period of 12 months for small business employees is too long, particularly as the purported reason for a qualifying period is to enable an employer to assess the capacity and conduct of an employee.⁶⁴⁰ Given that a qualifying period of six months is regarded as being sufficient to assess the capabilities of an employee in a non-small business context, which by definition, involves a larger number of employees, it seems illogical that an employer in a small business (with presumably, more direct contact with and knowledge of his or her employees) should not be able to make an assessment of an employee’s capacity and/or conduct within a six month qualifying period.

In addition, the ACTU is also concerned about the situation of employees who are employed on a series of consecutive fixed term contracts. Fixed term contracts are a relatively common feature of the Australian workforce and are endemic in certain industries and sectors, such as tertiary education, information technology, community services and health. Many of these employees are, for all practical purposes, permanent employees with years of continuous service with a

⁶⁴⁰ *Fair Work Bill 2008 Explanatory Memorandum*, paragraph 1512.

single employer, subject only to periodic renewal of their fixed term employment contracts. There seems no justifiable reason to exclude such employees from UD protections. However, a strict application of the exemption in s386(2)(a) to such situations would lead to this result, notwithstanding that individual members of the FW Commission (or its predecessor) have expressed a willingness to look beyond the formality of the “contract” to examine the underlying reality of the employment relationship.⁶⁴¹

It appears to us that the proper approach to excluding potential ‘wind-fall’ claims in relation to employees with genuine fixed term contracts, is not to restrict access to UD protection, but to link potential remedies in such cases to a realistic expectation of what the employee could have expected by way of ongoing employment, regardless of the formal terms of the contract. This would at least remove the anomalous situation where employees engaged on a series of casual contracts of employment seem to have more ready access to UD than employees on consecutive fixed term employment contracts.

The Small Business Fair Dismissal Code and the employment threshold

The Small Business Fair Dismissal Code is a document developed as a checklist to assist small business operators in terminating an employee in a fair manner. The document is widely available for free over the internet, through employer organisations and other sources.

There is some value in providing guidance to small business operators on how to properly interact with employees in the context of counselling, discipline and dismissal. However, the Code should not be seen as a ready-guide or “tick the box” list of how to terminate an employee.

The ACTU has concerns that the Code is used as an ex post facto justification by certain employers facing unfair dismissal claims. This is clearly not the intent of the document and should not be accepted as a proper function for a document generated by the Commonwealth.

More generally, the ACTU can see no proper or rational basis in the UD framework for employers to be divided into “small” and other businesses. The principal effect of the differential threshold is to disadvantage one class or group of employees relative to another, with no evidence that the differentiation delivers any particular social benefit, by way of increased employment or lesser regulatory burden on small business. In general, there is little in the way of hard evidence to support the proposition that the operation of UD laws in Australia has had any significant effect on small business – whether in terms of regulatory costs, or propensity to hire. As Stewart and Forsyth have observed:

“...there has been no evidence of any adverse impact on employment levels or economic performance [from FW Act UD laws] – just as none could be found when the Howard Government was endeavouring to justify the removal of unfair dismissal protection for workers at ‘small’ businesses. This is borne out by the few independent studies that have been done on the effect of employment protection laws in Australia. For example a survey of small businesses, undertaken just before the introduction of the 100-employee exemption in 2006, found that unfair dismissal laws ‘had minimal influence on job creation in the respondent businesses’, and that there was ‘no evidence’ to suggest that the new exemption would affect their short term plans for job creation. Other case studies have shown that while there is a strong degree of opposition on the part of

⁶⁴¹ *Smith v Mareeba RSLA Services Club Inc* [2013] FWC 351 (unreported, Spencer C, 15 March 2013) [46]-[47]; *Banchit v St Mina’s Global Restaurants Pty Ltd* (unreported, AIRC, Harrison C, 14 November 2003) PR940477 [39].

small business owners to the *idea* of employees being protected against unfair dismissal, few of those surveyed had actually experienced any claims – and those that had were generally satisfied with the process and outcome.”⁶⁴²

We also refer to our commentary in chapter 4 (under the heading “The problems of labour demand”) concerning Borland’s work in this regard.

The small business employment threshold should be scrapped because there is no logical or evidentiary basis to support its continuation.

Compensation

The power of the FW Commission to order payment of compensation in lieu of reinstatement comes from s390(3) and s392 of the FW Act.

The FW Act specifies criteria that the FWC must consider prior to issuing a decision ordering the payment of compensation. This includes a range of indicia including; the effect that any order for compensation might have on the viability of the employer’s enterprise; the length of service of the employee; the likely remuneration the employee would have received but for the dismissal; and efforts by the employee to mitigate his or her loss.⁶⁴³

According to the FW Commission website,⁶⁴⁴ during the period 2013/14 the number of arbitrated decisions where compensation was ordered were actually very small with less than 1% of applications for an unfair dismissal remedy resulting in an arbitrated outcome where compensation was awarded.

Whilst there is there is a general discretion to award compensation, members of the FW Commission are in fact subject to significant constraints. First, they are constrained by the statutory cap on unfair dismissal compensation awards, which confines the maximum payment to six months wages or 50% of the high income threshold, whichever is the lesser. Second, FW Commission members are constrained by the existing jurisprudence, which takes into account the legislative framework and common law decisions in regard to payment of compensation under the UD system reflected in decisions such as *Sprigg v Paul’s Licensed Festival Supermarket*.⁶⁴⁵

The current cap on compensation payments should be removed. It is an arbitrary and unnecessary restriction on the discretion of the FW Commission. The ACTU believes that the existing criteria under s392(2) are sufficient to ensure that the FW Commission will not order over-generous compensation orders to affected employees.

⁶⁴² Forsyth, Anthony and Stewart, Andrew *Submission to the Fair Work Act Review, 2012* at page 28.

⁶⁴³ FW Act s392(2)(a).

⁶⁴⁴ Fair Work Commission website - Decisions outcomes <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

⁶⁴⁵ (1998) 88 IR 21.

Also, as we have argued in the Fair Work Act Review in 2012, Australia's cap on unfair dismissal compensation payments does not compare favourably at an international level:

"Of the 28 OECD countries for which we have information:

- Compensation is unlimited in 15 countries;
- Ten countries impose a minimum compensation payment, with an average amount of 6 months' wages, with higher minimums imposed in some countries when long-serving employees are dismissed; and
- Of the 14 countries that impose a cap on compensation, the average level of the cap is 15 months' wages, not including any higher cap which applies to long-serving employees."⁶⁴⁶

Awards of compensation in the high range in Australia (i.e. 4 to 6 months wages) are usually reserved for unfair dismissal cases where there was no valid reason for the termination, or the termination of employment was excessively harsh in the circumstances. The strict limitation imposed by the statutory cap clearly works against just compensation for workers who have been unfairly and harshly treated, sometimes after many years of loyal service to their employer.

The ACTU is concerned that the current compensation cap operates unfairly in respect to certain employees of long standing, as the case study below demonstrates.

Case Study – Workers unfairly dismissed prior to redundancy

In one example of an unfairly dismissed worker, whose claim of unfairness would almost certainly have been upheld by the FW Commission, reinstatement was strenuously opposed by the employer, meaning that compensation may well have been the only option at the arbitration of the claim.

In this particular case, at a food manufacturer in Victoria, four long-serving employees were terminated for misdemeanours that were relatively minor, and did not warrant as was evident during conciliation. Shortly after the workers were terminated, the maintenance work which these workers had been undertaking before their dismissal was outsourced to the employees of a subcontractor. In the ordinary course, had the four workers stayed in employment, they would either have been transferred to the subcontractor under their current terms and conditions, or they would have been made redundant. One particular worker was a very long standing employee who had accrued 80 weeks of redundancy, amounting to \$200,000.

In conciliation, the employer was strenuous in its submission that trust and confidence had broken down, so that reinstatement of the workers would not be an option. The employer's representative was also quick to offer 24 weeks' pay by way of settlement of the unfair dismissal application – a most extraordinary offer, particularly at a conciliation stage. However, the offer was not extraordinary when the saving of 56 weeks' redundancy pay is considered.

Clearly, the employer in this particular case was leveraging the statutory cap on compensation as a means to divest itself of four long-standing employees on as cheap a basis as possible.

⁶⁴⁶ Australian Council of Trade Unions *Submission to the Post Implementation Review of the Fair Work Act 2009*, 17 February 2012, Volume 1, page 53.

'Go away money'?

The term 'go away money' is a term that employers sometimes use to describe paying money to settle an unfair dismissal application in conciliation. The use of the phrase is emotive, pejorative and unfair to the overwhelming majority of applicants in the system. Whilst there are probably situations where 'go away money' is paid, it would be wrong to suggest that the FW Act UD system is afflicted by this problem more than any other comparable jurisdiction.

The two remedies that are available to an applicant under the FW Act UD regime are reinstatement and compensation. These remedies are contained in s390 and s391 of the FW Act. Hence these two remedies at the arbitration stage strongly influence applicants and respondents when participating in conciliation in an effort to settle a claim.

It must be borne in mind that there is nothing unusual or inherently undesirable in litigation being settled prior to a final hearing of merits. Indeed, much of the law reform agenda in Australia in recent decades has been in the direction of encouraging the settlement of litigation prior to final hearing. In practice, this occurs with most courts and tribunals offering some form of conciliation or mediation service, and in many cases, providing incentives for settlement, such as linking costs orders to standards of reasonable behaviour during the litigation process.

The FW Commission likewise offers a conciliation service. According to statistics kept by the FW Commission, the conciliation service commenced operating by conducting phone conciliations on a national basis. Most conciliation conferences are conducted within a 90 minute time frame⁶⁴⁷. There is no requirement for legal representation, and many parties are self-represented⁶⁴⁸. According to the FW Commission the amounts of compensation agreed in settlement discussions is relatively small with 49% of monetary payments below \$4000 and 79% below \$8000.⁶⁴⁹ It should also be noted that this data does not distinguish between the payment of compensation and payment of outstanding entitlements that may form part of an agreed settlement outcome.

However, it needs to be understood that payment of compensation in conciliation is only one type of settlement outcome. Again, the data produced by the FW Commission shows the following settlement outcomes:

- 17% involve a monetary amount of compensation;
- 18% are settled for no monetary compensation;
- 43% are settled for monetary and non-monetary compensation;
- <1% are reinstated and involve monetary compensation.

There is no reliable evidence concerning the extent of any 'go away money' problem and certainly, sensationalist reporting of individual anecdotes do not meet the definition of reliable evidence. In this regard it is worth repeating at length what the 2012 Review Panel Report had to say about the complexities of this issue and the difficulties with simplistic, knee-jerk responses:

⁶⁴⁷ What happens at conciliation? Fair Work Commission website. <https://www.fwc.gov.au/at-the-commission/coming-the-commission/what-happens-at-conciliation>

⁶⁴⁸ Ibid, at page 16.

⁶⁴⁹ Fair Work Commission website - Conciliation Outcomes <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

We do not doubt that employers continue to make a commercial decision to pay an amount to an applicant to settle an unfair dismissal claim, and that the factors identified by Forsyth and Stewart and others contribute to this approach. In some cases, the employer may genuinely consider that the application has no merit, but is convinced that settling the claim for a small or nominal amount is preferable to incurring significantly higher costs in defending it. In other cases, an employer may be advised (or form the view) that the applicant has some prospects of success, and will weigh this up in determining whether to settle and for how much. As has been noted, these are practices that existed under the legislation before the FW Act, and almost certainly exist under other small claim jurisdictions where costs do not necessarily follow the outcome.

We accept comments made by unions in face-to-face consultations that they do not tend to pursue cases where they assess that there is little or no merit. This is likely to be partly based on an efficient use of union resources, as well as an appreciation of the limits to compensation available (particularly where the individual member is not seeking reinstatement). In our consultations with the legal profession, one law firm said that many features of the system influenced them to caution individuals against pursuing claims.

As we have already noted, it is difficult to assess the extent to which employers are settling claims in conciliation by paying money when they believe the claim is without substance (and perhaps, additionally, it is without substance as a matter of objective assessment). It is not surprising that this might become a feature (though to what extent is another question) of a legal process in which one party can seek a remedy against another party using processes that are comparatively informal, inexpensive and where the grant of the remedy is likely to depend upon a subjective evaluation of criteria which are fairly broadly expressed. We accept that it is undesirable that payments of this character are made.

Ultimately, however, the various proposals by mainly employer interests to avoid this appear to be either a solution with potentially unacceptable indirect consequences (for example, increasing filing fees) or unlikely to be effective in addressing the issue. An example of the latter was a suggestion there might be some preliminary assessment on the papers. We were anxious, in our consultations, to explore options for reducing or avoiding the phenomenon of 'go away money'. However, as some employer groups conceded in discussion, earlier attempts in other jurisdictions (Victoria was given as an example) to filter out unmeritorious claims by a preliminary assessment on the papers had not proved particularly successful.

We think that to the extent there is a solution, it lies in the FWA processes and procedures. An employer would be more likely to settle an unmeritorious claim by agreeing to pay compensation during conciliation if the employer believed that to contest the claim would be a drawn out, time consuming and potentially expensive process. An employer would be less likely to do so if the contest was dealt with quickly, efficiently and as cheaply as possible. We discuss existing procedures later in this chapter and make some recommendations to improve them, including some that we think will help to address the 'go away money' issue.

In its 2013/2014 Annual Report, the FW Commission notes a significant number of UD applications that have been dismissed under s587 of the FW Act (frivolous, vexatious, no reasonable prospects) and s399A (failure of unfair dismissal applicant to comply with FW Commission directions, etc.). The FW Commission report notes that the administrative framework to capture data in relation to decisions issued under these sections was not available for 2012/2013, but that is not surprising given that s399A did not commence operating until 1 January 2013. Nonetheless, the total number of applications dismissed under either s399A or 587 of the FW Act over the reported period is 363 cases, a significant proportion of the 1200 cases that was disposed of by arbitration. These figures indicate that it is likely that the new

provision under s399A of the FW Act, combined with the increasingly vigorous application of the tests in s587 will play a major role in weeding out unmeritorious UD claims.

Finally, as to the recent changes to the FW Act providing an increased ability of the FW Commission to award costs in certain cases (ss400A, 4001(1A)), it is too early to provide a definitive assessment of the effect of the changes. It is clearly the case that the issuing of costs against a party, or indeed a representative of a party, remains rare in the UD jurisdiction. However there have been recent decisions by the FW Commission that indicate that there may be an increase in the number of costs decisions issued against parties, or their legal representatives in coming years.⁶⁵⁰

Disproportionate effects on particular groups of employees

There does not appear to be any reliable data available dealing with this issue, other than perhaps statistics that correlates location with unemployment rates and industry. Clearly, unemployment caused by an involuntary employer termination is likely to have a greater effect on employees located in an area with relatively higher unemployment profile. Similarly, an employee who is terminated from employment in an industry or occupation that is subject to structural decline, is likely to face significant challenges in adjustment and obtaining further employment, either in that industry or elsewhere.

Ultimately however, the position of a worker terminated involuntarily in the circumstances described above is likely to be similar to other workers terminated for reason of redundancy, other than the worker dismissed for a conduct or capacity related issue will not have the benefit of redundancy pay to cushion the economic effects of termination. This fact reinforces the need to provide broad access to the UD system so that an employee that is terminated harshly, or unfairly, is able to have some chance of reinstatement, or if not that, is able to obtain some monetary compensation for the loss of ongoing employment.

Main grounds and claims

The main grounds upon which an employee can sustain a claim that he or she has been unfairly dismissed has been canvassed in the question above relating to whether the current 'tests' for unfair dismissal are appropriate.

An application for an unfair dismissal remedy can only be successful if the FW Commission finds that an employee's termination was harsh, unjust or unreasonable⁶⁵¹. These grounds are set out in s387 of the FW Act, and have been in existence in one form or another for over 30 years.

Importantly, if, upon its own assessment in dealing with an application, a FW Commission member finds that there was no valid reason relating to conduct or capacity for the termination

⁶⁵⁰ See for example, *Livingstones Australia v ICF (Australia) Pty Ltd T/A Frith and Associates* [2014] FWCFB 1276.

⁶⁵¹ *Byrne and another v Australian Airlines Limited*, (1995) 185 CLR 410.

of an employee, an applicant is more likely to be reinstated, as the reason for the termination, may either not exist, or be found to be capricious or fanciful.⁶⁵²

Generally speaking, where the FW Commission finds that the termination of employment is to be upheld because there is a valid reason for terminating the employee but there are procedural fairness defects in the way in which the employer has dealt with the termination, compensation payments are more likely to be awarded.⁶⁵³ Reinstatement has also been awarded, albeit very rarely, when the FW Commission has determined that the procedural fairness defects have been so serious, that it warranted overturning the dismissal.⁶⁵⁴

In short, the types of claims that are likely to succeed are those that specifically address the criterion in s387 of the FW Act on the basis of a sound evidentiary footing.

International comparisons

A common point of comparison for Australia are the member states of the Organisation for Economic Cooperation and Development ('OECD'). As the 'club' of advanced industrialised countries, OECD member states can be a relevant and useful comparison point. However, caution also needs to be exercised in any comparison given the sometimes very significant differences that exist, even amongst OECD nations, in terms of political arrangements, economic structures and legal frameworks.

Market based economies are characterised by a continuous reallocation of labor resources. New firms are created; existing firms expand, contract or shut down. In that process large numbers of jobs are created and destroyed. New job seekers will enter the market and fill new job vacancies, whilst workers will change jobs or leave employment. Job displacement represents a non-negligible proportion of these flows in many OECD countries.⁶⁵⁵ When a worker is dismissed a worker will lose income, tenure related entitlements and potentially accumulated job specific skills and experience.⁶⁵⁶

The OECD regularly measures employment protection for workers across the OECD countries. In 2013 a review of employment protection measurers was undertaken. The review included measuring employment protection provisions across OECD and G20 countries. Below we extract relevant findings of the OECD report in respect of two areas; first, the rules governing termination of employment (referred to in the Report as "difficulty of dismissal"); and second, the remedies that exist for employees who are unfairly terminated.

"Difficulty of dismissal"

⁶⁵² *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371.

⁶⁵³ *Sebaeto v Waterloo Car Centre Pty Limited trading as Red Spot Rentals*, PR930816, 20 May 2003.

⁶⁵⁴ *Flanagan and Ors v Thales Australia Ltd t/a Thales Australia* [2012] FWA 6291, 7 September 2012.

⁶⁵⁵ OECD Employment Outlook 2013, Protecting jobs, enhancing flexibility: A new look at employment protection legislation page 64.

⁶⁵⁶ *Ibid* at page 64.

Almost all OECD and G20 countries have legislated remedies for unfair individual dismissals, but the way that statutory or customary law defines what is fair or unfair differs markedly across all countries.

- In Chile or Indonesia, dismissal for bad individual performance or unsuitability is unfair for ordinary employees except in the case of serious fault;
- In Mexico and the Russian Federation, dismissal for unsuitability is possible but severely restricted to permanent physical or mental disability;
- In Spain, worker capability is a sufficient ground for dismissal only in cases of unfitness or lack of adaptation to technological changes;
- In Norway, the law allows dismissal for personal motives, but is restricted to material breach of employment contract (disloyalty, persistent absenteeism etc);
- Dismissals for redundancy will be considered unfair if the worker could have been redeployed within the same company (e.g. Australia, Estonia, France, Germany, Italy, Norway and Sweden);
- Worker capability and redundancy are considered fair grounds for dismissal within limited substantial additional conditions in almost one half of the OECD countries;
- In most common-law countries, courts are inclined to consider redundancies as fair provided that they do not hide disguised personal reasons and procedural requirements are respected.⁶⁵⁷

There are other components that are also measured when determining whether protection from unfair dismissal for workers is adequate. Things such as time periods for lodgement, qualifying periods and other legal and cost prescriptions are also factored in. In analysing the degree of difficulty, for termination of a worker the following factors are taken into account:

- Definition of justified or unfair dismissal;
- Length of trial period;
- Compensation following unfair dismissal;
- Possibility of reinstatement following unfair dismissal; and
- Maximum time for claim.

According to the 2013 OECD Report, the relative difficulty of dismissal across OECD countries shows that dismissal of individual workers is easiest in Canada, Denmark, Poland, Switzerland, Turkey, the UK and the USA. By contrast dismissal appears more difficult or uncertain in Chile, Finland, France, Italy, Mexico, Norway and Portugal. Amongst the broader G20 countries, China, India, Indonesia and the Russian Federation stand out as countries where dismissal is particularly difficult.⁶⁵⁸ Australia is marginally lower than average in terms of the degree of protection provided to workers in respect of unfair dismissal.

In summary, the UD system under the FW Act does not stand out as unusually protective of workers by reference to standards applying generally in OECD or G20 nations. Whilst there are peculiarities in some of the language and concepts used in Australia (for example, the term “fair go all round” would not doubt bemuse those not familiar with the Australian vernacular), the UD system under the FW Act is unremarkable as a whole and slightly less beneficial to employees than the average.

⁶⁵⁷ Ibid page 81.

⁶⁵⁸ Ibid page 83.

Remedies

In a number of countries reinstatement and/or compensation payments will be ordered by a court or tribunal if the dismissal is deemed unfair. Where reinstatement is ordered, the employee is typically entitled to wage arrears and social security contributions as if the employee had never been dismissed.

- In Austria, the Czech Republic and Korea reinstatement is almost always granted or offered to the dismissed employee. The situation is the same in Portugal except in the case of procedural irregularity;
- Non-OECD countries such as China, India, Indonesia, Latvia and the Russian Federation also provide the ability to order reinstatement for workers deemed to be unfairly dismissed;
- However, in cases where discrimination has been found, reinstatement is never offered to workers in Belgium, Estonia, France, Luxembourg, Spain, Switzerland, Turkey and the Nordic countries, with the exceptions of Denmark and Norway. Compensation is offered instead.⁶⁵⁹

Adequately high and predictable compensation orders over and above amounts due for notice periods and severance pay are also an effective way of protecting workers against arbitrary behaviour. The highest typical compensation payments in terms of months of former pay where an employee has 20 years job tenure can be in the order of:

- Sweden - 32 months' pay;
- Italy - estimated 21 months' pay;
- China - 20 months' pay;
- Portugal - 17.5 months pay;
- France - 16 months pay.

The OECD average is closer to six months' pay. By contrast, very low compensation, beyond ordinary severance and or notice is typically ordered in Estonia, Poland, Brazil and Saudi Arabia.⁶⁶⁰

In summary, the Australian compensation cap of effectively six months wages is in line with the OECD average, but operates unfairly in respect of employees who are dismissed after long periods of service. If the position advocated earlier in this submission of leaving the determination of compensation to the discretion of the FW Commission is not regarded as practical, then an alternative may be to link maximum compensation payments above the present cap to years of service, similar to the practice adopted in a number of comparable jurisdictions.

⁶⁵⁹ Ibid page 82.

⁶⁶⁰ Ibid.

19 Employment Protections: (2) Unlawful Termination and General Protections

The General Protections and Unlawful Termination provisions are largely concerned with protection from discrimination. They have a long history and are informed by international instruments. Recent developments suggest a need for some reform in order to ensure the protection they promise is not illusory.

General Protections

The general protections provisions are to be found in Part 3-1 of the FW Act. The purpose of these provisions is to protect persons with certain attributes, or engaged in certain conduct covered by the FW Act, from ‘adverse action’ engaged in or initiated by another person. The intended effect of the general protections is beneficial and protective. They are designed to further and promote certain internationally recognised norms including, *inter alia*, the protection of persons engaged in lawful industrial activity.

The general protections provisions of the FW Act therefore play an essential role in Australian industrial and employment law. The provisions provide legal protection to employees, contractors and employers from egregious interference with their workplace rights and in doing so, reinforce the notion of freedom of association and the important role that workplace representatives play in the functioning of a fair industrial relations system.

Provisions akin to those contained in Part 3-1 of the FW Act, have existed in one form or another for many years in Australian jurisdictions.⁶⁶¹ However, with the introduction of the FW Act, many of the prior existing provisions were consolidated to create a greater consistency in the expressions used across a range of different types of conduct and attributes covered. In addition, the scope of conduct covered by the FW Act was expanded in certain areas, particularly in respect to the new limb of “discrimination”,⁶⁶² but also as result of the broadening of the definition of the protected activity of “making a complaint or inquiry”.⁶⁶³

Since the introduction of the general protections provisions in the FW Act, there has been a significant amount of litigation under relevant provisions, including two matters that ended up being the subject of judgments by the High Court of Australia. Because of their practical and legal importance, this submission concentrates on the state of the law in the aftermath of the High Court decisions in *Board of Bendigo Regional Institute of Technology and Further Education v*

⁶⁶¹ The ACTU gratefully acknowledges the assistance of barrister Claire Howell in the preparation of these submissions.

⁶⁶² FW Act s342(1) Item 1(d)

⁶⁶³ FW Act s341(1)(c)

Barclay (“*Barclay*”)⁶⁶⁴ and the more recent decision in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (“*CFMEU v BHP*”).⁶⁶⁵

Both High Court judgments turn on the critical issue of how adverse action engaged in by the relevant employers was to be characterised. As will be shown below, the current state of the law on this point is unsatisfactory and uncertain and appears to allow for the essential purpose of the general protections provisions to be undermined by artificial and semantic descriptions of the reasons for employer conduct that belie objective reality.

The most important question to be decided in most proceedings under the general protections provisions will generally be whether adverse action was taken “*because*” of a prohibited reason - see for example s340, 346 and 351 of the FW Act. The word “*because*” was introduced under the FW Act. Previously the legislation had used the words “*for the reason that*” for most purposes. It is generally accepted that this is a change of style rather than of substance.

Causation has always been a difficult issue in many fields of law. The question of causation in respect of the general protections is one on which the Courts have divided, both before and after the High Court decisions in *Barclay* and *CFMEU v BHP*⁶⁶⁶.

Prior to the various decisions in *Barclay*, the debate tended to focus upon whether a subjective or an objective approach should be taken. That was how the appellant employer framed the debate in the appeal to the High Court in *Barclay*.

The facts in that case bear repeating. Mr Barclay was employed as a senior teacher by Bendigo TAFE. He was also the president of the Bendigo TAFE sub-branch of the Australian Education Union (AEU). In January 2010, Mr Barclay sent an email in his capacity as an AEU officer to all AEU members employed by Bendigo TAFE. In the email, Mr Barclay said, among other things, that several members had reported being asked to be part of producing 'false and fraudulent' documentation for an upcoming reaccreditation audit. Mr Barclay did not take his concerns to management.

The employer commenced a disciplinary inquiry. The decision maker asserted that the reasons for so doing were as follows:

- (a) the allegations of fraudulent conduct were made without any complaint or report of conduct of that kind being raised any member of senior management;
- (b) the language used in the email was bound to cause distress to members of staff, bring the reputation of the educational institution into question and undermine staff confidence in the Audit process; and

⁶⁶⁴ (2012) 248 CLR 500

⁶⁶⁵ [2014] HCA 41

⁶⁶⁶ *Board of Bendigo Regional Institute of Technology and Further Education v Barclay* [2012] 86 ALJR 1044, HCA 32

- (c) the decision maker was also concerned that Mr Barclay was employed in the Unit responsible for overseeing the preparation for the Audit process.

The institution of a disciplinary inquiry against Mr Barclay led, at first instance, to an unsuccessful application to a single member of the Federal Court of Australia and was followed by an appeal to the Full Court of the Federal Court.⁶⁶⁷

The majority of the Full Court of the Federal Court in *Barclay*, found that the conduct in circulating the email was industrial activity within the meaning of s 347(b)(iii) of the FW Act⁶⁶⁸ because by sending the email on 29 January 2010 Mr Barclay was engaging in lawful industrial activity by encouraging members of the AEU to contact the AEU and seek support and advice; and had acted in his capacity as an officer of the AEU by retaining the confidences of AEU members who had approached him in this capacity.

The majority, whilst accepting that subjective reasons were relevant to the question of whether conduct occurred “because of” a prohibited reason, stated that the test was not confined to subjective reasons.⁶⁶⁹ The majority said the real reason for the conduct is not necessarily the reason the person asserts. What is required is a search for what actuated the conduct of the person, which may include the conscious or subconscious thoughts of the perpetrator. The majority found that as the disciplinary action was taken because of conduct which was protected, a contravention was established.

The reference by the majority in the Full Court to the subconscious of the decision maker was, with hindsight, unfortunate. It was seized upon in the High Court. The High Court unanimously overturned the Full Court decision.

The decisions of the High Court in the *Barclay* case are somewhat confusing. The Court correctly identified that the question to be decided for the purpose of s. 346(b) of the FW Act is whether adverse action was taken *because* an employee engaged in conduct which is protected. This is a question of fact, the answer to which will depend upon the particular circumstances of each case. Indeed, Justices Gummow and Hayne rejected the objective - subjective ‘dichotomy’ as “*an illusory frame of reference*”.⁶⁷⁰

The Court also reaffirmed the approach taken in the earlier decision *General Motors Holden Pty Ltd v Bowling*,⁶⁷¹ which has been applied by the Courts on many occasions. The reasoning in *Bowling* shows an appreciation of the complexities of identifying the operative reasons for adverse action in a case which considered the dismissal of a ‘shop steward’ who was annoying to the employer for a range of reasons including his union activism.

⁶⁶⁷ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14.

⁶⁶⁸ Namely: encouraging or participating in a lawful activity organised or promoted by an industrial association and representing or advancing the views, claims or interests of an industrial association.

⁶⁶⁹ FCAFC *Barclay* at pars [27] – [36]

⁶⁷⁰ HCA *Barclay* at [121]

⁶⁷¹ (1976) 12 ALR 605

Much of the discussion in the High Court in *Barclay*, and the criticism of the majority in the Full Court, seems to indicate a lack of understanding of the reasoning of the Full Court majority. The various judgments do not explain with any clarity what approach should be taken to the determination of reasons for adverse action. Although a subjective approach is expressly disavowed, the reasoning seems to suggest at times that if the decision maker denies having a prohibited reason, and is believed, the respondent will have discharged its onus.

What the High Court did not seem to acknowledge or understand is that in some cases the issue will depend not on the subjective belief of the decision maker as to his or her reasons, but on the proper characterisation of those reasons. This is essentially the point the Full Court was making and is the issue which dominated the litigation leading up and including to the more recent High Court decision in *CFMEU v BHP*.

The case of *CFMEU v BHP* concerned the dismissal of Mr Henk Doevendans, a Vice President of the Saraji Lodge (that is, local union branch) of the main coal miner's union, the CFMEU. Mr Doevendans was dismissed because he was observed in amongst a group of about 30 or so CFMEU members holding up a sign during a peaceful protest outside the Saraji mine in Central Queensland in 2012. The industrial context surrounding Mr Doevendans' actions was a campaign of protected industrial action engaged in by about 3000 members of the CFMEU in pursuit of a new collective agreement covering seven coal mines operated by BHP Billiton (trading under the name of BMA) in Queensland.

Mr Doevendans held up a sign provided by the union which stated: “*No Principles, SCABS, No Guts*”. This was one of a number of signs held up by union members at the demonstration site, but Mr Doevendans was the only person singled out for disciplinary action. In terminating Mr Doevendans' employment, BHP asserted that the reason for the dismissal was not because of any involvement in industrial activity, but because the sign held up by Mr Doevendans was offensive and contrary to the company's Code of Conduct.

The CFMEU sought relief for Mr Doevendans under the general protections provisions of the FW Act. Jessup J of the Federal Court, whilst accepting the evidence of the relevant decision maker that Mr Doevendans' industrial activity did not play “*any part*” in his decision to terminate, nonetheless found that the dismissal was because of conduct protected by the general protections provisions of the FW Act – that is, it was not possible to separate the lawful industrial conduct engaged in by Mr Doevendans from the reasons for termination asserted by the employer.⁶⁷²

BHP appealed the decision of Jessup J to the Full Court of the Federal Court of Australia. During the appeal, it was accepted by both parties that in holding up the “scab sign”, Mr Doevendans was representing the views and interests of a registered organisation within the meaning of the general protections provisions of the FW Act.⁶⁷³ It was accepted that the decision maker dismissed Mr Doevendans because he held up the sign at the protest and because, *inter alia*, he regarded that conduct as having unacceptable attributes⁶⁷⁴.

⁶⁷² *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (No 3) [2012] FCA 1218.

⁶⁷³ *Ibid* at [28] – [31].

⁶⁷⁴ *Supra* at [36]

However, the majority of the Full Court in a 2:1 judgment found that, once the evidence of the decision maker as to his state of mind set out above was accepted, there could be no contravention, despite the fact that the conduct for which he was dismissed (the waving of the sign) fell within the scope of the general protections. Naturally the Full Court majority relied upon the High Court in *Barclay* for this conclusion.

The CFMEU appealed the judgment of the Full Court of the Federal Court of Australia to the High Court. A five member High Court was convened to hear the appeal. In a 3:2 judgment, the High Court upheld the decision of the majority of the Federal Court. Which means that by the time of the final High Court judgment a total of 4 judges had found in favour of the CFMEU on the key issue of characterisation, and 5 judges had found in favour of BHP.

In *CFMEU v BHP*, the four High Court judgments each take a somewhat different approach to the issues presently raised. French CJ and Kiefel J in their joint judgment said that:

*Section 346 does not direct a court to enquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action.*⁶⁷⁵

Their honours considered that the conduct for which the employee was dismissed could be sufficiently separated from the protected industrial activities. On this reasoning the primary judge's finding as to the reasons was not available because of the findings as to the state of mind of the decision maker. French CJ and Kiefel J did not directly address the question of characterisation of reasons.

Hayne J, in dissent,⁶⁷⁶ expressed the view that no useful distinction could be made on the facts between participation in a lawful industrial activity and the *manner of* participation in a lawful industrial activity.

Crennan J in dissent took a similar approach to Hayne J, observing that "*Barclay does not hinder the drawing of available inferences which may controvert an honest decision-maker's assertion that he or she did not take adverse action for any prohibited reason*".⁶⁷⁷

Gageler J addressed the central issue raised by the appeal by introducing a distinction⁶⁷⁸ between adverse action taken because the employee *engages in an act or omission that has the character of a protected industrial activity* and adverse action taken *because of that act or omission having the character of a protected industrial activity*. With respect, the proposition introduced by His honour is a difficult one to grasp. It also has the tendency to render many if not most of the general protections in Part 3-1 ineffectual.

This is because rarely will adverse action be taken merely because of the *character* of activity as industrial activity. To take the example of *Bowling*⁶⁷⁹, on the reasoning of Gageler J a shop

⁶⁷⁵ [2014] HCA 41 at par [19].

⁶⁷⁶ Ibid at [42] – [51].

⁶⁷⁷ Ibid at [68]

⁶⁷⁸ Ibid at [92]

⁶⁷⁹ (1976) 51 ALJR 235; (1976) 12 ALR 605

steward could lawfully be dismissed because he was considered to be disruptive to productivity, even though the sole basis of the 'disruption' was in fact his or her legitimate trade union activities. Thus as a practical matter, there would be no protection for lawful industrial activities as long as the employer could plausibly characterise the reason for the adverse action as not being motivated by such a reason.

The majority reasons in *Barclay* and *CFMEU v BHP* have left the crucial question of how an employer's actions are to be characterised, as open to doubt and confusion. In particular, the majority reasoning implies that an employer may escape liability if the decision maker is able to subjectively categorise relevant conduct as something other than the exercise of a workplace right. To take this reasoning to its logical extreme, an employer may have a policy which implicitly or expressly prohibits union membership – but if a decision maker sacks an employee and states that this was not because he or she is a union member, but because he or she breached the company's policy, then there is no contravention.

The current state of the law on general protections cases means that the protections that Parliament envisaged as an integral aspect of the industrial relations framework in this country, have been effectively read-down by the Courts and are at risk of being undermined in a critical area.

This means that legislative amendment may be the only means of reinstating the essentially beneficial and protective operation of the general protections provisions of the FW Act. Such an amendment might positively describe the relevant test of characterisation as an objective test, in which the courts are required to take into account, but not treat as conclusive, the testimony of relevant decision makers. Alternatively, the relevant legislation could be expressed more narrowly to simply preclude a purely subjective approach to ascertaining the reasons for adverse action and requiring an inquiry into real or actual reasons. Either way, the current state of law cannot be allowed to continue to develop in the direction of diminished protection for employees engaged in lawful industrial activities.

Unlawful Termination

Supplementing the protections contained in Division 4, Part 3-1 of the FW Act is the separate protection from unlawful termination by reason of a temporary absence from work due to illness or injury contained in s352.

The operation of Division 4 of Part 3-1 of the FW Act is sufficiently broad to protect national system employees from unlawful termination due to a temporary absence due to illness or injury. For example, dismissal of an employee for reason of temporary absence due to illness or injury is likely to infringe upon an employee's workplace rights as defined in s341 of the FW Act (the workplace right being found in State or Commonwealth workers compensation legislation preventing termination for a defined period).

However, s352 of the FW Act is based on a different constitutional footing to the Division 4 protections and its reach extends beyond just national system employers and their employees, as defined in the FW Act. This is because the unlawful termination provision in the FW Act precedes the endorsement by the High Court of the "corporations" power of the Constitution as the substantial basis for founding Commonwealth industrial laws, and is was originally founded on

the “external affairs” power of the Commonwealth.⁶⁸⁰ The Explanatory Memorandum that accompanied the introduction of the *Fair Work Bill 2008* states that the section is intended to “broadly cover paragraph 659(2)(a) of the WR Act”, which was repealed with the making of the FW Act.⁶⁸¹

Whilst the reach of the general protections (including unlawful termination related to temporary absence due to illness and injury) is extensive, the ACTU is concerned about a deficiency in the protection offered by s352 of the FW Act. That is, the combined operation of s352 and Regulation 3.01 (5) and (6) of the *Fair Work Regulations 2009* works to remove protection from termination of employees of non-national system employers who are temporarily absent from work for a duration longer than 3 months in a 12 month period because of a workplace injury for which the employee receives workers compensation payments.

It appears that the rationale for this exclusion has to do with preserving the operation of State worker’s compensation systems in relation to the prohibitions against termination of employment of employees who have injured themselves at work. However, as discussed below, these State-based protections (with the exception of relevant provisions in NSW⁶⁸² and Qld⁶⁸³) are insufficient to provide employees with an effective remedy against unlawful termination (including access to appropriate interlocutory relief) which is available to employees of national system employers under the FW Act.⁶⁸⁴

All State workers compensations systems, to varying degrees, protect employees for a period from involuntary termination whilst in receipt of workers compensation payments, as the Table 24 below shows:

⁶⁸⁰ The purpose of giving effect to relevant international conventions is explicitly referred to in the prefatory words appearing in s659 of the *Workplace Relations Act 1996*.

⁶⁸¹ *Fair Work Bill 2008* Explanatory Memorandum at paragraph 1432.

⁶⁸²*Workers Compensation Act 1987* (NSW), Part 8.

⁶⁸³ *Workers Compensation and Rehabilitation Act 2003*, Chapter 4, Part 6.

⁶⁸⁴ FW Act, Part 4-2, Divisions 2 & 3.

Table 24: Injured Workers' protection from involuntary termination

Jurisdiction	Legislation	Period of protection from termination
Victoria	<i>Workplace Injury and Rehabilitation Act 2013</i> , s103	52 weeks, but conditional
Western Australia	<i>Workers Compensation and Injury Management Act 1981</i> , ss84AA, 84AB	12 months
Queensland	<i>Worker's Compensation and Rehabilitation Act 2003</i> , s232B	12 months
New South Wales	<i>Workers Compensation Act 1987</i> , s248	6 months or the duration of a relevant accident pay provision in a State or Commonwealth industrial instrument, whichever is longer
Tasmania	<i>Workers Rehabilitation and Compensation Act 1988</i> , s143L	12 months, but conditional
South Australia	<i>Workers Rehabilitation and Compensation Act 1986</i> , ss58B and 58C	Not defined period, but employer must give WorkCover Corporation 28 days notice of intention to terminate employment

The effect of the relevant restriction on access to s352 of the FW Act is that an employee of a non-national system employee who sustains a work-related injury and is off work for a cumulative duration of 3 months in a 12 month period, does not have effective access to reinstatement on either a permanent or interlocutory basis. However, this restriction is in practice, limited to employees located in the States of South Australia, Western Australia or Tasmania who are not employees of national system employers.⁶⁸⁵

There does not seem to be any sound policy rationale for this outcome, which applies to a minority of private sector employees located in States that comprise less than a quarter of Australia's total population.⁶⁸⁶ On both equity and regulatory simplicity grounds, the position described is most unsatisfactory and anomalous.

⁶⁸⁵ As to the exclusion of national system employees from the unlawful termination provisions see Creighton, Breen and Stewart Andrew *Labour Law* 5th Edition, Federation Press Sydney at p656.

⁶⁸⁶ The combined population of New South Wales, Queensland and Victoria represents 76.98% of Australia's total population. Victoria has referred all of its workplace relations powers to the Commonwealth, making all workers in that State employees of national system employers.

The effective solution to this anomaly would be to repeal or disallow the operation of Regulation 3.01(6) to restore the legal position to that which pertained prior to the Regulation being introduced and as reflected in judgments such as *Lee v Hills Before & After School Care Pty Ltd*.⁶⁸⁷ In *Lee*, Federal Magistrate Raphael dealt with an application by a child-care worker for a remedy following her termination by her employer whilst she was off work on workers compensation. The employer sought to have the matter dismissed on the grounds that the applicants temporary absence from work due to injury did not fall within the definition of “paid leave” and was therefore outside of the protection afforded by s659. In dismissing the application by the employer, His Honour considered in some detail the *Termination of Employment Convention 1982* and the preparatory work of the Convention drafters:⁶⁸⁸

“An interpretation of s.659 based solely on the words of the statute reveals no exclusion of workplace injury from the term 'temporary absence for illness or injury'. That Parliament intended, in enacting the provision, to exclude employees on Workers Compensation from protection from dismissal would be anomalous with its obligations under the Convention, viewed in the context of the preparatory materials, which the Act embodies.

Further, the fact that the category of employees absent due to workplace injury has not been excluded by Parliament, as empowered by the Regulations, indicates those employees should fall within the purview of the section. It would certainly be an odd result that a person who has an industrial accident and suffers injury could claim protection if he or she consequently claimed only sick pay, in which case it would be unlawful to dismiss him or her, but if she or he claimed Workers Compensation, upon the respondent's construction of the subsection it would be lawful to do so. Again the restriction of injuries to those not sustained in the workplace cannot be implied from a reading of the Convention papers or from the wording of the statute itself. An injury sustained outside of the workplace may entitle a worker to be paid through sick pay entitlements. An injury in the workplace would give a similar entitlement to be paid the "special form of sick pay" described by Deputy President Drake. If this interpretation of the phrase is accepted then there is no need to imply the absurdist distinction between the cause of injury that a definition that excluded Workers Compensation payments would require.”⁶⁸⁹

(Our emphasis)

Whilst it appears that the making of Regulation 3.01 sub-regulation (6) was intended to have the effect of excluding workers compensation from the protections afforded by s352 of the FW Act, the fact remains that its operation is anomalous and inconsistent with Australia’s obligations under the *Termination of Employment Convention 1982*. Moreover, given that the exclusion (by virtue of constitutional vagaries restricting the operation of the Division 4 protections) operates arbitrarily in respect of one minority class of employees – for no logical or defensible policy reason - it should be repealed immediately.

⁶⁸⁷ [2007] FMCA 4.

⁶⁸⁸ Ibid at paragraphs 14 – 17.

⁶⁸⁹ Ibid at paragraphs 23-24.

20 Employment Protections: (3) Workplace Bullying

The FW Commission anti-bullying jurisdiction has been in operation for 14 months [Part 6- 4B], FW Act. At the time of writing, the jurisdiction had produced just one anti-bullying Order; the Order was by consent and it has since been revoked, again by agreement⁶⁹⁰

It may still be too early to make an informed assessment of the jurisdiction but it is not unreasonable to conclude that, so far, the FW Commission's preference is to settle matters by agreement wherever possible. Given the complex workplace and psychological factors involved in bullying cases, this approach is perhaps understandable, however it is difficult for industrial parties to make an assessment on the type and rigour of evidence required to achieve an arbitrated anti-bullying order. It is also not possible to assess the efficacy of the jurisdiction against the expectations of employers, employees, unions and the community, or to determine if the jurisdiction has created a deterrent to bullying in the workplace.

At the time the FW Act was amended it was suggested that new resources may be employed to provide dedicated mediation services for the anti-bullying jurisdiction. The limited experience to date suggests that if the current legislation is to have an impact without adding to delays for applicants, more resources are required – notwithstanding the fact that we understand that at least some of the promised resources have in fact been delivered. This is because, as the discussion below illustrates, an “unintended effect” of the anti-bullying regime is the time it takes to have a matter resolved.

Consideration should be given to resourcing the FWC with dedicated conciliators who can hold conferences quickly and efficiently and make recommendations about how cases should proceed; for example, is there enough evidence to proceed to hearing? The FW Commission's dedicated Unfair Dismissal Unit is a model for such an approach. The FW Commission should also record and publish the length of time it is taking to settle or arbitrate these matters so that a more fulsome review can occur in due course.

The Legislation

The legislation was effective from 1 January 2014.

The impetus for the legislation arose from some recent high-profile cases and the findings of the House of Representatives Standing Committee on Education and Employment Inquiry into Bullying at Work which resulted in the Report *Workplace Bullying: We Just Want it to Stop*, Commonwealth of Australia (2012).

⁶⁹⁰ *Applicant v Respondent*, [2014] PR548852 (21 March 2014); AB2014/1052 FWC 9184 (16 December 2014).

Though the House of Representatives Inquiry did not make a specific recommendation around the FW Act, it examined the various legislative and regulatory frameworks which cover bullying and it occurred as the Commonwealth and (most of) the states and territories were adopting 'harmonised' work health and safety laws.

The model *Work Health and Safety Act 2011* includes duties to the psychological health of workers (s.4), and a draft Code of Practice on Workplace Bullying was developed by Safe Work Australia, but regrettably abandoned.⁶⁹¹

The aim of the amendments to the FW Act is to stop workers being bullied at work and the legislation gives the FW Commission broad powers to make (non-pecuniary) orders to suit each case provided they have found:

- that bullying⁶⁹² of a worker has occurred, and
- that the behaviour creates a risk to health and safety.
- There must also be a risk that the worker will continue to be bullied by an individual or a group.⁶⁹³

The legislation mirrors state and federal workers' compensation legislation in exempting matters which involve 'reasonable management action carried out in a reasonable manner'.⁶⁹⁴ Indeed, several cases have arisen from the jurisdiction in relation to reasonable management action.⁶⁹⁵

Applications so far

According to the FW Commission figures on the jurisdiction, 701 matters were lodged between 1 January 2014 and 31 December 2014.⁶⁹⁶ Of these, the Commission's figures tell us that 149 (just over 21%) were withdrawn 'early in the case management process' and an additional 90 were withdrawn 'prior to proceedings'. That is a total of 34% of applications lodged in 2014 did not make it to conciliation, mediation or hearing.

The fears of some industrial parties that the FW Commission would be 'flooded' by applications have not been realised.⁶⁹⁷ Presumably the FW Commission's 14 day 'triage' system has assisted in rooting out trivial or vexatious claims; the FW Commission's figures note that all 701 applications were 'dealt with' within 14 days.⁶⁹⁸

⁶⁹¹ The Code has never been adopted and instead provided content for Safe Work Australia Guidance Material, which is unenforceable. See *Guide for preventing and responding to workplace bullying*.

<http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/guide-workplace-bullying>

and *Dealing with workplace bullying – a workers' guide*

<http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/workers-guide-workplace-bullying>

⁶⁹² The definition of "bullying" is 'repeated, unreasonable behaviour', s. 789FD (1).

⁶⁹³ s. 789FF(1)

⁶⁹⁴ s. 789FD(2)

⁶⁹⁵ See *Applicant v Respondent* [2014] FWC 6285 (31 October 2014); *Mac v Bank of Qld (and others)* [2015] FWC 774 (13 February 2015) and *Willis v Gibson: Capital Radiology; Carroll* [2015] FWC 1131 (17 February 2015).

⁶⁹⁶ 4 *Quarterly Reports*, (Jan- Dec 2014), Fair Work Commission.

⁶⁹⁷ In a speech on bullying and investigations in April 2014, Employment Lawyer Josh Bornstein quoted some media articles predicting that the Fair Work Commission would be swamped by anti-bullying applications, and implying that many of these would be trivial. He noted that the reality had – so far- proven to be far more 'mundane'; *"Bullying & Workplace Investigations: The Case for Reform"*, Josh Bornstein, Maurice Blackburn Lawyers, N02 Bullying Conference, Gold Coast 8 April 2014.

⁶⁹⁸ *Ibid.*

Just 56 of the 701 cases lodged (8%) have resulted in a decision of the FW Commission. This reinforces our view that there is a strong preference within the FW Commission to settle anti-bullying claims.⁶⁹⁹

The FW Commission's Annual Report of 2013/14 found that in the first 6 months of the jurisdiction, though there were 100,000 unique website hits relating to anti-bullying, and 3,500 telephone enquiries, the FW Commission processed only 343 applications. This suggests that interest in anti-bullying processes may be high but taking the steps to make an application is another matter. The total of 701 applications in 2014 suggests that interest by and large stayed the same over the first 12 months of the jurisdiction. We have no way of knowing if this will change.

How is the system working 'on the ground'?

In 2014, the FW Commission had a 100% success rate in dealing with anti-bullying applications within 14 days. However, this is the stage at which the Commission's case management team are in contact with the applicant, respondent and any representatives, and acting as a 'triage' for matters. It is the experience of some affiliates that the Commission's workload does not allow expedient processes for dealing with applications once they are in the system, following this initial 14 day period.

For example, an applicant represented by the National Tertiary Education Union (NTEU) lodged her application in March 2014. It was subject to 6-7 conciliation conferences and was only settled in early February 2015. In this case, the FW Commission issued directions and the worker's evidence was prepared and submitted by the Union in May 2014. The FW Commission member who had carriage of the matter then took extended leave and the respondent did not follow directions that had been issued. A subsequent member of the FW Commission did not issue new directions so the respondent had the worker's outline of submissions and 5 witness statements for many months as the matter was conciliated, whilst the applicant had no idea what material the respondent might seek to rely on.

The approach in this case may have been an anomaly but the lengthy conciliation process raises two important matters. Firstly, (and unlike the unfair dismissal jurisdiction), applicants are presumably seeking to maintain their employment relationship whilst the anti-bullying matter is being dealt with. The longer the matter takes to resolve, the more difficult it must be to maintain a reasonable employment relationship. Secondly, a finding of bullying of a worker can only occur if there is a risk that the bullying will continue. To this end, the jurisdiction is what it purports to be – a means to have bullying stopped and not a punitive measure after the fact.

Though an applicant may argue that lodging an anti-bullying application is a motivator to stop bullying in the interim, we have no way of knowing how far a settlement will go towards changing a workplace culture or stopping bullying behaviour over the long-term, and without an order, no way of enforcing this.

One union organiser in a NSW "blue-collar" union has been involved in 8-9 applications in the anti-bullying jurisdiction. Based on her experiences representing members of the Rail, Tram and

⁶⁹⁹ The Commission's four quarterly reports for 2014 cite 154 applications which were 'resolved' during the course of proceedings (22%) however a further 80 were withdrawn after a conference or hearing so it is not possible to reach a conclusive number on how many matters were *settled* to the satisfaction of the parties.

Bus Union (RTBU), Helen Bellette identified the 'pros' and 'cons' of the jurisdiction as she sees it, so far as including:

Pros ⁷⁰⁰	Cons
Can be therapeutic for members as at the end of the process, they feel justified in making their complaint	Has to be an immediate threat to the member Takes too long for the matter to be listed
The process works – bullying is stopped	Psychologically damaging to member to continue working with the bully
Workers feel empowered by organising around the issue and seeing a result	Managing members' (workers') expectations
Employer can sometimes recognise there is an issue and address it accordingly	Is employer managing the bully in the correct manner or covering up the issue?

Ms. Bellette was involved in bullying cases within a large Sydney employer. A major restructure had occurred and new managers were brought in. Members experienced a spike in bullying incidents.

In one instance, a manager had been the subject of numerous grievances from different workers, four workers compensation claims had been made by another group of workers and one adverse action claim was lodged in the FWC.

An individual member of the Union then lodged an anti-bullying claim and reached settlement with the employer after one conciliation conference in the FWC. Unfortunately though the workplace bullying escalated, and the Union's members organised on the ground to support the member.

In this case the worker initiated ill-health termination due to his severe health issues.

In a second case, an anti-bullying application was lodged and one conciliation conference held. An outcome of the conference was the transfer of the respondent manager from the original work area.

The FW Commission then recommended discontinuing the anti-bullying claim and lodging a dispute in accordance with the relevant enterprise agreement to resolve outstanding matters. This course of action was suggested because the transfer of the manager meant there was no future risk to the health and safety of the worker. Outstanding matters, including pending disciplinary action against the member, were settled via the dispute application.

The Union reports that the member felt the anti-bullying process had been helpful in recognising that the bullying had occurred, and finding solutions.

⁷⁰⁰ Adapted from *Fair Work Commission – Anti-bullying jurisdiction: In the Rail Industry*; Presentation to the Union Labour Lawyers and Industrial Officers' Conference (NSW), Helen Bellette, RTBU, 27 February 2015.

The Health Services Union – Tasmanian Branch had a case in 2014 which involved some unique characteristics including a respondent accused of bullying at the applicant's workplace and outside of it, and that respondent was not an employee.

In this case, the employer attempted to claim that they could not be held responsible for the applicant's well-being, despite their obvious obligation to provide a healthy and safe workplace under work health and safety laws.

The case involved a Registered Nurse working in a small nursing home in southern Tasmania. She also lived in the same community as the respondent – the husband of a resident at the nursing home.

The case involved allegations that the respondent had made sexual advances towards the applicant. It was further alleged that the respondent retaliated to the applicant's rejection of those advances by subjecting her to bullying behaviour, including shouting at her, confronting her in the corridors of the facility and entering staff-only areas to talk to her.

The Union further alleged that management did not want to deal with the staff member's complaint as they did not want to risk the husband taking his wife out of the facility –and the subsequent loss of fees.

Eventually management changed the shifts of the applicant, without consultation or gaining her consent. It was at this point that the applicant sought assistance from her Union.

The Union's initial approach to management was also rejected – they claimed the worker's shifts were changed for her 'own protection'. The Union assisted the applicant to make a formal complaint of bullying in accordance with the workplace policy, and a dispute was initiated under the enterprise agreement around failure to consult around change of hours.

In the meantime, several staff members had come forward in support of the applicant, but some withdrew their support. The Union alleges that the withdrawal of that support was a consequence of those other staff being subjected to bullying by management.

Eventually management met with the Union, protested that they had not realised how serious the matter was, and restored the original roster of the member. They agreed they would monitor the health and safety of the member and put some safety protocols in place. One such protocol was that the member never be alone whilst she was working, but in such a small facility this protocol proved impractical and the respondent allegedly continued to harass the member.

Adding to the distress of the applicant was the fact that she lived in a very small community, which was the same community that the respondent lived in. It is alleged that he continued to harass her both at the workplace and in the streets of her community.

Eventually the nurse became quite ill from the stress and lodged a workers' compensation claim. The employer accepted the allegation that the resident's husband harassed their employee on the street and relied on this to disclaim any liability, and challenged the workers' compensation claim. This despite the fact that all medical practitioners involved related the injury to the employee's workplace.

Workers' compensation was paid and an eventual return to work only lasted a few days.

The Union lodged an anti-bullying application in the FW Commission and the respondents challenged the matter on jurisdictional grounds, but the FW Commission found that the issues involved were so serious as to warrant proceeding.

Witness statements were lodged on behalf of the applicant, by her work colleagues, and the Union drafted a proposed order which was discussed between the parties.

The form of the order was eventually agreed but Union would not agree to withdraw the application as they wanted the formality of orders issued from the FW Commission. The FW Commission informed the parties that in order for consent orders to be issued, the matter must proceed to full hearing; (by this stage only the Union's opening statements had been heard by the FW Commission).

Ultimately the applicant conceded she had lost all faith in her manager and the matter was settled outside of the auspice of the FW Commission, with the member leaving her employment and being paid a sum of money by the employer.

This case demonstrates just how complex bullying can become and the Union's insistence that an enforceable order be issued is understandable given the worker's health, the apparent reluctance of management to face the bullying, and the complication involving the behaviour of a respondent who was not an employee. It also demonstrates where the Fair Work jurisdiction is unique in that an earlier enforceable order to stop-bullying may have had the desired effect and maintained the employment relationship.

Overlap

The unique aspect of the anti-bullying jurisdiction would seem to be its capacity to provide enforceable orders to have workplace bullying stopped. However, some 14 months into the operation of the jurisdiction just one such order has been made.

The jurisdiction may, over time, act as an authoritative deterrent to workplace bullying. The process of an applicant having their story heard and seeking to resolve a bullying issue before a FW Commission member, should in the best cases assist in changing workplace management practices and cultures.

Affiliates' experiences suggest though that the FW Commission is seeking to resolve applications via lengthy conciliation processes. In some instances, these take many months and if they don't result in an enforceable order, we may well ask what can be offered by the legislation that can't be resolved via best practice processes at the workplace (where they exist). For example, in Higher Education, University policies and enterprise agreements often include rigorous processes for resolving grievances, including claims of bullying. On paper, these appear democratic as workers are not only entitled to representation but have a union nominee on an investigation, grievance or misconduct committee.

However, as with many modern workplaces a Human Resources department is often the central and 'controlling' source of progress on investigations and this may contaminate outcomes at worst and, at best, lead to less than transparent processes.. In addition, the layers of escalation involved lead to lengthy and stressful delays. For this reason, a Union affiliate such as the National Tertiary Education Union – who represent workers in Universities- had hopes that the FW Commission jurisdiction would provide for quick resolution of bullying matters; this has not

been their experience and without additional resources, it is difficult to know how the FW Commission can resolve these matters more efficiently.

Another unique aspect of the jurisdiction is its potential to ensure that the employment relationship is maintained, in the hope that the bullying will stop. It is hoped that the FW Commission could deal with anti-bullying applications quickly and before the effects of the psychological hazard posed by bullying behaviour have rendered an employee injured or incapacitated for work. To this end, the jurisdiction is preferable to state or federal workers' compensation schemes which address injury or incapacity arising from workplace injury and provide financial compensation. Again, however the length of time it takes the FW Commission to deal with an individual case will contribute to the health and safety risk continuing. In serious cases, individual employees may be well advised to lodge both an anti-bullying and workers' compensation claim.

Clearly there is consistency between the FWC jurisdiction and the state and Commonwealth workers' compensation jurisdictions in terms of the legislative definitions of 'bullying' (repeated unreasonable behaviour etc) and the respective legislations' exemptions for 'reasonable management/administrative action'. This makes sense and should provide some level of faith and certainty for employers, employees and their representatives.

The Explanatory Memorandum to the anti-bullying amendments suggests the FW Commission can refer matters relating to an anti-bullying application to the relevant health and safety regulator.⁷⁰¹ Such a referral could serve to trigger more lasting change within a workplace, through the intervention of the regulator, than might otherwise be the case via an individual anti-bullying application. It is envisaged, for example, that the FW Commission may act in this way when concerned about a wide-spread and entrenched culture of poor management and bullying which puts many employees at risk.

It should be noted that aside from a prohibition on pecuniary orders, the intent and effect of the legislation is that the FW Commission has wide powers to make any order it deems appropriate [ss.789FF]. It is foreseeable that the FW Commission could Order a process of long-term monitoring of policies, practices and training within a workplace. If the FW Commission could call on the expertise of investigatory and other staff from a health and safety regulator this could enhance the reach and effectiveness of the jurisdiction.

Investigations

The FW Commission is obliged to consider the outcomes of any internal investigations within the workplace subject to an anti-bullying application [ss.789FF(2)]. However, it is not a requirement that a workplace investigation has occurred prior to lodging an anti-bullying application with FWC. This makes sense and it means that the FWC is a genuine option in workplaces with inadequate bullying policies and procedures or without procedures at all. As discussed, having a member of the FW Commission address the details of an anti-bullying application must surely lend the process authority for employees and keep employers on their toes"

Workplace investigations of bullying matters are often flawed and one would hope that where the FW Commission has identified a flawed investigation, they can attend to this via their own examination of the facts and, potentially, an Order addressing inadequacies in workplace

⁷⁰¹ See Schedule 3 – Anti-Bullying Measure, *Fair Work Amendment Bill 2013- Explanatory Memorandum* paras 91-92

processes.⁷⁰² There is no reason why the FW Commission's orders need only address the facts of an individual case; ss789FF(2)(c) enables the FW Commission to consider "any matters that the Fair Work Commission considers relevant". Over time, it would be reassuring to see orders of a nature which will affect real workplace change.

⁷⁰² Refer Bornstein op. cit, 2014.

21 Accessing Workplaces

There has been a longstanding consensus in Australian industrial relations that employees are entitled to the benefit of union representation in the workplace. The acceptance of this notion follows from the broader proposition, enshrined in fundamental and internationally accepted labour Conventions and in domestic legislation, that employees should have the freedom to associate - to form and have the benefit of, representative organisations which are capable of defending and promoting their common industrial interests.

Union representation in the workplace can take a variety of forms. It can include ongoing representation by employees elected by their fellow union members, formal representation about industrial issues in an external forum or tribunal, or even advice and information provided to union members other than through the physical attendance of union officials at a workplace. However the capacity of workers to have union officials attend in person and enter a workplace for industrial purposes has been a critically important aspect of representative rights and a central tenet of Australian industrial law and practice for many decades.

Properly understood, the physical access of union representatives to a workplace is not so much a 'right of entry' which resides in a union or its officials but a 'right to representation' that belongs to employees. It is a recognition of the fact that freedom of association is more than an abstract concept. For freedom of association to have substance, it must include the conferral of rights which are of meaningful benefit for those who enjoy the freedom. These rights must facilitate the ongoing existence of freedom of association.

Freedom of association and the right of employees to have their representative organisations act in their interests also requires an effective line of communication between a union and the employees seeking representation. It is only when this is in place that employees can benefit from unions that function responsively and ultimately, democratically in a legitimate institutional role to uphold and advance the first principles discussed in Chapter 1.

Whilst the FW Act recognises the importance of freedom of association and representative rights⁷⁰³, the current provisions governing employee access to union representation in the workplace fall far short of an acceptable standard and have shown to be little more than a legal quagmire that does as much to discourage and frustrate access as to facilitate it.

⁷⁰³ The objects of the Act include 3(e)...'*enabling fairness and representation at work and the prevention of discrimination by recognizing the right to freedom of association and the right to be represented....*' (emphasis added)

History of Entry Provisions

Awards

For many years, federal industrial awards conferred a legal right on trade union officials to enter Australian workplaces. The constitutional basis for these types of provisions was recognised by the High Court at least as early as *Archer's* case in 1919.⁷⁰⁴ In that matter the Court held that a claim for an award provision authorising a union officer to enter premises, on notice, where an award breach was suspected and to have access to time and wage records, could form the basis of an 'industrial dispute' within the meaning of s. 51(xxxv) of the Constitution.

Clauses of this kind proliferated and became a common feature in many federal awards. Typically, these clauses were simply worded provisions which authorised an accredited official to enter premises to interview employees and investigate award breaches or safety conditions provided they presented themselves to management before they conducted their union business and did not unduly interfere with work.⁷⁰⁵ These award clauses reinforced the legitimate role unions had in representing employees and enforcing the award conditions that had been obtained by using the award-making machinery of the system.

By 1997, the *Workplace Relations and other Legislation Amendment Act 1996* (Cth) inserted a section into the re-named *Workplace Relations Act 1996* (Cth) rendering these clauses unenforceable.⁷⁰⁶ That section, in combination with the introduction of the concept of "allowable award matters",⁷⁰⁷ meant that so-called 'right of entry' clauses were progressively stripped out of awards during the award simplification process which followed in the late 1990s. From that point onwards, employee access to union officials in the workplace has been predominantly regulated by legislation.

Statutory Rights of Access

There was a period when workplace access provisions could be found in both awards and statutes in federal and state jurisdictions. Federally, from November 1973⁷⁰⁸, statutory entry provisions existed alongside those in awards.

Section 42A of the C&A Act provided:

(1) An officer of an organization authorized in writing by the secretary of the organization or of a branch of the organization to act under this sub-section may, at any time during working hours, but subject to any conditions provided by the relevant award, enter any premises in which work to which an award binding on the organization is applicable is being carried on, being premises specified in the authority, or premises occupied by an

⁷⁰⁴ *The Federated Clothing Trades of the Commonwealth of Australia v. Archer and Others* (1919) 27 CLR 207.

⁷⁰⁵ See for example clause 43 Right of Entry, of the former *National Building and Construction Industry Award 1990*.

⁷⁰⁶ Section 127AA commenced 1 January 1997.

⁷⁰⁷ Section 89A.

⁷⁰⁸ Act no. 138 of 1973.

employer who is bound by the award and is specified in the authority, for the purpose of ensuring observance of the award, and may for that purpose inspect any work, books or documents and interview any employee, being a member or a person eligible to be a member of his organization, on those premises, but an officer so authorized shall not hinder or obstruct an employee in the performance of his work during working time.

(2) If an officer of an organization proposing to enter, or being in or on, premises in pursuance of this section is required by the occupier or person in charge of the premises to produce evidence of his authority to that occupier or person, the officer is not entitled to enter or remain on the premises unless he produces to that occupier or other person the authority in writing referred to in sub-section (1).

(3) A person shall not hinder or obstruct an officer of an organization in the exercise of a power conferred by this section.

Penalty: \$100.

(4) In this section –

“**officer**”, in relation to an organization, means a person holding office in, or employed by, the organization or a branch of the organization;

“**premises**” includes any building, structure, mine, mine working, ship, vessel or place.

A section in similar terms was re-enacted in s. 286 of the IR Act.

“Organisation may authorise inspection

286. (1) An officer of an organisation authorised in writing by the secretary of the organisation or of a branch of the organisation to act under this subsection may, for the purpose of ensuring the observance of an award or an order of the Commission binding the organisation:

(a) at any time during working hours, but subject to any conditions provided by the award or order, enter prescribed premises that are specified in the authority or occupied by an employer specified in the authority;

(b) inspect or view any work, material, machinery, appliance, article, document or other thing on the prescribed premises; and

(c) interview, on the prescribed premises, an employee who is a member, or is eligible to be a member, of the organisation; but an officer acting under this subsection shall not hinder or obstruct an employee in the performance of work during working time.

(2) If an officer of an organisation proposing to enter, or being on, premises under subsection (1) is required by the occupier to produce evidence of authority to enter or be on the premises, the officer is not entitled to enter or remain on the premises without producing to the occupier the authority referred to in subsection (1).

(3) In this section:

"officer", in relation to an organisation, means holding an office in, or employed by, the organisation or a branch of the organisation;

"prescribed premises", in relation to an organisation bound by an award or an

order of the Commission, means:

(a) premises in which work to which the award or order applies is being carried on; or

(b) premises occupied by an employer bound by the award or order. “

By the time the new statutory scheme for access to workplaces was introduced into the *WR Act in 1996*, the scale of the regulation in this area and the detail into which the legislation had descended had increased many times over.

Section 286 (and section 306 which governed contraventions of s. 286) of the IR Act was replaced by an entire new Part IX Division 11A, consisting of seven sections with twenty seven sub-sections between them.

Parliament, it appeared, had decided to take over this area and comprehensively and prescriptively regulate it itself⁷⁰⁹, even though there was little if any evidence to suggest that the existing laws required the fundamental overhaul that the changes represented.

A pre-election commitment by the then Labor Opposition prior to the 2007 election to maintain the substance of the workplace access laws meant that the scheme of the WR Act carried over into the FW Act as a matter of politics but without any proper reconsideration of the effectiveness of these laws.

The 1996 Changes and Beyond

Twenty four hours' notice

The 1996 WR Act entry regime represented a fundamental departure from previous statutory schemes governing workplace access. It introduced into the law for the first time a scheme of permits authorising entry which was administered by the AIRC. It also introduced mandatory requirement that entry to workplaces only occur after a minimum period of 24 hours' notice had been given to the occupier of the premises.⁷¹⁰ There was no significant policy debate or rationale advanced to justify the introduction of these changes.

The most obvious point about the introduction of a requirement to give 24 hours' notice is that it immediately alerted those employers who were inclined to, to the possibility of altering, destroying or concealing relevant material and avoiding the consequences of what might follow from an unannounced inspection. This is particularly so where the purpose is to investigate suspected contraventions of industrial instruments. Notice in that instance defeats the very purpose for which the power to enter and inspect is given.

Where the purpose is to hold discussions with employees, some employers have taken the notice as an additional opportunity to create barriers to any reasonable discussions by, for example, transferring employees to other worksites, monitoring employee participation or insisting on inadequate venues to discourage attendance. More will be said about this below.

⁷⁰⁹ *Moranbah North Coal (Management) Pty Ltd v. CFMEU* (2000) 103 IR 267 at 273.

⁷¹⁰ Section 285D(2).

Further, the requirements in relation to notice have steadily expanded since the obligation was first introduced in 1996.

Originally, the requirement was simply for 24 hours' notice per se, to the occupier.⁷¹¹ The current requirement is for written notice in a prescribed form to the occupier (and any 'affected employer' in the case of entry to investigate suspected contraventions).⁷¹²

Section 518 now also sets out a comprehensive list of entry notice requirements, some of which are common to all notices and others which vary depending on the purpose for which entry is sought. Notices require declarations as to capacity to represent the industrial interests of the employees concerned (and penalties for misrepresentations about that aspect) and, in the case of notices relating to suspected contraventions, particulars of the suspected breach. The notice must be given during working hours and at least 24 hours, but not more than 14 days before, entry.

Quite aside from the administrative burden of attending to the number of these notices for union officials who are required to visit multiple workplaces each day, the notice requirements themselves have provided fertile ground for arguments about technical and other deficiencies.

Employers regularly take issue with the level of particularity required to be given in the case of entry for suspected contraventions and delay or refuse entry on that basis. Employer disputed union coverage rights can take time to resolve, often diverting scarce resources away from the underlying compliance issues for which entry is sought, such as unpaid wages or even health and safety problems.

Even the question of which part of a workplace an entry notice permits access to has been contentious. In *Molina v. Zaknich*⁷¹³ a Full Court of the Western Australian Supreme Court held that in the case of a multi-employer construction site where numerous subcontractors and their employees were engaged, the 'premises' to which entry was permitted could be that particular part of the site occupied by subcontractors on which members performed work.

Determining who are the occupiers and affected employers in multi-employer workplaces, or in the increasingly common situation where the employing entity is different to the owner or lessee of the premises where work is carried out, can be a difficult, time consuming and costly exercise.

Suspected contraventions that relate to or affect, a member...

Trade union access to workplaces and to employment records obviously reflects an important role that unions have played in establishing and enforcing employment standards on behalf of their members.

For many years in the federal jurisdiction, unions were the main, and for the most part under the C&A Act, effectively the only, organisations responsible for enforcing the terms of industrial awards which the unions themselves had obtained through the dispute settlement processes of the C&A Commission and the AIRC.

⁷¹¹ Section 285D(2) WR Act 1996.

⁷¹² Section 487.

⁷¹³ (2001) 24 WAR 562

The capacity to enter workplaces to inspect wage and other records helps to ensure that individual employees receive their lawful entitlements without recrimination. It also ensures that disputes about rates of pay are effectively and efficiently resolved and that employment standards more generally are not undermined through non-compliance. It discourages wages and conditions being used to unfair competitive advantage by employers who are prepared to flout the law. As the Federal Court of Australia said when discussing an earlier statutory provision relating to the inspection of employment records:-

“The rights given by s. 286 are a vital part of the process of enforcement of awards, which in turn are at the very heart of the system of conciliation and arbitration which is set up by the Industrial Relations Act 1988.”⁷¹⁴

That statement applies with equal force to the present system under which enterprise agreements play a more prominent role in the regulation of employment standards.⁷¹⁵

Since the 1996 amendments, entry for what might be called ‘enforcement purposes’ has been limited to the process of investigating specific suspected contraventions. This is a much narrower role than entering to monitor compliance with awards and orders more generally which was the prevailing situation before 1996. In the latter case, there did not have to be an actual or suspected breach, let alone a particularised one, before entry could occur.⁷¹⁶

There is a further important limitation which has developed since the statutory right of access was introduced. Under the FW Act, entry rights for investigating suspected contraventions are not at large but are confined to those that relate to or affect a member of a permit holder’s union.⁷¹⁷ This restriction was introduced by the 2006 ‘*WorkChoices*’ amendments and carried over to the FW Act.

Whilst there is some capacity to seek access to non-member records,⁷¹⁸ there is no doubt that the present limitation significantly detracts from the capacity of unions to oversee compliance with industrial instruments when there is a clear public interest in ensuring that the law is being complied with. There is an economic efficiency in having unions identify and rectify these matters without the necessity for court proceedings or the intervention of public authorities such as the Fair Work Ombudsman.

The Cole Royal Commission into the Building and Construction Industry concluded that in that industry at least, underpayments, whether inadvertent or deliberate, were a substantial problem and that union officials should be able to enter work premises to investigate suspected breaches. The final report of the Royal Commission said:

‘It is unrealistic to expect statutory authorities to intervene each and every time a dispute arises in relation to compliance with statutory or award obligations, or obligations under workplace agreements.’⁷¹⁹

⁷¹⁴ *AFAP v. Ansett Transport Industries (Operations) Pty Ltd (No 2)* 1991 36 IR 219 at 220.

⁷¹⁵ ‘*Being There: Changing Union Rights of Entry Under Federal Industrial Law*’, W J Ford *Australian Journal of Labour Law* Volume 13 No 1 June 2000, page 1.

⁷¹⁶ *AFAP v. East West Airlines (Operations) Limited* (1992) 40 IR 426 at 428.

⁷¹⁷ Section 481.

⁷¹⁸ Section 483AA.

⁷¹⁹ Final Report Volume Seven, Chapter Five, paragraphs 110 and 111.

Trade unions are central to the award and agreement-making processes and the enforcement of industrial instruments and legislation is a core union function. Unless compliance with these instruments is observed, the integrity of the industrial safety net, supplemented by enterprise agreements, established under the FW Act, is seriously undermined. Moreover, ensuring the integrity of the industrial system is a matter affecting trade union members and non-members alike. Both have an interest in ensuring that minimum standards are monitored and legally enforced.

The limitation on entry for compliance purposes relating to trade union members only should be removed.

Ex-employees

The FW Act confines entry to investigate a suspected contravention only for a member who ‘performs work on the premises’.⁷²⁰ There is no sound public policy reason why this should be the case.

Many employees are reticent to raise underpayment issues whilst they are still employed for fear of retribution. A large number of union wage claims are processed after the employment relationship has come to an end. Again, there are efficiencies in permitting unions to have access to work records for former employees and seeking to resolve disputes about entitlements informally and close to the source.

In 2012 the Fair Work Act Review Panel recommended that the legislation be amended to extend the rights under section 481 to cover the post-employment situation.⁷²¹ Unfortunately that recommendation was not acted upon. It should be adopted.

Discussions

Since the 1996 amendments, union permit holders have had access to workplaces in the federal jurisdiction for the purpose of holding discussions with employees who wish to participate in those discussions. Twenty four hours’ written notice to the occupier is required. Permits must be produced on request.

The legislation does not permit discussions to take place at any time during working hours. The discussions may only be held during mealtimes or other breaks i.e. during the employees’ own free time. This severely limits the time during which employees can have access to union representation.

The Fair Work Act Review Panel observed that the exercise of entry rights in these very limited circumstances is much less likely to impinge on the operations of the employer or require them to devote the resources that might be required to deal with an entry in other circumstances such as to investigate a suspected contravention.⁷²²

On major resource and infrastructure projects where thousands of employees are housed in temporary accommodation camps, the limitation allowing entry to ‘work premises’ during

⁷²⁰ Section 481(1)(b)

⁷²¹ Recommendation 37 ‘Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation’ June 2012.

⁷²² At page 194.

'working hours' and the common refusal of camp owners to allow union access means that employees are effectively denied access to union representation during their own, non-working time. FWA has observed that the laws did not guarantee privacy or anonymity for employees seeking access to union representation. 'If permit holders and employees wish to have total privacy and anonymity they are able to hold the discussions off-site out of working hours.'⁷²³ Unfortunately, even this option is not available for many employees.

Permit holders must also comply with any reasonable request by the occupier to comply with occupational health and safety requirements applying at the premises and reasonable requests as to the route to be taken to get to the meeting place.

As to the venue for discussions, the *WorkChoices* legislation allowed employers to designate a 'reasonable venue' for the first time. The FW Act attempted to address examples of employer recourse to obviously unreasonable venues by setting out some of the circumstances where a request would be unreasonable. This approach was unsuccessful.

In *Somerville*⁷²⁴ FWA found that occupiers of premises had the right to request permit holders to conduct interviews or hold discussions with employees in a particular room or area of the premises provided the request was reasonable and that a union could only succeed if it established that the employer's request was objectively unreasonable.

In *CFMEU v. Foster Wheeler Worley Parsons (Pluto) Joint Venture*⁷²⁵ (Pluto) the tribunal found that notwithstanding that the employer designated meeting areas suffered from intense heat (up to 45 degrees), were uncovered in some cases or covered only by shade cloth, had problems with dust, flies and noise, had limited or no seating and allowed managers to observe the meetings, they were nonetheless 'fit for the purpose' of holding discussions. Whether employees were intimidated or discouraged, or found it difficult to participate in discussions, was not the relevant question under the previous provisions. Rather, the union had to show that was the *intention* of the employer in designating the meeting places to discourage, intimidate etc., in practice a virtually impossible task.⁷²⁶

Since 1 January 2014, permit holders must conduct interviews or hold discussions in areas agreed with the occupier. Lunch rooms have been designated as the default venue in the absence of agreement. Clearly this is appropriate as this is where workers are likely to be located during break times – the only times the union is permitted to engage in discussions with them.

Other Deficiencies with Access to Representation in the Workplace Regime

There are numerous and ongoing issues associated with the existing laws. Some of the problems faced by employees and their representatives have included:

⁷²³ Williams C FWA in FWW at paragraph 186.

⁷²⁴ *Somerville Retail Services P/L v Australasian Meat Industry Employees Union* [2011] FWA 120.

⁷²⁵ [2010] FWA 2341

⁷²⁶ At paragraph 154.

- refusal of access despite permit holders having properly issued entry notices at least 24 hours in advance of attendance and after covering long distances to get to a workplace;
- claims that entry notices were “invalid” but with no explanation provided as to why the notices were said to be invalid;
- a permit holder who entered a workplace under the legislation then exited briefly to retrieve a pen from his car only to be told that he had already exercised his right of entry and would need to issue a new entry notice and wait a further 24 hours if he wanted to go back to the workplace.
- permit holders being ordered to leave the site and threatened with the police as a result of raising safety issues;
- permit holders being refused access to documentation directly relevant to suspected safety breaches, without explanation;
- employers claiming that permit holders could only enter the site during “business hours” rather than working hours;
- refusing entry to permit holders unless they could produce hard copies of the entry notices issued in advance of attendance, rather than electronic copies of the notices;
- assuring permit holders that rectifications of safety problems would take place and then refusing to allow the permit holder access to check whether the promised rectification work had been done;
- requiring the permit holder to undergo the same visitor’s induction on each visit to site;
- blanket refusals to allow permit holders to consult with workers about safety matters at their work stations; and
- employers refusing to allow an elected health and safety representative (HSR) to receive assistance from permit holders and refusal to acknowledge an HSR at all.

Frequency of Workplace Access

One recurring complaint from employers about the current entry regime is that it has resulted in a major increase in the frequency of union workplace visits. Whether or not this is the case, what is clear is that in some cases the approach of the employers themselves has contributed to an increase in the number of entry notices, if not entries, to Australian workplaces. Employers have actively resisted a coordinated and efficient approach to workplace access which would limit the frequency of these visits.

Case Study:

In *Pluto* FWA dealt with an entry dispute on a major construction site in a remote site in the North Western region of Western Australia. The site, valued at \$11b, consisted of over 3,300 workers, an engineering, procurement and construction management contractor (FWW), twelve to fourteen major contractors and from 50 to 70 lower tier subcontractors.

Amongst other things the head contractor, FWW, insisted in its ‘entry protocol’ that unions meet only with the employees of one contractor at a time. In practice, this meant that even where the official visited this remote site every day of the week, the union could meet only 10 contractors’ employees in that week. The employer argued that this was necessary in order to restrict the movement of employees on the site and thereby minimise safety concerns.

The tribunal found that this approach was valid in some circumstances but ‘questionable’ in others. It said that it was not reasonable for the employer to always request that permit holders have discussions with the employees of one contractor at a time.

‘The applicant (union) has an interest in meeting with its members and potential members and doing this **efficiently**, and these employees have an interest in receiving information from permit holders at their workplace.’⁷²⁷ (emphasis added)

And

‘In many workplaces there would be no basis for an occupier to request that a permit holder meet with anything less than all of its members and all employees eligible to be members at the same time.’⁷²⁸

Options for Reform

The current regulatory regime under which employees are given access to their union representatives in the workplace is extensive, complex and burdensome. The legislation has grown from a single section introduced in 1973 and remaining until 1996, to laws which now comprise an entire Part 3-4 of the FW Act and consist of some 48 sections with numerous sub-sections within each section.

Despite their ever expanding nature - and perhaps because of it - the only certainty that the laws provide is that this area will become even more contestable and litigation will flourish. Simplifying the current system and making it less prescriptive, without diminishing basic rights, is the starting point for any reform.

Entry and Representation by Agreement

A significant amount of interaction in the workplace between employers and trade union employee representatives occurs by mutual agreement and without incident or disruption. Where entry and representation arrangements can be agreed by the industrial parties the law should facilitate and not impede those arrangements.

Whilst it is clear that Part 3-4 of the FW Act is not an exhaustive code regulating entry to workplaces,⁷²⁹ the Act nevertheless limits the circumstances in which agreed entry clauses can be included in enterprise bargaining agreements.

Section 194(f) makes agreement terms that provide for an entitlement to entry for the purposes described in the legislation ‘unlawful terms’ and therefore incapable of approval by the FW Commission. Various decisions have confirmed that clauses authorising entry for other purposes not specified in the legislation, such as representation under a disputes settlement clause or to meet with employers to discuss a replacement agreement or consult over proposed

⁷²⁷ At paragraph 132

⁷²⁸ At paragraph 123.

⁷²⁹ *CFMEU v. Moyle Bendale Timber Pty Ltd* (2011) 213 IR 157.

redundancies,⁷³⁰ are permitted in agreements. However, the section still presents a major obstacle to parties agreeing to mutually acceptable clauses on access that accommodate the needs of their particular industry and workplace. Given the range of matters that are able to be dealt with in agreements there is no good policy reason why the parties should be limited to be able to agree to entry for some purposes but not others.

Aside from the statutory provisions, there have been other Government disincentives for the parties to agree to their own arrangements for access and representation in the workplace.

The former Implementation Guidelines to the National Code of Practice for the Construction Industry insisted that no agreement between the parties on this issue was permitted. It provided that no employer was to grant admission to a site by an employee or official of an industrial association other than in strict compliance with the procedures governing entry of these representatives under the WR Act and any relevant and applicable OHS or State legislation.⁷³¹ The penalties for failing to abide by this requirement included a possible suspension or prohibition on tendering for Federal Government construction work. The Government's proposed *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* is to similar effect.⁷³²

There are also many informal arrangements in place under which union representatives are invited onto work premises by employers/occupiers without resort to the exercise of rights under Part 3-4. Many employers have good longstanding working relationships with union representatives allowing for regular access. Some employers acknowledge the value of union attendance to assist in resolving workplace disputes or to play a positive role in the negotiation of workplace agreements. Many lack the time, resources or inclination to attend to the formalities associated with the statutory regime.

In some cases it can also be difficult to draw a clear line between situations where Part 3-4 rights are being exercised and where they are not. Since civil penalties attach to the improper exercise of those rights, it is important that no party is exposed to penalties where those rights are not being used.

Section 194(f) should be repealed to allow the parties to negotiate the terms of access and representation clauses as part of the enterprise bargaining process. Other obstacles to consensual arrangements, including commercial disincentives like those embodied in the Construction Code, should be discontinued.

⁷³⁰ See for example *AiG v. Fair Work Australia* (2012) 205 FCR 339, [2012] FCAFC 108, *Moyle Bendale* op cit .

⁷³¹ Implementation Guidelines to the National Code of Practice for the Construction Industry - reissued June 2006.

⁷³² Clause 14.

Current Restrictions

The current requirement to give notice of entry for the purpose of discussions during employees' meal or other breaks should be removed as should the notice requirement for suspected contraventions, the latter of which is inappropriate in the context of investigations and significantly undermines the proper enforcement of employee entitlements.

The limitation on the inspection of records relating to currently employed members should likewise be rescinded.

Role of the FW Commission

Since the introduction of the 1996 legislative provisions the FW Commission and its predecessors have been limited in their role in settling disputes about access to workplaces. Section 285G of the WR Act provided that the AIRC could exercise its dispute settlement powers in this area but could not make an order '*conferring powers that are additional to, or inconsistent with, powers exercisable under*' Division 12 of Part IX. That limitation has been carried over, with some modifications, into subsequent legislation.

The effect of these sections has been that the FW Commission is unable to make orders varying the circumstances under which access can occur for the purposes set out in the FW Act, even where to do so could be justified as a matter of merit and discretion *and* would have the effect of settling a live industrial dispute. This 'one size fits all' approach to workplace access disputes is unnecessarily restrictive and inconsistent with achieving reasonable and flexible arrangements that suits the needs of Australian workplaces.

The FW Commission should have the capacity to make orders that amend the legislative requirements, by order, where that can be justified on the merits of a particular case.

22 Institutional Performance.

The FW Commission and the FWO are the two most significant government agencies at work in the industrial relations system. However, the Road Safety Remuneration Tribunal, State Industrial Relations Commissions, the Fair Work divisions of Federal Court and Federal Circuit Court, the FWBC, anti-discrimination agencies of Commonwealth and the States and certain State Courts also have a substantial role in regulation and enforcement. The other significant institution that is critical to the proper functioning of the industrial relations system is organised labour.

Performance and role of the labour inspectorates

The FWO is regulatory agency of substantial value in the industrial relations system. Its core functions are essentially education and enforcement, both of which it executes well in an objective sense, notwithstanding that we and our affiliates could point to examples of where we consider the advice given by the FWO is not correct. Even in those outlying cases, the FWO have engaged with us to discuss the areas of disagreement or how standard advice might be revised. We have good lines of communication with them which is essential given that, in some measure, our affiliates' regulatory functions overlap with theirs.

The FWO 2013-14 Annual Report indicates that it received 12,376,395 telephone or written inquiries and website visits and that it finalised 25,650 complaints for 2013-14 through dispute resolution initiatives (62%), compliance and enforcement (21%) and assessment (17%). The most common complaints were not being paid for work (32%), underpayment (26%) wages and conditions (17%), leave entitlements (16%) and payment in lieu of notice (9%). The FWO issued 116 infringement notices, 65 compliance notices and 15 enforceable undertakings for the period 2013-14.⁷³³ Its compliance and enforcement policy indicates it applies a sensible triage and management process to the inquiries it receives, save perhaps in relation superannuation matters which it perplexingly refers to the ATO notwithstanding that agency's poor track record of action on such matters. The FWO has also shown initiative in driving responsible compliance through supply chains, as evidence by its action against the Coles group and by entering into Proactive Compliance Deeds⁷³⁴. Again, whilst there might be room for disagreement on the detail, the substance and intent is overwhelmingly positive.

We note the PCs tendency to refer to "dispute resolution" in the context of a discussion with FWO. We construe this as a reference to the FWO's mediation service⁷³⁵. This is a function that the FWO has evolved to assume and, in our view, it may be a symptom of the gaps in the

⁷³³ FWO annual report 2013-14 p.p. 25-28

⁷³⁴ See <http://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/proactive-compliance-deeds/list-of-proactive-compliance-deeds>

⁷³⁵ See the FWO Compliance and Enforcement Policy at section 6-7:
<http://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.pdf.aspx>

functions of the FW Commission or a poor awareness about its existing functions and the lack of accessibility to the Court system. Mediation is inaccessible through the court system until proceedings have been issued and other steps taken in litigation, which can present up-front costs. The process of commencing a matter in the FW Commission is less complex and conciliation generally happens very early in the process. However, as discussed in Chapter 12, the FW Commission does not have the ability to preside over all disputes, and it does not have the capacity to arbitrate all of the disputes that are brought before it. It may be the case that one present advantage of the FWO's mediation service is that it carries with it the implied threat that if the matter is not resolved, a further step may be taken independently of the will of the parties involved. It is somewhat perverse from a resource allocation perspective that some of the functions of the FW Commission are duplicated in the result. In our view, it would be a far more efficient outcome if the FW Commission were formally able to assume the mediator role for the core wages and conditions complaints that FWO is seemingly inundated with (particularly at a safety net level) and that the mediation take place under a framework where active involvement (such as making recommendations) and ultimately arbitration were a real prospect.

Another and perhaps more glaring issue of inefficiency and waste is the fact that there are two separate and separately funded, statutory agencies *enforcing* one set of industrial laws – the FWO and the FWBC. Although the FWBC is confined in its role to laws applying to 'building work' as defined, its statutory mandate is in virtually identical terms to that of the FWO⁷³⁶. Moreover, since the introduction of the FW(BI) Act in 2012, there is no difference in the laws that they enforce and the penalties which apply to any contraventions of those laws. There are really only a couple of significant differences between the operations of the two inspectorates.

Firstly, the FWBC has at its disposal coercive information gathering powers which include a criminal sanction of up to six months imprisonment for failure to comply with those powers.⁷³⁷ The FWO has the power to compel the production of records or documents⁷³⁸, however contravention of this provision results in a civil penalty and is not a criminal offence. Both sets of provisions override the common law privilege against self-incrimination. The most recently published report of the FWBC shows that the FWBC's coercive notices have only been relied on 4 times in the 2013-14 period and twice in the period 2012-13⁷³⁹. In any event this distinction is set to fall away in less than 3 months' time when the sunset provision in the FW(BI) Act takes effect and the FWBC is no longer able to apply to issue these coercive notices⁷⁴⁰. At that point, FWBC inspectors will have the same powers in respect of building matters as those available to inspectors of the FWO under the FW Act⁷⁴¹.

The other point of distinction between the two agencies is that whilst the FWO carries out the full range of functions that would ordinarily be expected of a labour inspectorate, and does so in a way that is consistent with Australia's international obligations as a signatory to ILO Convention 81, Labour Inspection, (namely by securing '*the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters,*'⁷⁴² the FWBC has made a policy decision not to perform

⁷³⁶ see s 682 of the FW Act and s. 10 of the *Fair Work (Building Industry) Act*.

⁷³⁷ s. 52 FW (BI) Act

⁷³⁸ s. 712 FW Act

⁷³⁹ FWBC Annual Report 2013-14

⁷⁴⁰ s. 46

⁷⁴¹ see s. 59C of the FW (BI) Act)

⁷⁴² see Article 3, 1(a) of C81

that role itself - notwithstanding that it is clearly a part of its statutory responsibilities to do so. Instead, in relation to the enforcement of employee entitlements under industrial instruments, the FWBC has 'outsourced' this responsibility to the FWO to perform and has done that on the basis that the FWO is better equipped to carry out this work. This failure to carry out the proper role of a labour inspectorate has drawn strong condemnation from the ILO's Committee of Experts on the Application of Recommendations and Conventions. In 2011 that body said of the ABCC (now FWBC):-

"Noting with concern that the manner in which the ABCC carries out its activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the Convention."

The effect of this 'policy' decision by the FWBC not to secure and enforce employee entitlements but to abdicate that responsibility to the FWO makes the case for disbanding the FWBC and allowing the FWO to function as the sole federal labour inspectorate even more compelling. The fact is the FWO is already performing the most basic function of enforcing the legal rights and entitlements of employees in the construction industry and there is simply no need for another inspectorate to cover that industry.

The only time where the question of the existence of a separate statutory agency for the construction industry was considered was during the course of the Wilcox Inquiry in 2008-09. In his final report Mr. Wilcox QC dealt with the argument about the administrative and structural context in which any specialist agency would operate in the construction industry. He said:-

"As I understand the position, the Australian Government is keen to reduce the present proliferation of Commonwealth workplace relations agencies. It would be consistent with that objective for it to make the Specialist Division part of the OFWO. Efficiencies and costs savings should result from amalgamation of what is now the ABCC, with what is now the Office of the Workplace Ombudsman. The amalgamated units could then share not only accommodation and other infrastructure, such as computer and other communications systems, but also expensive supporting services, and financial, human resources, legal and IT personnel.

..I considered whether it is possible, without making the new Specialist Division a separate statutory body like the ABCC, to ensure it receives earmarked resources, sufficient to enable it to provide high standard, focussed services to the industry. I raised with DEEWR the possibility of the Specialist Division, although within the OFWO, having its own one-line Budget allocation. I was informed this would not be unprecedented but was probably unnecessary."

Ultimately, the very first recommendation of the Wilcox Inquiry was that any new agency for the construction industry be established *within* the FWO, not separate from it.

Funding of the ABCC/FWBC costs the Australian taxpayer in the order of \$30m per annum. That has meant a total outlay of around \$250m since its establishment in 2005. The FWBC was set up at a time when the Fair Work Ombudsman did not exist and the Commonwealth inspectorate, such as it was, was nowhere near as active, efficient and well-resourced as the current FWO. The continued existence of the FWBC amounts to unnecessary duplication and inefficiency. There is no reason for a second agency to exist for the construction industry. Nor is there any doubt that the FWO has the capacity, powers and resources to carry out all of its function in the construction industry along with every other industry. The FWBC should be disbanded and its operations absorbed into the FWO.

The FW Commission

As alluded to above and in Chapters 11-16 & 18 & 21 in particular, there is room for the FW Commission's jurisdiction to be modified and broadened in order for the industrial relations system to provide more effective pathways to resolving rights and interest based disputes. Further, as we raised in Chapter 8, reforms to the minimum wage setting framework should be pursued to more closely align that function with the distributional purpose of the industrial relations system.

Within the footprint of its present functions, the FW Commission is in our experience functioning highly effectively subject to three concerns considered elsewhere: the Award review process (see Chapter 9), the processing of Right of Entry matters (see Chapter 6) and the inflexibility and delay in the processing of unfair dismissal matters (see Chapter 18). Unions report the FW Commission processes as generally user friendly, especially compared to other institutions. In particular, unions value the ability to file matters electronically, use email for routine correspondence and ease of access to transcripts and decisions. The ACTU and other stakeholders recently reported our experiences to KPMG, who had been appointed by the General Manager of the FW Commission to conduct a benchmarking study on the FW Commission which looked at its effectiveness as compared to other tribunals and courts. We are unaware of whether the KPMG study has been completed. Both its findings and its methodology may be of interest to the PC.

The raw numbers contained in the annual reports of the FW Commission provide a sense of the significant caseload of the FW Commission and in that context it is to be commended for the fact that criticism of it are at the margins of exceptions and well distant from being the rule.

The FW Commission 2013-14 Annual Report indicates that the FW Commission:

- Received 37,066 applications;
- Conducted 19, 620 hearings and conferences;
- Made 13,302 decisions, orders or determinations; and
- Had 3,259,939 web site visits and 208,102 telephone inquiries.

A breakdown of the total applications the FW Commission received for the 2013-14 reporting period⁷⁴³ appears in Table 25 below.

⁷⁴³ FWC Annual Report 2013-14, p. 26

Table 25: Breakdown of applications made to the FW Commission 2013/14

Case matter	No. heard	Median no. days
Agreements	6,754	17
orders relating to good faith bargaining	422	10
dispute resolution	3295	20
orders relating to industrial action	989	2
general protections involving dismissal	2879	29
unfair dismissals	14,796	46
appeals	214	78
applications to terminate individual agreement based transition instruments	2841	35
registered organisations;	1381	-
Other matters	3495	-

The bulk of matters were unfair dismissal claims and approvals of agreements. Seventy-nine percent of unfair dismissal claims were conciliated. 92.8% of agreements were approved within 8 weeks and 98.4% within 12 weeks.

The timelines for other key matters were:

- Reserved decisions : 83.9% within 8 weeks and 93.4% within 12 weeks
- Appeals(lodgement to hearing): 94.6% within 8 weeks and 100% within 16 weeks
- Appeals (reserved decisions): 88% within 8 weeks and 97.2% within 12 weeks

These turnaround times are remarkably good given the volume of matters the members and staff of the FW Commission must contend with.

Beyond looking at those raw numbers, it is important to appreciate that the FW Commission conducts a range of research functions, public and stakeholder engagement projects which facilitate evidence based innovation, cooperative and productive workplace relations. This wider role should be recognised as a critical component in the measurement of the performance of the institutions regulating our industrial relations system.

Further, the FW Commission has instituted a change program, *Future Directions*, in an effort to respond appropriately to 'constantly changing social and industrial environments'. In particular,

the FW Commission has identified changes in the nature of its work- from dealing with predominantly collective disputes between represented parties to an increasing number of self-represented applicants pursuing individual rights based disputes- as a critical area.

The program includes a range of initiatives grouped under the four key themes of:

- Promoting fairness and improving access;
- Efficiency and innovation;
- Increasing accountability; and
- Productivity and engaging with industry

Of relevance to this Review, in 2015-16 the FW Commission intends to evaluate its performance against the International Framework for Tribunal Excellence⁷⁴⁴.

State interference

We note that the PC has identified s. 569 of the FW Act as controversial section. We regard it as both controversial and unnecessary to provide intervention as of right to the Minister or any other State agency in industrial relations proceedings. The courts, through rules of procedure and the common law, have developed thorough tests to determine on a discretionary basis when a non-party to a proceeding should be heard in a proceeding, and, if so, what role they should play therein⁷⁴⁵. Similarly, the FW Commission has broad powers to inform itself in any way it sees fit, which have been applied to determine whether it is appropriate for particular parties to be heard.⁷⁴⁶ These rules are sufficient and fair.

Beyond section 569 of the FW Act, there are other provisions which give rights to a Minister or a regulatory authority which bypass the discretionary considerations otherwise applicable. These include:

- Section 71 of the FWBI Act, which gives the Director of the Fair Work Building Inspectorate the power to intervene in court proceedings as of right;
- Section 72 of the FWBI Act, which gives the Director of the Fair Work Building Inspectorate the power to make submissions in the FW Commission as of right
- Section 569A of the FW Act, which gives the Industrial Relations Minister of a State or Territory the power to intervene in court proceedings as of right
- Section 351A of the RO Act, which gives the Minister the power to intervene in court proceedings as of right.
- Section 310 of the RO Act, which gives the Minister (rather than the inspectorate) the exclusive public right to prosecute union officials and employees of unions for non compliance with orders or directions of the Federal Court or the FW Commission.
- Sections 28 and 30 of the RO Act, which gives the Minister the power to apply to the Federal Court or the FW Commission to cancel a union's registration under that Act;
- Sections 133 and 137A of the RO Act, which give the Minister the power to seek demarcation orders from the FW Commission (i.e. orders that prevent a union from

⁷⁴⁴ <http://coat.gov.au/images/downloads/INTL%20COAT%20FRAMEWK%20TRIB%20April%202014.pdf>

⁷⁴⁵ See, for example, *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCA 54

⁷⁴⁶ See [2010] FWA FB 6021.

representing particular workers that its constitution otherwise permits them to represent);

- Section 605 of the FW Act, which gives the Minister the right to seek a review of a decision of the FW Commission, in the absence of any party to the matter appealing against it.
- Section 247 of the FW Act, which gives the Minister the exclusive right to prevent workers, in all multi employer bargaining contexts save for those involving franchises, joint ventures or related companies, from accessing protected industrial action at any stage during their bargaining.
- Section 431 of the FW Act, which gives the Minister the power to terminate protected industrial action;
- Section 433 of the FW Act, which gives the Minister the exclusive power (after a direction under section 431 has been made) to direct that parties to bargaining disputes engage in or cease engaging in any conduct.

Each of the powers above involve unwarranted state interference in industrial relationships, and should be repealed.

Organised labour

Organised labour has a significant institutional presence: the broad acceptance of the importance of trade unions and the ethos of the fair go which they enshrine. One of the core reasons why the 2014 Budget was so soundly rejected was the broad acceptance in the community of these principles of fairness. This broad acceptance of the importance of unions is also evident in survey research. The 2005 Australian Survey of Social Attitudes (AuSSA) found that 88 per cent of union members believed that ‘Without trade unions, the working conditions of employees would be much worse than they are’. Among a group called ‘unrepresented workers’—those not in a union but who would like to be—the figure was slightly higher at 89 per cent. Finally, even among a group called ‘satisfied non-members’—those not in a union and not wanting to be—some 46 per cent agreed with this sentiment.⁷⁴⁷

The role of unions in the industrial relations system is multifaceted: We are advocates, we are enforcers, we are negotiators. Most importantly, and pervading all of that, we are the democratic voice of workers. This means that our goals also extend beyond those that the system is presently capable of delivering, and it is why (as regulation theory would predict) we engage in the broader political process in pursuit of reform. This can be seen in our position on labour supply issues (such as the proper regulation of temporary overseas workers) as well as labour demand issues (such as industry and innovation policy) and the socialisation of risk through the tax and transfer system.

Our role within the confines of the industrial relations system as it stands is critical, because we are fundamental to the two vehicles by which it gives effect to its central purposes: the setting of minimum standards and collectivism. Without a strong organised labour movement, policy makers are forced to devote more public resources to try and replicate what organised labour does in order to make the system appear objectively fair. A case in point is the “fairness test”,

⁷⁴⁷ Gabrielle Meagher and Shaun Wilson 2007, ‘Are Unions Regaining Popular Legitimacy in Australia’, in: *Australian Social Attitudes 2: Citizen, Work and Aspirations*, ed. by David Denemark et al., Sydney: UNSW Press, p. 200

during *WorkChoices* - under which the Public Service was effectively asked to re-draft agreements which had been designed to be made with little or no union involvement and ascribe dollar values based on their views about what were fair trades as between labour, capital and the minimum standards. Replication of the role of organised labour is not possible (as the electoral consequences of the example bear out). This is not only because of cost, it is also because the State can never truly adopt the partisan position necessary to fully express workers' aspirations. The legitimate role of the State's market intervention is limited to giving effect to the first principles discussed in chapter 1 by setting the rules (such as the NES, good faith bargaining requirements and employment protections), providing the tools for the contest (such as protected action and the civil penalty framework), and supplying an independent umpire.

This is why it is so concerning to us that limits on collective action highlighted in this submission, such those that relate to protected action ballots, multi entity bargaining and the collective participation rights of contractors and labour hire workers, remain features of our system. If a balanced contest - a fair system - is what is desired, these limits must be addressed. Failing to do so amounts to placing arbitrary limits on the application of the first principles upon which the system is built, if not outright rejection of them.

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