



Australian Government
Productivity Commission

Workplace Relations Framework

Productivity Commission
Inquiry Report
Overview and recommendations

No. 76, 30 November 2015



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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).



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30 November 2015

The Hon Scott Morrison MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

In accordance with Section 11 of the *Productivity Commission Act 1998*, we have pleasure in submitting to you the Commission's final report into the *workplace relations framework*.

Yours sincerely

A stylized, handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke.

Peter Harris AO
Presiding Commissioner

A handwritten signature in black ink that reads "Patricia Scott" in a cursive script.

Patricia Scott
Commissioner

Terms of reference

WORKPLACE RELATIONS FRAMEWORK

Productivity Commission Act 1998

I, Joseph Benedict Hockey, Treasurer, pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake an inquiry into the workplace relations framework.

Background

The Australian Government believes that it is fundamentally important to make sure that the Fair Work laws work for everyone.

Workplaces are important to our economy and society. Higher living standards, better pay and more jobs all depend on having fair, productive, and effective workplaces. The prosperity of tomorrow is driven by what happens in our workplaces today and this is why it is in our national interest to make sure that the Fair Work laws are balanced and effective.

The Australian Government's objectives in commissioning this Inquiry are to examine the current operation of the Fair Work Laws and identify future options to improve the laws bearing in mind the need to ensure workers are protected and the need for business to be able to grow, prosper and employ.

Scope of the Inquiry

The Productivity Commission will assess the performance of the workplace relations framework, including the *Fair Work Act 2009*, focussing on key social and economic indicators important to the wellbeing, productivity and competitiveness of Australia and its people. A key consideration will be the capacity for the workplace relations framework to adapt over the longer term to issues arising due to structural adjustments and changes in the global economy.

In particular, the review will assess the impact of the workplace relations framework on matters including:

- unemployment, underemployment and job creation
- fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net

-
- small businesses
 - productivity, competitiveness and business investment
 - the ability of business and the labour market to respond appropriately to changing economic conditions
 - patterns of engagement in the labour market
 - the ability for employers to flexibly manage and engage with their employees
 - barriers to bargaining
 - red tape and the compliance burden for employers
 - industrial conflict and days lost due to industrial action
 - appropriate scope for independent contracting.

In addition to assessing the overall impact of the workplace relations framework on these matters, the review should consider the Act's performance against its stated aims and objects, and the impact on jobs, incomes and the economy. The review should examine the impact of the framework according to business size, region, and industry sector. It should also examine the experience of countries in the Organisation for Economic Co-operation and Development.

The workplace relations framework encompasses the *Fair Work Act 2009*, including the institutions and instruments that operate under the Act; and the *Independent Contractors Act 2006*.

The review will make recommendations about how the laws can be improved to maximise outcomes for Australian employers, employees and the economy, bearing in mind the need to ensure workers are protected, the need for business to be able to grow, prosper and employ, and the need to reduce unnecessary and excessive regulation.

The Productivity Commission will identify and quantify, as far as possible, the full costs and benefits of its recommendations.

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

In conducting the review, the Productivity Commission will draw on the full spectrum of evidence sources including, but not limited to:

- Australian Bureau of Statistics data and publications
- data sources maintained by other relevant Government bodies, including but not limited to the Department of Employment, Fair Work Commission and Fair Work Ombudsman
- employers or their representatives
- employees or their representatives

-
- academia
 - special interest groups.

The review should also identify gaps in the evidence base where further collection may assist in the analysis of the overall performance and impact of the system.

Process

The Commission is to undertake an appropriate public consultation process including holding hearings, inviting public submissions and releasing a draft report to the public.

The final report should be provided to the Government in November 2015.

J. B. HOCKEY

Treasurer

[Received 19 December 2014]

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The full report is available at www.pc.gov.au

OVERVIEW

Key points

- A workplace relations (WR) framework must recognise two enduring features of labour markets.
 - Labour is not just an ordinary input. There are ethical and community norms about the way in which a country treats its employees.
 - Without regulation and an ability to act collectively, many employees are likely to have much less bargaining power than employers, with adverse outcomes for their wages and conditions. Equally, poorly-designed regulation can risk bestowing too much power on organised labour in their dealings with individual employers.
- The challenge for a WR framework is to develop a coherent system that provides balanced bargaining power between the parties, that encourages employment, and that enhances economic efficiency. It is easy to both over and under regulate.
- The bulk of relationships between employees and employers are harmonious. The adversarial relationships between the parties that sometimes surface can often reflect poor relationship management, rather than flaws in the WR framework.
- Contrary to perceptions, Australia's labour market performance and flexibility is relatively good by global standards, and many of the concerns that pervaded historical arrangements have now abated. Strike activity is low, wages are responsive to the economic cycle and there are multiple forms of employment arrangements that offer employees and employers flexible options for working.
- Set against that background, Australia's WR system is not dysfunctional — it needs repair not replacement. Nevertheless, several major deficiencies need addressing.
- While the Fair Work Commission (FWC) undertakes many of its functions well, the legalistic approach it adopts for award determination gives too much weight to history, precedent and judgments on the merits of cases put to it by partisan interest groups. This calls for a change in institutions and in practices. The wage regulation function of the FWC should be separated from it. The existing FWC would concentrate on its tribunal and administrative functions. A new body, the Workplace Standards Commission (WSC), would be dedicated to determining minimum wages and award regulation.
 - The WSC would use different types of expertise, and apply a clear analytical framework supported by evidence it collected.
- The appointment process for FWC members can lead to inconsistencies in some of its decisions, a problem that a new 'fit for purpose' governance model involving all Australian jurisdictions could resolve. The same processes would apply to the WSC.
- The *Fair Work Act 2009* (Cth) and sometimes the FWC can give too much weight to procedure and too little to substance, leading to unnecessary compliance costs and poor outcomes. For example,
 - some minor procedural defects in enterprise bargaining can require an employer to begin the agreement-making process again
 - an employee may engage in serious misconduct but may receive considerable compensation under unfair dismissal provisions due to procedural lapses by an employer.
- These problems can be easily remedied without removing employee protections.
- Minimum wages are justified, and the view that existing levels are highly prejudicial to employment is not well founded. However, significant minimum wage increases pose a risk for employment, especially for more disadvantaged job seekers and in weakening labour markets.
- Complementary policies that provide in-work benefits — such as wage subsidies or an earned income tax credit — might support higher incomes for lower paid employees, while not damaging employment. However, there are challenges in developing effective policies of this kind.

Key points (continued)

- Awards are an Australian idiosyncrasy with some undesirable inconsistencies and rigidities, but they are an important safety net and a useful benchmark for many employers. The WSC should address specified troublesome hotspots on a thematic basis.
- Penalty rates have a legitimate role in compensating employees for working long hours or at asocial times. However, Sunday penalty rates for hospitality, entertainment, retailing, restaurants and cafes are inconsistent across similar work, anachronistic in the context of changing consumer preferences, and frustrate the job aspirations of the unemployed and those who are only available for work on Sunday. Rates should be aligned with those on Saturday, creating a weekend rate for each of the relevant industries.
- Enterprise bargaining generally works well, although it is often ill-suited to smaller enterprises. However,
 - while the better off overall test is cosmetically similar to a no-disadvantage test (NDT), in practice, the NDT makes agreement-making less costly and more efficient. A NDT with guidelines about the use of the test should be used for all enterprise agreements and individual arrangements
 - bargaining arrangements for greenfields agreements pose risks for large capital-intensive projects with urgent timelines. A limited menu of bargaining options would address the worst deficiencies, while taking account of the different nature of greenfields projects.
- Individual flexibility arrangements have many possible advantages, but their take-up is relatively low. In part, this reflects ignorance of their existence. But there are perceptions (sometimes not well based) of defects, which also constrain their use. These should be resolved by providing information on their use, extending the termination period of the arrangements, and by moving to the NDT.
- There is scope for a new form of employment arrangement, the 'enterprise contract', which would provide for variations to awards suited to the circumstances of individual enterprises. This would offer many of the advantages of enterprise agreements, without the complexities, making them particularly suited to smaller businesses. Any risks to employees would be assuaged through a comprehensive set of protections, including a clear written statement to employees of the implications of award variations, a no-disadvantage requirement, the right to revert to the award or to initiate enterprise bargaining, and continued coverage by the National Employment Standards and employee protections.
- Strike activity in Australia is at low levels, but debilitating processes and problematic new forms of action should be fixed:
 - overly complex processes for secret ballots should be simplified
 - aborted strikes and brief stoppages are sometimes ingeniously used as bargaining leverage by employees, but a few modest remedies can address this without affecting the legitimate use of industrial action
 - employers should be given more graduated options for retaliatory industrial action other than locking out its workforce.
- It is too easy under the current test for an employer to escape prosecution for sham contracting. Recalibrating the test from one of 'recklessness' to 'reasonableness' is justified.
- Migrant workers are more vulnerable to exploitation than are other employees, and this is especially true for illegally working migrants. This requires a package of measures that encourage migrants to report exploitation and support for the Fair Work Ombudsman to detect and pursue exploitative employers.

Overview

Despite some significant problems and an assortment of peculiarities, Australia's workplace relations system is not systemically dysfunctional. Many features work well — or at least well enough — given the requirement in any system for compromises between the competing and sometimes conflicting goals the community implicitly has for the system.

The system acknowledges that labour differs from other inputs, and that a sound workplace relations system must give primacy to the wellbeing of employees (and would-be employees), and take account of community norms about the fair treatment of people. While there are hot spots that justifiably attract major concerns, the day-to-day life of most employees and employers is harmonious and productive, with a reasonable balance between the relative powers of the parties.

The key message of this inquiry is that repair, not replacement, should be the policy imperative. The adapted system needs to give primacy to substance over procedure, rebalance some aspects of the system that have favoured some parties over others, and reform its principal regulator. An improved workplace relations framework must involve decision-making that is not unnecessarily beholden to precedent, excessive process, or to dated labour market structures. It must rely much more on economic evidence as a basis for its future direction, including information on the relevance of new developments in labour relations. This is best achieved by removing award and minimum wage setting from the Fair Work Commission and placing it into a new statutory body with different expertise. The framework's broader menu of bargaining arrangements and institutional reform will underpin greater responsiveness to emerging social and economic developments (for example greater demand for flexible work arrangements with shared childcare, an even greater shift to the 24/7 economy, and further automation of services).

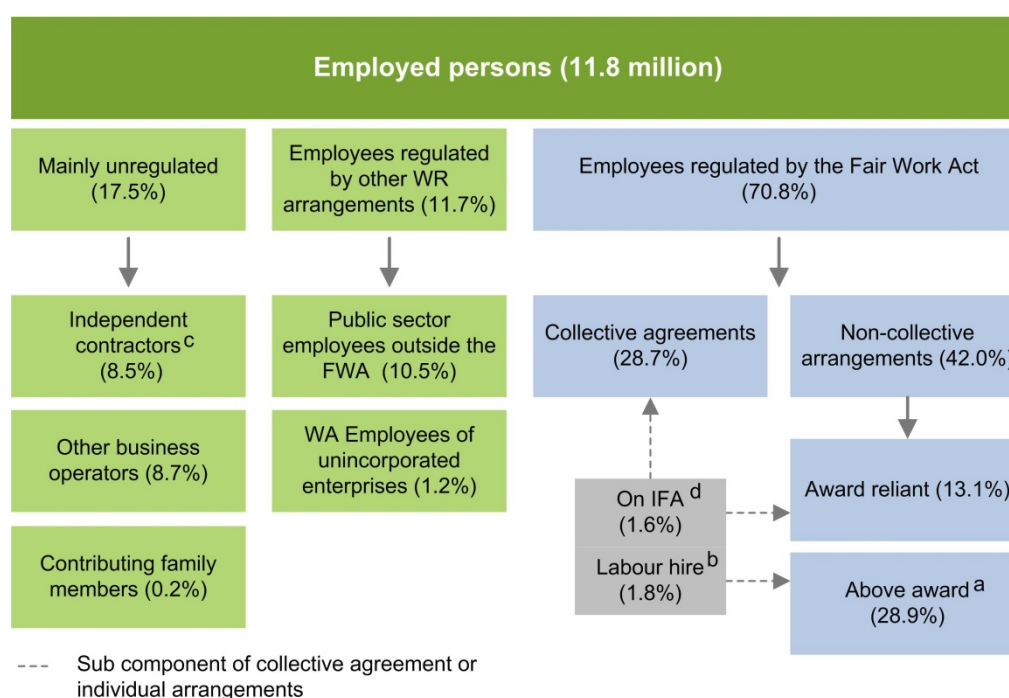
This broad strategy will improve productivity, increase employment, and aid flexibility for employees and employers, without destabilising the system.

The workplace relations (WR) framework comprises a complex array of labour laws, regulations and institutions. Along with market forces, accepted practices, cultural norms and the common law, these shape people's behaviour, the nature of their workplaces and their working lives.

The national system directly affects millions of Australian workers. In mid-2015, around 11.8 million people worked in more than 2 million workplaces around Australia. Of these

people, around 70 per cent were covered directly by federal workplace laws (figure 1), and others were indirectly affected. For instance, the choices of people to become self-employed are strongly influenced by the alternative wages and conditions that they could receive by being an employee. There are also around 750 000 unemployed Australians whose job prospects are affected by the system, and an even greater number who are underemployed. Even employees outside the national system (some state public servants and some employees captured by the separate Western Australian system) find that their arrangements are shaped by the national arrangements. Further, to the extent that the WR system embodies community expectations about fairness or influences national prosperity and productivity, all Australians have a stake in its effectiveness.

Figure 1 **Employment arrangements, 2015**



a Not all this group would be covered by an award. **b** Excludes independent contractors. Employees paid via a labour hire arrangement could have their pay set according to the award, above the award or under a collective agreement. **c** Independent contractors are regulated by the *Independent Contractors Act 2006* (Cth). **d** Individual flexibility arrangement.

The premise of any WR system is that, absent specific workplace legislation and oversight, many employees would suffer from unequal bargaining power. Most stakeholders recognised this. Of course, bargaining power is not always in the hands of employers. Aspects of the *Fair Work Act 2009* (Cth) ('the Fair Work Act') and the *Competition and Consumer Act 2010* (Cth) seek to address excessive use of bargaining power by unions. *Once a system is in place to regulate bargaining power*, there will always be questions about the efficiency and effectiveness of the system, and whether the system has over or under shot in remedying any prior imbalances.

In trying to produce a balanced system, WR legislation, institutions and regulation are now highly elaborate and broad ranging (figure 2). However, market forces play a larger role in most wage outcomes and, in the longer term, have a strong impact on conditions. For example, wage growth is strongly influenced by the business cycle, long-run productivity and sectoral changes. No WR system can guarantee job security.

The regulatory arrangements have grown from a limited Commonwealth role in dispute settlement one hundred years ago to a position today where the Commonwealth — through its statutory bodies — regulates the bulk of industrial awards, sets minimum wages, provides information, registers agreements, checks compliance with the law and adjudicates on key matters of WR law.

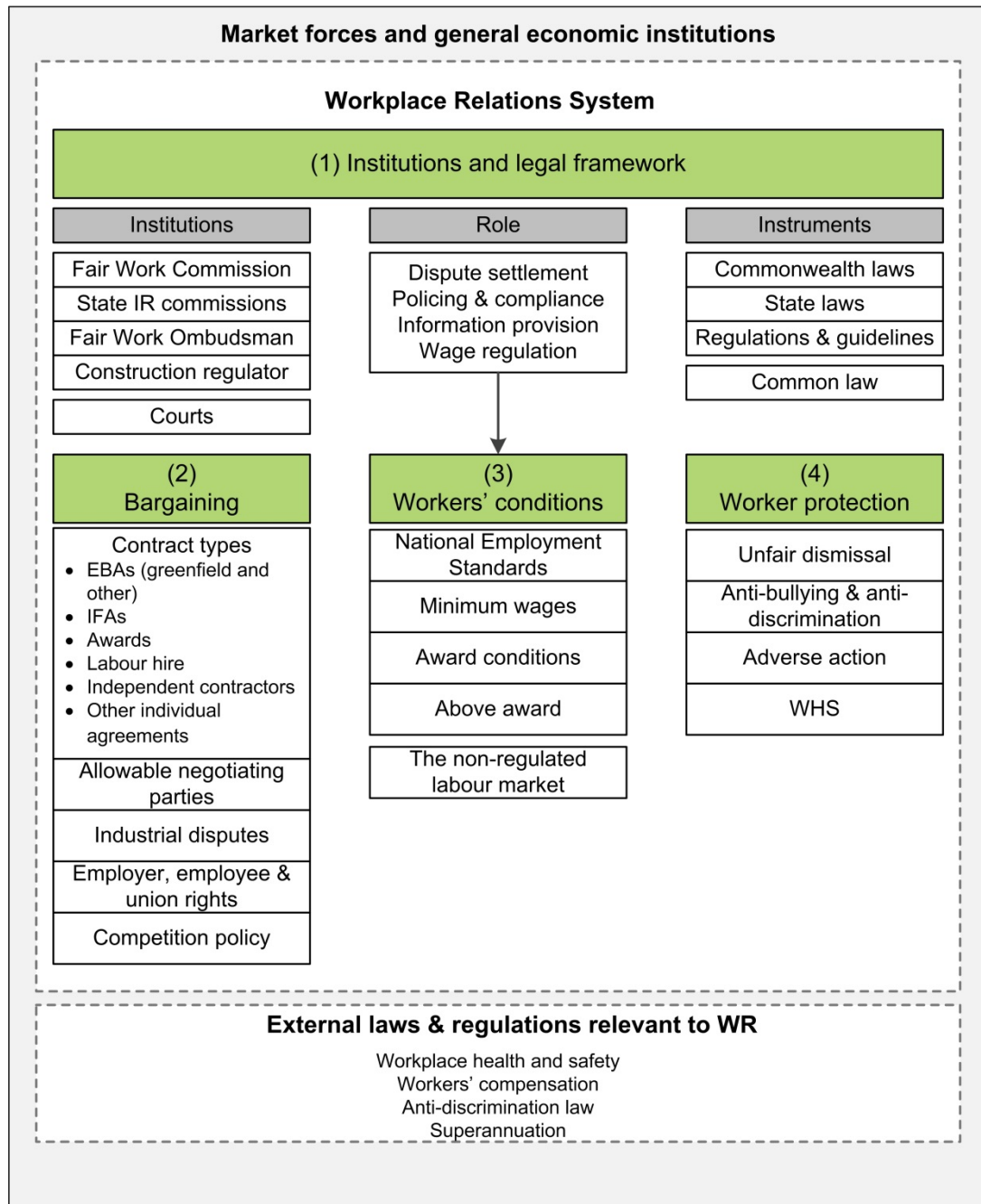
Three bodies, the FWC, the Fair Work Ombudsman and Fair Work Building and Construction, are the key national regulators, while the Federal Court is the principal judicial body. Various other institutions — state and territory work safety regulators, anti-discrimination bodies and the Australian Competition and Consumer Commission — also have specialist roles in parts of the WR system, for example in relation to regulation of secondary boycotts.

In its roughly 900 pages, the Fair Work Act covers most aspects of the way in which parties should deal with each other in their employment relations, and in setting a variety of minimum standards. An extensive body of common law sits beside the statutory framework. Reflecting the regulatory underpinning of the system, wages and conditions for most national employees must be at, or above, the safety net of those set in 122 awards.

Notwithstanding complaints from some employers, there is considerable scope for flexibility through independent contracting and employers' capacity to negotiate individual and firm-specific outcomes. In fact, award wages are less important now than at any other time in the last 100 years. Nevertheless, the 'clunkiness' of the system, concerns about the complexity of forming enterprise agreements, inconsistencies and lack of clarity in awards, barriers to forming individual flexibility arrangements, and the unpredictability of FWC decisions on a range of matters deters firms from using some of the available avenues.

The Fair Work Act cites objectives that are diverse and — as is often the case with such diversity — inevitably sometimes in conflict. The Fair Work Act is intended to deliver outcomes that are fair, flexible, co-operative, productive, relevant, enforceable, non-discriminatory, accessible, simple and clear. The legislation is complex and there are meaty pickings for lawyers and workplace practitioners on all sides.

Figure 2 The main elements of the current workplace relations arrangements



People are confused by the system, and some parties that should have a bigger voice in it — consumers, the unemployed and underemployed — have marginal influence. There are unquestionable inefficiencies, remnant unfairness, some mischief and absurd anachronisms.

In this messy context, there is an understandable tendency to imagine that there must be a much neater and coherent system, and that it would be desirable to start with a clean slate. The bulk of stakeholders and this inquiry's analysis suggests that this view would be misplaced. The system needs renovation, not a 'knockdown and rebuild'.

Moreover, some of the Productivity Commission's recommendations are not new. The 2012 review of the Fair Work Act identified a range of worthwhile reforms, some of which were not acted on at the time. But this inquiry does not simply traverse the territory of the previous review. The terms of reference require the Productivity Commission to cover all those aspects of workplace relations that limit the ability of the system to adapt to longer-term structural shifts and changes in the global economy. An ageing workforce, and, as always, disruptive technologies, will figure prominently in that future.

This inquiry does not examine in any detail some dark aspects of the WR system — most particularly issues of union corruption, criminal conduct and intimidation, sometimes seemingly abetted by the tolerance, if not complicity, of some businesses. The current Royal Commission into Trade Union Governance and Corruption is examining these issues, as have previous inquiries such as those of Wilcox and Cole. In large part, the centre of the concerns is the commercial construction industry. The Productivity Commission has examined the construction industry as part of its previous inquiry into public infrastructure and proposed more severe penalties as part of the solution. This report has also recommended much higher penalties for unlawful industrial action regardless of the sector (see later). However, apart from recommending a stronger role for Fair Work Building and Construction in identifying secondary boycotts, this inquiry does not traverse territory covered by the Royal Commission or on measures aimed at criminal activities.

1 Australia's recent labour market performance does not suggest a dysfunctional system

There are several myths about Australian labour markets that suggest that some of the key concerns voiced by stakeholders on all sides are of dubious validity.

The prevalence of independent contracting has remained an important source of labour and has been stable over the last decade.

Security of work appears to have changed relatively little in recent years. While the proportion of casual jobs increased throughout the 1990s, this trend tapered off during the 2000s, particularly for women. Most people working in casual jobs move into permanent jobs in later stages of their lives.

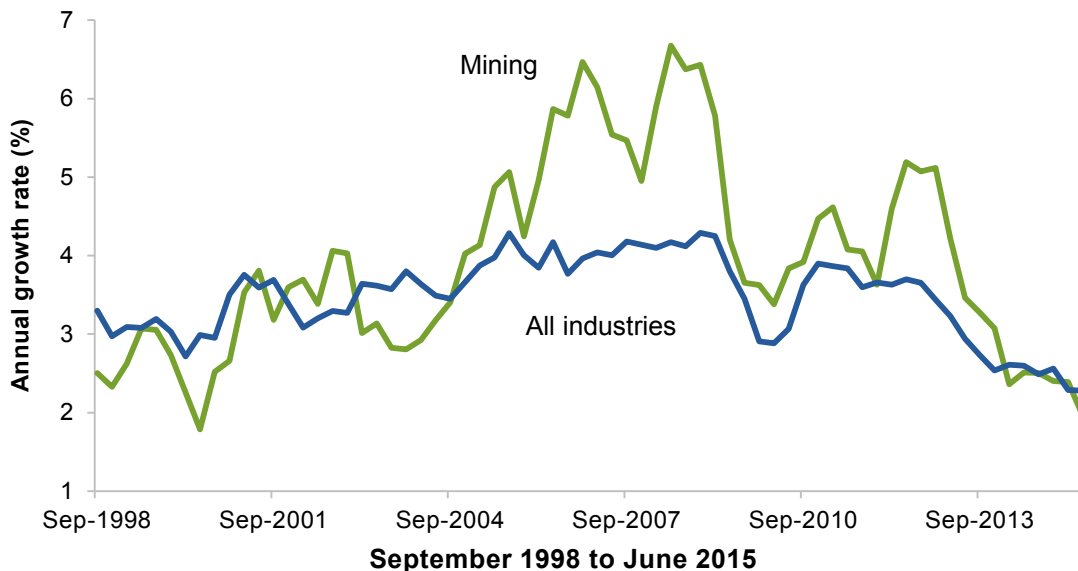
The labour market has accommodated well to large increases in the labour supply and to major compositional shifts. Many more women, students, more mature age workers and large numbers of skilled migrants have entered the labour market. For example, the current level of skilled migrant intake is almost three times higher than levels of the late 1990s.

Most people who experience unemployment do not do so for long. The shift away from making solid things to services has largely been achieved without growing unemployment.

Weekend work is now common. The traditional Monday to Friday week is not dead, but nor is it as predominant as in the past. Some 4 million employed people — around one in three in the workforce — work at least a Saturday or Sunday each week.

There are several indicators that the labour market has become more flexible, most notably through a greater tendency to adjust hours rather than employment during demand downturns, and the unresponsiveness of inflation to strong labour demand in leading sectors. Economywide wage breakouts and associated stagnation — the horror of the 1970s — seem as dated as floppy disks. The resources boom led to strong growth in mining wages, but not wages in general (figure 3). There is little evidence that labour market mismatch has changed.

Figure 3 The end of wage contagion
Growth in the mining wage index compared with all industries



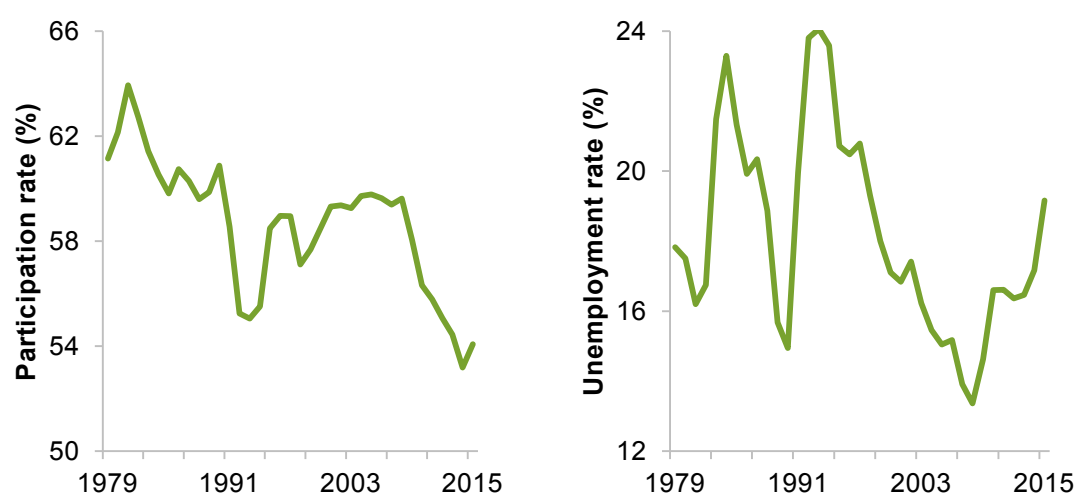
Surmise aside, there is little robust evidence that the different variants of WR systems over the last 20 years have had detectable effects on *measured* economywide productivity. This does not mean there are no effects, but simply that they apply at the enterprise and industry level and are hard to identify in the aggregate economy given the myriad of other factors shaping productivity.

However, there are some concerning trends (figure 4). In particular, youth unemployment is rising, and by more than the growth in the unemployment rates of prime-aged people in

the labour market. More generally, underemployment and long-term unemployment has also risen in recent years.

Figure 4 How are the young faring in labour markets?
Outcomes for 15-19 year olds, year ending June 1979 to 2015

Participation rates have tended to fall since ... unemployment rates have tended to rise 2008, while ...



2 Institutional reform

The performance of Australia's WR system relies strongly on the capabilities and functioning of its main institutions. Discretion and judgment exercised by competent and independent bodies are as critical as statute in an efficient and fair system.

The Fair Work Ombudsman is performing well, adopting targeted and innovative approaches to compliance and information provision. It is highly regarded by many stakeholders. It is essential to the credibility of any future systemic reforms that it receive sufficient resourcing as new hot spots emerge (such as, for example, recently exposed problems for 417 visa holders).

Likewise, the FWC has adopted efficient conciliation processes in unfair dismissal cases, and has introduced a variety of innovations more generally. Its approach to the current four yearly review of modern awards acknowledges some of the glaring problems that still beset awards (but do not go far enough). While there are concerns about the FWC's use of evidence (see below), its expert panel on annual wage reviews does consider some empirical evidence in its annual wage case determinations, particularly information on current labour market and macroeconomic conditions.

That said, some perceive the FWC in less positive terms, although in part this is the inevitable accompaniment to the diverse, complex, and controversial nature of its functions. However, there are three flaws in the structure and operation of the FWC.

The heavy weight of history

History and precedent play too big a role in some of the FWC's key economic and social functions, particularly award determinations. In effect, the past is assumed innocent unless found guilty, embedding old, but outdated, features of the WR system. One award still provides employees with the option of an X-ray every six months if they work in a tuberculosis home or hospital (the last of which closed in 1981). The survival of this provision is benign, but is nevertheless telling about the weight of history.

A distinguished former high court judge has noted the power of the past in industrial relations:

The past is another country. It is a place safer for people like me to dwell than in the industrial present or the future. Judges live with the past, surrounded by its stories in their books, from which they seek to derive logical analogies and the great streams of principle that will promote consistency and predictability in decision-making. (Justice Kirby 2004)

This backwards-looking perspective is a necessary feature of the legal judgments of the FWC as a tribunal. Past decisions assist in interpreting the law. Although not formally bound by the rules of evidence used in courts, the FWC's practices also tend to give greatest weight to the evidence put by the contesting parties, rather than on better evidence that it has actively sought. These approaches have carried over to the FWC's wage determination functions, which require a different mindset. Wage determination is inherently an economic, statistical and social matter that needs to give most weight to new evidence on the consequences of regulatory choices in contemporary society. As new evidence or analytical approaches emerge, its economic decisions should be re-framed.

One option would be to create a specialist arm within the FWC, which, equipped with the right skills and experience would undertake the annual wage review and make award determinations. However, the legal and institutional culture of the FWC, which is suited to its tribunal and administrative functions, has such a powerful gravitational pull, that it could readily undermine the capacity of the new arm to apply fresh analytical frameworks to wage determination.

Accordingly, the Australian Government should create a separate institution — the Workplace Standards Commission (WSC) — to undertake wage determination. Most of its members would have professional capabilities in economics, the social sciences and commerce, with legal experts primarily used to ensure enforceable awards. Members would not have the status of judges, making both recruitment and culture change simpler. It should proactively undertake its own data collection and systematic high-quality empirical research as the key basis for its award decisions and wage adjustments. (While

the FWC does initiate some research, much of it is of limited specific relevance to its actual decisions.) The WSC should impartially hear evidence from all parties. This should include the views of consumers and the jobless, who though substantially affected by the WR system, do not usually make submissions.

The FWC would then continue to be responsible for its current quasi-judicial functions, such as hearing matters relating to unfair dismissals and anti-bullying cases, and for various administrative functions, such approval of agreements, right of entry and authorisation of protected action ballots. Its members should have broad experience and be drawn from a range of professions, including the law, commercial dispute resolution and the ombudsman's offices. Given the shift of wage regulation to the WSC, fewer members would be required than today.

Governance

The governance of the FWC needs reform. Some of the primary causes of inconsistencies in its determinations reflect the choices made by successive governments, particularly the emphasis on appointing persons with perspectives oriented more to one side or the other of industrial relations debates. FWC members will accordingly reach different judgments even in instances where the circumstances are similar. This is not so much the result of bias, but rather a reflection of the fact that they come with different priors, are obliged to weigh up the often competing objectives laid down by the Fair Work Act, and must deliberate on matters that are inherently subjective. As an illustration, there is good statistical evidence that the findings in unfair dismissal cases have allowed some inconsistencies to creep into judgments. Given their different perspectives, it is not surprising that members with an employer association background are more likely to find in favour of an employer compared with other members, while on average those with a union background produce outcomes in the opposite direction.

Better governance practices are essential for a body with determinative powers on economically important matters operating in a politically sensitive and highly technical area. Two main reforms are required.

First, the processes for appointing members of the FWC require reform (and these would also apply to the WSC). The Australian, state and territory governments should create an expert appointments panel, which would provide a merit-based shortlist of candidates for the two bodies.

The Australian Minister for Employment would then choose members from the shortlist for a fixed tenure. Both the panel and the relevant minister would need to be satisfied that a candidate for appointment had (and was seen to have) an unbiased and credible framework for reaching conclusions and determinations. Appointments would be made for a period of ten years, or to the age of 70, whichever comes first. There should be no reappointments beyond this term, to ensure a good stream of new talented people and to eliminate the risk

(or perception of risk) that members might alter their decision-making to secure reappointments.

Second, the President should have greater scope to guide members. In cases where members have failed to perform, there should also be an external judicial review process (as already occurs for the judiciary in some states), which would encourage improvement, and in the worst of circumstances, provide an impartial basis for action by the Australian Parliament.

These changes would align governance within the FWC more closely with that observed in many other contemporary decision-making bodies.

Safe is not sound

Some commentators have suggested that the politics of institutional change is too hard, and that the issues at the heart of WR are ones that distinguish the political identities of the two main parties. Each new government, faced with the appointment choices of former governments, attempts to restore ‘balance’ in the FWC by making safe appointments that more closely reflect its viewpoints. The argument is that if there is a reasonable mix of members with somewhat varying views, the FWC as a whole can reflect both sides of politics. This is exceptionally weak institutional design, and undermines the integrity of one of Australia’s foremost decision-making bodies.

The Productivity Commission is aware of the prevailing view that no Minister or government willingly gives up the power to determine appointments. Several decades ago, governments around the world struggled with the concept of independent central banks, but reforms occurred, and few would now contemplate reversing this policy. Genuine reform consists of breaking customary bad habits. The Productivity Commission strongly encourages a lateral shift in thinking about the governance and design of Australia’s workplace regulatory institutions. This reflects the primacy of these institutions in wage-setting and in interpreting, applying and enforcing the Fair Work Act — roles that are critical in an evolving economy. This shift would not remove the Australian Minister for Employment’s power, but is designed to lift skill levels and the standards of appointees, change the culture, and improve consistency in a system that has shifted away from arbitration cases heard by several Commissioners to a workload now more dependent on the determination of individual Commissioners. Outcomes in cases should not be a lottery draw depending on the background of a Commissioner. Institutional change would represent one of the bigger microeconomic reforms in the last 15 years.

Structural changes of this nature will take some time, but action on some fronts is needed, and can be taken, now. The FWC already has the capacity to appoint more experts as advisors to its members and to take an activist and evidence-based approach to an assessment of awards. A change in mindset requires no legislation, and a move in this direction under the strategic guidance of the President would be a major step. The Australian Government can also be a catalyst for change. Its submissions to the periodic Annual Wage Review and award reviews are a vehicle to make clear the need for reforms in the FWC's *processes* for minimum wage and award determination along the lines recommended in this report.

3 The safety net

The safety net comprises three main instruments that set floors to wages and conditions for employees: the national minimum wage, the National Employment Standards and awards (including penalty rates).

Minimum wages

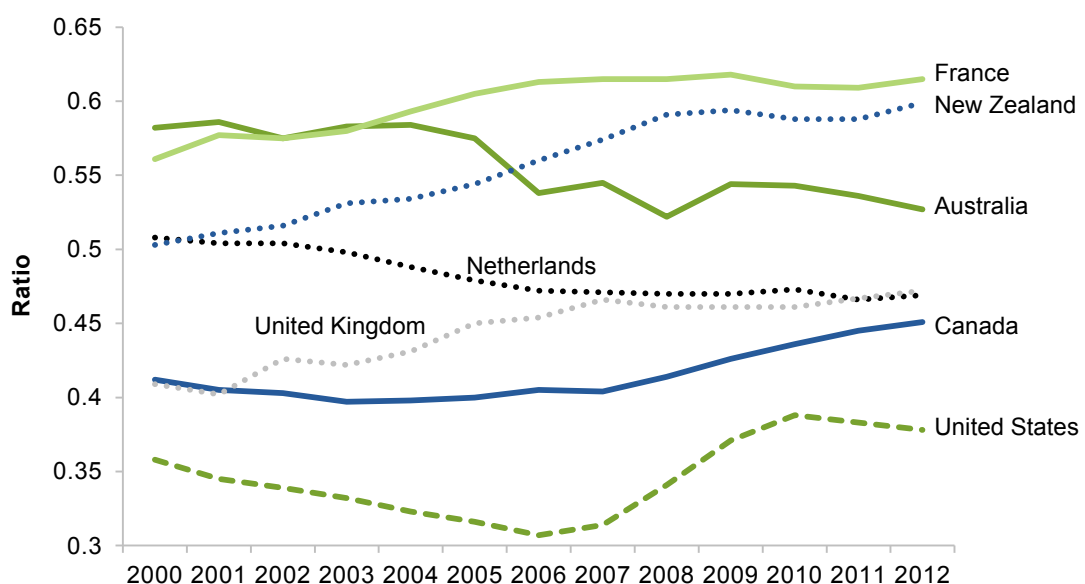
Minimum wages in Australia are set by the FWC Expert Panel, taking into account changes in economic conditions and representations, especially from the Australian Government, business and union stakeholders. It generally determines modest rises in minimum wages, and its predecessors have occasionally suspended increases during downturns. A commonly used measure of the comparative level of the minimum wage is its ratio to the median wage rate, which also enables meaningful comparisons with other countries. While the minimum-to-median wage ratio remains high in Australia compared with most other countries (France and New Zealand being the notable exceptions), it has declined over the past decade. Indeed, no other OECD country has shown such a strong trend decline (figure 5). Over the longer run, a smaller share of Australian employees has relied on the minimum wage as the safety net, and real growth in economywide productivity has substantially outpaced the real minimum wage (based on producer prices).

There are several rationales for minimum wages:

- Minimum wages (if not set too high) may address the stronger bargaining power of employers. There is reasonable empirical evidence that many individual firms have some market power in hiring employees. This reflects the various frictions associated with job search and matching. As well as having distributional effects, this means that unregulated labour markets can suppress wages below their efficient level and, in some cases, may actually reduce employment.
- Minimum wages increase the pay levels (and thereby the living standards) of the lowly paid so long as they retain their jobs and can work the desired hours.

However, even accepting such rationales, the question of the impacts on (and the risks they pose for) employment and earnings is an empirical matter. Unfortunately, while some confidently assert the matter is decided on one side of the debate or the other, the vast international (and more limited Australian) evidence is not so definitive. Much of it is beset by data and methodological limitations, or misinterpreted. That said, the evidence suggests some patterns. Small increases in the minimum wage are unlikely to have readily measurable effects on employment, but the larger they become, the more likely that the hours available to existing workers will fall and job opportunities for new workers (and sometimes for existing workers) will be lost. The effects also depend on the characteristics of the labour force. Low-skilled or disadvantaged people have poorer prospects of employment at any feasible minimum wage, and such prospects can be further reduced in weak regional labour markets.

Figure 5 Minimum to median wages for several OECD countries

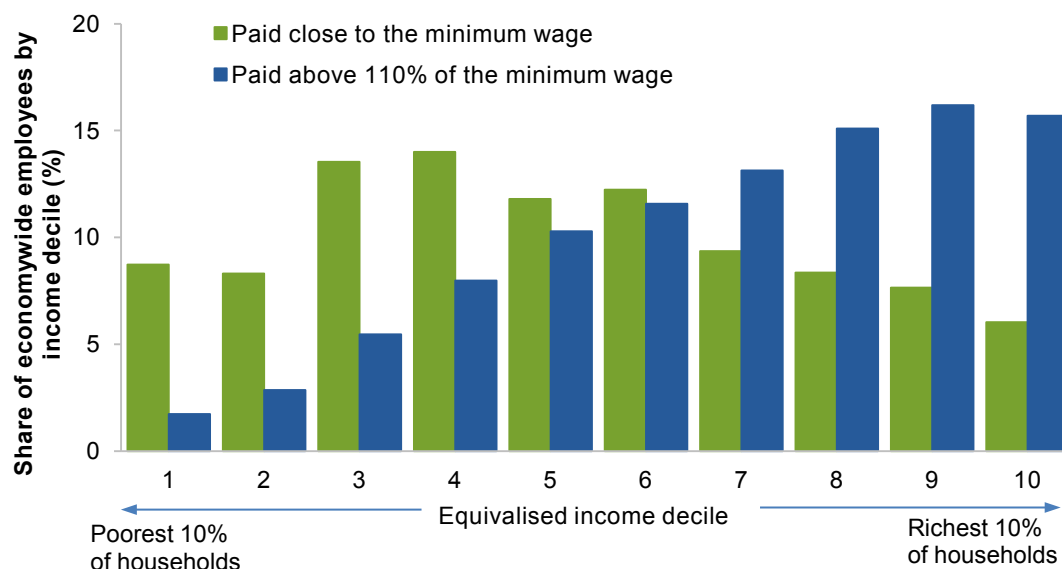


The risk of jeopardising employment is just one consideration. The effects on household income of annual wage reviews depend on:

- how those pay increases affect all other wages in the economy. Australia's unique system of awards creates hundreds of wage floors for different jobs whose annual growth rates are linked to changes in the adult minimum wage

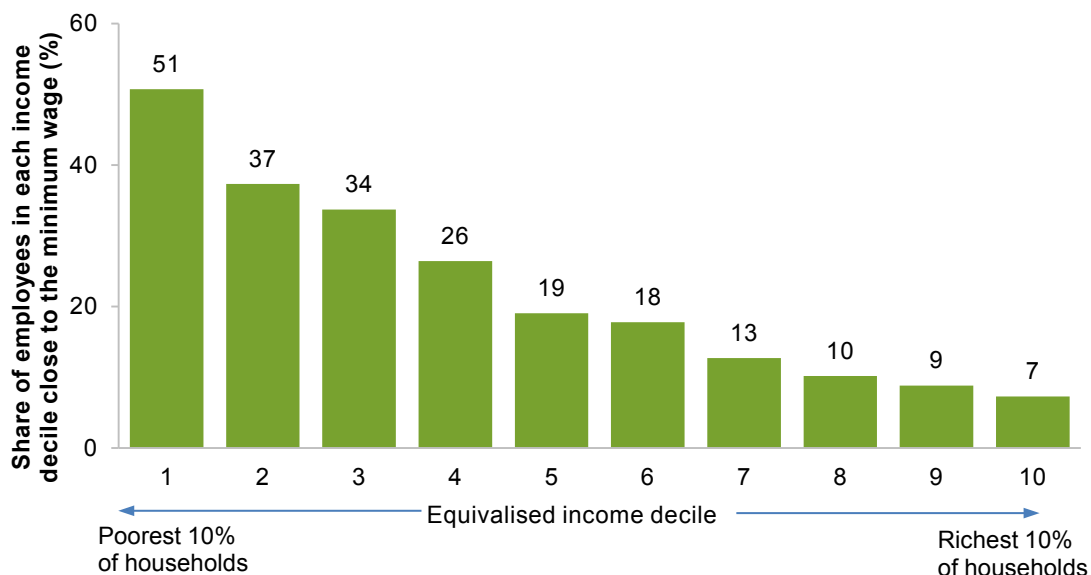
- the overall income of households where some people are paid at the minimum wage or whose wage level is strongly related to it. Many employees with wages linked to the minimum wage are not in low-income households. In 2013-14, around 30 per cent of such wage earners were in the richest 40 per cent of working households (figure 6). This reflects that many higher-income households have some family members in low paid jobs
- the degree to which it reduces employment and hours worked. Unemployment is not only strongly associated with lower income levels, but has highly adverse effects on people's wellbeing. As emphasised throughout this report, people without jobs tend to have little voice in the current WR system, a defect that requires correction
- possible dynamic effects. On the one hand, people facing the risks of unemployment at high minimum wages may acquire skills to avoid this. On the other hand, for many people, minimum wage jobs are a temporary part of their working lives, and indeed such jobs can be a 'stepping stone' into the world of work and higher paid jobs later.

Figure 6 Many people receiving wages around the minimum wage are from middle income households



Nevertheless, there is strong evidence that the minimum wage (and awards) tend to assist people in lower paid households who retain their jobs, with a high share of low-income working households on the minimum wage. In 2013-14, the likelihood that an adult employee in the lowest decile of working households was at, or close to, the minimum wage was around seven times higher than that for the top decile of households (figure 7).

Figure 7 **An employee in a low income group is much more likely to be paid around the minimum wage rate**



Policy implications

Against that background, while some minimum wage is justified, the FWC faces Goldilocks' dilemma of determining the level that is 'just right'.

That level has a long-run and short-run dimension. On the former score, the level of minimum wages that can sustain a particular level of employment depends on the skills and capabilities of the jobless and those employees paid close to the minimum wage, and on the relative demand for such people. For example, *if* the average skills of existing jobless people improved over a sustained period, or there was an increased demand for people in industries intensive in the use of minimum wage employees, such as retailing, aged care and hospitality, there would be greater scope to increase minimum wages without significant adverse effects on their employment prospects. (If that is *not* the case, it reinforces the case for complementary measures to supplement the incomes of the low-paid — as discussed further below.)

Over the shorter-run, another set of considerations comes into play. Given the highly adverse outcomes of unemployment for people's wellbeing, whenever the employment outlook is weakening, there are grounds for the FWC to temporarily adopt a conservative approach to minimum wage setting. This does not require that minimum wages fall, but rather that they grow at less fast a pace than during normal economic times. This would encourage employment of people currently priced out of the labour market (and assuage underemployment). In improved economic circumstances, minimum wages could rise at a faster pace.

Some have suggested that Australia should follow the example of some other countries that have geographical variations in minimum wages. Currently, Australia has two adult minimum wages — a national minimum wage applying to most employees, and a Western Australian minimum wage applying only to the employees of unincorporated enterprises in that state. The difference in their minimum wage rates is very modest.

In contrast, some countries have multiple geographically-varying rates with large disparities between rates across regions. For example, Canada, Japan and the United States have different minimum wages by state (and indeed, in some US states, even variations between cities, Los Angeles being an example). In principle, such minimum wage variations look attractive as they could be set at levels that took account of local labour market conditions, thus reducing unemployment risks. However, there are many practical difficulties in an Australian context, including doubtful constitutionality, interactions with modern awards and the tax and transfer system, and complexity for national employers. (Notably, few employers have called for geographically varying rates, even in regions where the labour markets are relatively weak.) The Productivity Commission does not propose their introduction.

Complementary measures

A critical question is the degree to which the regulated wages system can effectively achieve its redistributive goals. Minimum wages were developed at a time when it was typically only a man who worked in a household and when the social welfare system was weakly developed — both of which have now changed. However, while Australia's welfare system has been important in alleviating income inequality, it can also stigmatise people, discourage employment and embed social disadvantage.

That invites the question of new ways of providing income supplementation to the low paid, while maintaining employment incentives. One approach is an 'earned income tax credit' (EITC), which many countries use to top up the incomes of the low paid, typically as a complement to minimum wages. For example, in its country report for the United States, the OECD has recommended that as the Great Recession recedes, it should expand its EITC and raise its minimum wage, indicating that hybrid policies are seen as appropriate.

By design, EITCs encourage labour force participation, and the evidence usually suggests that they do this, especially for single parents, though their effectiveness depends on their exact design. However, they do have several drawbacks, including high levels of incorrect payments (around one quarter of the funds in the United States), reduced incentives to work for second earners in some households, and barriers to working above a certain level of hours as household income rises. They must also be financed through taxes, which have their own adverse economic effects. The Productivity Commission's own analysis shows that some types of EITCs still tend to provide transfers to more than low-income households.

Reducing these incidental impacts is one reason why significant attention must be given to the design of any instrument and the economic context in which it sits, including any interactions with Australia's tax and transfer system. The OECD has highlighted that the impacts of in-work benefits depend on their design and the institutional settings of each country. In its study of 15 European countries, it found that the efficiency costs from in-work benefits were highly variable. The results were highly positive in some, but questionable in others.

At this stage, it is not clear that an EITC in Australia would be desirable. However, if there were systemic changes to the tax and transfer system — a matter beyond the scope of this inquiry — or if it was not possible over the long run to maintain a minimum wage that provided a balance between adequate income and unemployment risk, then it might reasonably be part of a repertoire of options that could be revisited.

Some have claimed that there may be constitutional constraints for an EITC that extended to single people as well as families, but this is a complex area of law and is untested in this context. (If this was an obstacle, the EITC might have to be narrower in its application or state cooperation would be required.)

Governments should not neglect other policies that are complementary to minimum wages. These could include skill development and wage subsidies, but only where these are designed carefully and properly targeted. Inevitably, improved social and economic inclusion requires more than a single policy, which is why governments should seek to use minimum wages as part of a policy suite.

Wages for juniors, apprentices and trainees

The FWC sets out minimum pay rates for younger workers, apprentices and trainees. Wage rates for juniors are a share of the adult minimum wage and increase with age until the person reaches 21 years old (although some awards vary this). Similarly, trainee wage rates also have an age-based structure, with rates depending on the time elapsed since leaving school. Apprentice wages vary across awards and are set as a proportion of a qualified tradesperson's wage and increase the closer the apprentice is to completion. Australia is one of around the 50 per cent of OECD countries that set youth wages as a share of the adult rate.

Notwithstanding the high ratio of the adult minimum wage to median wages, Australian youth wages start at comparatively low levels relative to those in many other countries. For example, a fast food level 1 employee aged under 16 years could have more than a year of experience, but would get AUD \$7.59 an hour (44 per cent of the adult minimum wage). In many states in the United States, many such employees would receive at least US \$8 (100 per cent of the adult rate). The decisive test in some countries is not age per se, but also experience, with much lower wages for someone with short experience in a job. In the United States, the federal minimum wage is around 60 per cent of the adult minimum for a person aged under 20 years who has worked with their employer for less than 90 days.

New Zealand has a similar system, with no minimum wage for people aged less than 16 years, and a discounted wage for 16- and 17-year olds with less than six months job experience with their employer.

The Productivity Commission is wary about making any precipitate changes to the current system of youth wages if that was to put at risk the employment of more vulnerable people with lower skills. The transition from education to work is one of the critical pathways, and changes that affected employment of the less academically able could have adverse generational impacts. That said, the WSC in its longer-run examination of systemic award issues could investigate the desirability of a hybrid system that recognises that experience or competency might sometimes justify a higher minimum wage. And of course, businesses may sometimes pay above-award wages to retain experienced young employees, and enterprise agreements can also vary award minima.

The training system, of which apprenticeships and traineeships are a component, involves a complex set of interlocking issues. The FWC has recently increased award wages for apprentices, while the Australian Government also provides incentive payments to employers and wage top-ups. These affect the relative attractiveness of apprenticeships to employers and would-be apprentices, with unknown impacts.

These complex issues go beyond the scope of this inquiry as they also involve concerns about the adequacy of skill formation and competency-based training and pay arrangements. The Australian Government should request the Productivity Commission to undertake a comprehensive review of Australia's apprenticeship and traineeship arrangements. This review should provide an assessment of the appropriate structure of junior and adult training wages, as well as government incentives.

National Employment Standards

The National Employment Standards (NES) specify minimum requirements for 10 conditions of employment — including hours of work, various forms of leave and redundancy pay. Awards, enterprise agreements and employment contracts cannot exclude any elements of the NES, or provide ongoing employees with less favourable employment conditions. The NES have attracted little controversy — mainly because their prime aspects (like annual leave) have a long and accepted role by all stakeholders and accord with community norms. There is also considerable scope for flexibility. For example, an employee can be required to work more than the standard hours if reasonable.

Nonetheless, there are concerns about several aspects of the NES.

The Standards specify eight national public holidays on which people are entitled to a paid day of leave (and penalty rates of typically 250 per cent if they work). Public holidays can yield community benefits by enabling coordinated social activities, particularly on days of major cultural or spiritual significance. However, many people treat *some* national public holidays as just normal days off, which throws doubt on their community function. The

Fair Work Act allows awards and enterprise agreements to include terms that allow an employer and their employees to observe a public holiday gazetted by government on a date other than the one prescribed, but not all awards contain such provisions. All awards should include the provision so that the option of swapping holidays is available in all workplaces.

Moreover, the Standards also recognise any public holiday declared by a state or territory government. (In a bizarre twist, every Sunday is a public holiday in South Australia — though there is a tacit agreement to ignore this by most employers and employees.) So, by declaring new holidays (such as the recently established *Grand Final Eve* holiday in Victoria), state and territory governments can unilaterally create obligations under the NES for any national employer in their jurisdiction to provide further leave days with pay. The 2012 post-implementation review of the Fair Work Act recommended limiting the total days that would attract penalty rates to just 11. However, employers would still have to pay employees absent on additional state public holidays. Should they want an employee to work on a public holiday, they would, for commercial reasons, have to pay them significantly more than 100 per cent of their base pay (since 100 per cent is what the employee would get if they did not go to work at all).

State and territory public holidays represent a policy conundrum in a national WR system, given that a substantial goal of the new system was to avoid interstate variations. The Australian Government should amend the NES so that employers are not required to pay for leave or any additional penalty rates for any *newly* designated state and territory public holidays. (Existing state holidays should be grandfathered.) Of course, employers and employees could still negotiate pay for any new state-declared public holiday, but that would be at their discretion, not state governments.

Long service leave (LSL) is an Antipodean idiosyncrasy. It was invented in the mid-19th century to allow citizens to sail to and back from England every decade. Despite its peculiar origins, it now has strong community support. However, the NES do not prescribe any consistent national LSL arrangements, so that there are relatively complex interstate variations. This means that national employers must deal with a diversity of qualifying periods and entitlements for LSL across the different arms of their national operations. This has been a longstanding complaint, and the last review of the Fair Work Act recommended a uniform national approach. Any change would produce winners and losers, and this may explain why there has been little appetite by states to change the status quo. Without a universal commitment by COAG to change, and an agreement about a workable transition, not much can happen in this area.

The NES adapt to community norms. Given the desirability that the NES continue to perform their role as a well-accepted baseline for workplace standards, changes to the NES should be preceded by high-quality analysis and public discussion.

Two significant social issues arose during this inquiry that could be considered as candidates for the NES. Equally, each could be considered for response via different mechanisms, such as a common clause in all modern awards or alternative avenues. Both

affect employment and workplaces; yet both have implications beyond the workplace. They are leave arrangements for domestic violence and breast-feeding arrangements at work.

The FWC is paying significant attention to the first of these issues under the current four yearly award review and the Productivity Commission sees that as an appropriate method for assessment. There are alternatives, such as the NES and government assistance, and ideally, decisions on these should await the outcome of the award review process.

Support for breastfeeding arrangements at work has the potential to improve workforce retention and female workforce participation, both desirable outcomes. There may be other factors — for and against — that should also be taken into account. A more in-depth review of it should precede further consideration by government — in the context of the NES, via award modernisation or anti-discrimination law. Employers should take note of the relatively simple facilities required in most workplaces to make this option a reality, and the desirability from a staff attraction and retention perspective of doing so.

Awards

Awards are the regulations that describe various floors on wages and conditions for a wide variety of skill levels across multiple industries. Relatively few people on individual contracts are *exactly* on an award payment. Awards still influence other employment contracts because some conditions (such as the span of hours or penalty rates) are derived from them, the wages and conditions of some employees who are part of an enterprise agreement largely reflect those in the relevant award, and because they form the regulatory benchmark against which to test whether other employment contracts disadvantage employees.

Awards are a longstanding part of Australia's workplace relations framework, with the FWC and its various quasi-judicial predecessors determining awards for more than 100 years. They are unique to Australia (and New Zealand until 1991), and sometimes this is seen as an indication that they are unnecessary. However, other countries have devised alternative wage determination systems that often also embody rigid rules to protect the low paid. And, while they are rigid and history bound, awards and the processes for determining them have adapted over time (though not by enough):

- For many years, awards were determined in response to industrial disputes, whereas today reviews are scheduled as a stipulation of the Fair Work Act and are primarily used to reassess their relevance, iron out anomalies, and ensure that the modern awards objective of the Fair Work Act is met.
- With the advent of enterprise bargaining in 1993, the primary role for awards shifted from being an instrument for setting actual wages and conditions to contributing to a broader safety net containing various floors for wages and conditions. As part of this safety net, awards help to balance the unequal bargaining power of employees and employers and increase the wages and conditions for some employees above those that

they would be able to negotiate on their own. Awards have been effective in this role by reducing the dispersion of pre-tax employment income (especially in the lower half of the household wage distribution) and increasing the wages of low-wage workers.

- Through the award modernisation process, thousands of awards were collapsed to just 122, so the system is simpler than earlier.

It is often (but not always) the case that modern awards are less rigid and costly than their historical predecessors. Nevertheless, they remain relatively inflexible and are often ambiguous, imposing costs for employers and employees. (Even the Fair Work Ombudsman is sometimes unclear about the interpretation of clauses.) In some instances, they are more historical relics of the relative bargaining strength of past protagonists than a carefully thought out way of determining the minimum terms and conditions of employment.

However, few stakeholders recommended their elimination, but rather suggested reform and the easier availability of alternative options for employment contracts. Most consider that the (uncertain) benefits of eliminating awards might be outweighed by the cost of any transition.

- All parties suggested that the costs of transitioning to the modern awards between 2009 and 2014 were considerable ('nightmarish' according to some stakeholders). Any major shift away from awards altogether would trigger costs of a higher magnitude again. Removing awards would also require re-assessment of many other features of the WR system. For example, what benchmark, if any, would be used for testing whether an enterprise agreement (or the Productivity Commission's new enterprise contract) really met some 'reasonable' wage standards? A no-disadvantage test is meaningless without a benchmark.
- The current system does not appear to be producing highly adverse outcomes.
- The tax-transfer system, while already highly developed, would need to further extend its reach to emulate the re-distributive effects of awards.
- Some of the 'distortions' created in labour markets are beneficial since they address unequal bargaining power and reduce the transaction costs of forming employment contracts for small business.

Nevertheless, there are strong grounds for improving the award system.

One relatively straightforward step — already partly underway — relates to the form of awards, rather than their content. Awards should be easier to understand and no more complex than they need to be. As the Business Council of Australia notes, many awards are unclear on penalty rates and overtime requirements. Awards should be in plain English and be written to avoid the mistakes and misunderstandings that arise from the present ambiguities of awards.

A more fundamental challenge is how to address the more systemic flaws in awards, without repeating the transitional costs of award modernisation. After the completion of

the current four yearly award review (whose scope is considerably constrained), the new WSC should adopt a different approach to amendments to awards. It should undertake careful empirical analysis into the aspects of awards that are the source of the greatest problems — ‘hotspots’. It should then vary awards to address these on a thematic basis. Those hotspots cannot be determined ahead of analysis, but any analytical framework would attempt to identify the award variations (such as in allowances, wage rates, penalty rates, and spans of hours) that were genuinely problematic, rather than merely untidy.

An important complement to this change in approach is the development of a more coherent and streamlined set of goals in the ‘modern awards objective’. The current provision comprises various unobjectionable, but overly prescriptive, goals concerning, for example, the low paid, social inclusion, the desirability of collective bargaining, remuneration for unsociable hours, simplicity, and the impacts of award content on business, productivity, regulatory burden, employment growth, inflation and the performance of the economy. Different members of the FWC have given different weight to each element in making judgments on award issues. It is easy in moving from item to item to lose sight of the broader community interests, and especially of the specific impacts of awards on the jobless and consumers. A much-simplified Objective would give primacy to community wellbeing as a whole, and list only a few considerations in making an assessment.

The regulator should also make changes to awards where there are easy gains from adding consistency or where anomalies become apparent.

However, there is no need for the regulator to review all aspects of awards, term by term. That would be an ambitious task, with diminishing returns and high costs for stakeholders. Once the current four yearly review has been completed, these periodic reviews should cease. Future assessments should be undertaken on a needs basis. Over time, the adoption of the Productivity Commission’s evidence-based approach to awards will make them more adaptive to workplace realities, reduce unjustified differences in awards, and make them more flexible, but without undermining their intrinsic role as a safety net.

Regulated penalty rates for shift, overtime and weekend work should stay

Many Australians work non-standard hours either by working longer than the 38-hour norm under the NES or by working at non-standard times, such as at night or on weekends. They are compensated by regulated premiums on normal wage rates (sometimes generically categorised as ‘penalty’ rates).

Penalty rates are strongly dependent on when work is undertaken and the total time spent working. The three principal time-related wage rates are:

- shift loadings, and weekend and evening pay premiums. These are requirements placed on employers to pay additional wages at certain times of the day or on certain days of

the week, and are not dependent on how many hours in total a person has worked during the week

- overtime rates, which represent higher wage rates for hours worked greater than the usual ordinary hours listed under an award or an agreement
- payments for working on public holidays.

There are compelling grounds for premium rates of pay for overtime, night and shift work:

- Long hours of work involve risks not only to an employee's health and safety, but also for the community. (Long working hours are not rare. In mid-2015, around 2.8 million Australian employees reported working more than 40 hours per week and over 1.5 million reported working 50 hours or more per week. In 2012, around one third of employees worked overtime.)
- There are proven adverse health effects from night shift and rotating shift work.
- By definition, public holidays are intended to encourage shared community activities. As such, there are strong grounds for deterrence against their use for working, but with some flexibility to provide some services on these days. The appropriate rate for public holidays would need to account for (a) the fact that, as is normal for other leave, public holidays are generally paid at ordinary wage rates despite the fact that people are not working, and (b) the additional requirement to deter activities that undermine the intended goal of such holidays.

Regulated minimum penalty rates recognise the impacts of such work and that absent regulation, the generally weaker bargaining power of employees may not lead to adequate compensation. The Productivity Commission has not recommended any changes in these rates. This is also in line with the views of participants in this inquiry, who did not raise any significant concerns about penalty rates for overtime, night or shift work.

Towards weekend rates for the hospitality, entertainment, retail, restaurant and cafe industries

Australia has multi-tiered arrangements for regulated penalty rates for weekend work. Only around half of the 122 awards specify such weekend rates, reflecting the different types of working arrangements of different industries and occupations. Of those that do have penalty rates, there is a wide variety of rates, eligibility criteria and triggers for when the arrangements apply. Factors such as the skill and occupation of the employee (even within a given award), whether they are a casual or permanent employee, and exact hours of working can be relevant to the rate. The variety exemplifies that penalty rates are an art borne of history, precedent, compromise and the lack of a coherent overarching set of principles.

In an unregulated well-operating market, it could be expected that employers would have to pay premium rates if they were unable to elicit sufficient labour supply on weekends. This reflects that most employees value weekends more highly than weekdays. But labour markets are not perfect (which is why WR systems exist in the first place). Individual businesses possess some bargaining power in respect of the labour they hire, with the risk that market-set penalty rates would be lower than they should be. Community standards about the reasonable rates for working on weekends in such industries are also relevant. The question is then not whether there should be regulated weekend penalty rates (or some other method for remunerating people working at asocial times), but whether they are set at the ‘right’ level.

Regulated penalty rates are particularly high on Sundays — as illustrated by the various rates applying in the hospitality industry for different working-time arrangements (figure 8). The effects of Sunday penalty rates across different parts of the economy depend on the characteristics of the relevant goods and labour markets, including the:

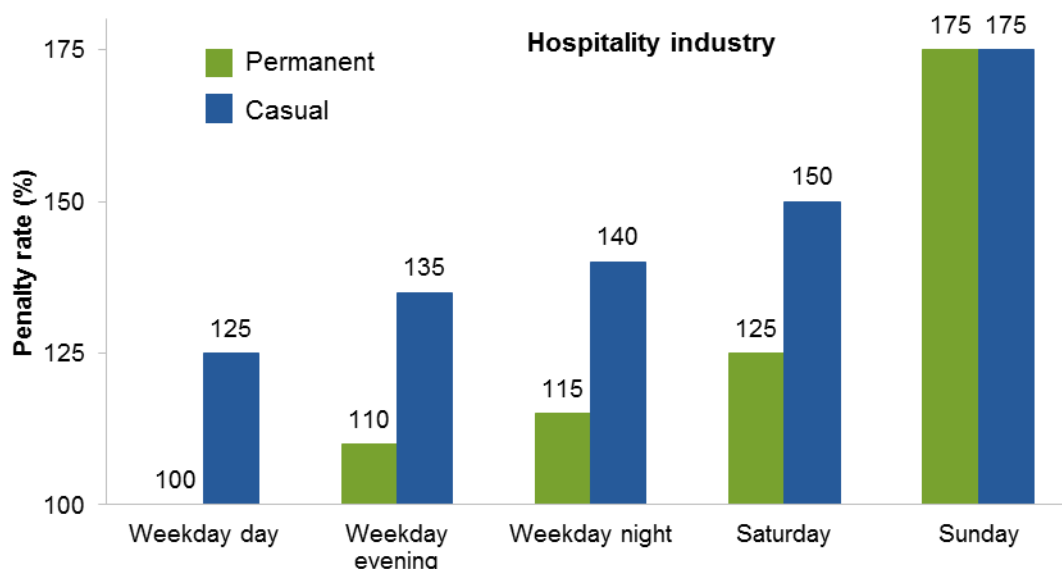
- response of businesses to high wage rates
- degree to which customers want services on Sundays
- nature of the labour used in an industry
- typical working arrangements on weekends.

Given their characteristics, one group of industries — the hospitality, entertainment, retail, restaurant and cafe industries (HERRC) — are particularly affected by regulated penalty rates. For these industries, social trends and community norms have shifted so that the historically distinctive role of Sundays as a time when people did not shop or engage in other consumer-oriented activities has changed. Sunday trading is now normalised and highly valued by consumers. Increased female workforce participation rates, especially among married women, the steep reduction in religious observance on Sundays, changing social norms about shopping times, the softening of trading hour restrictions, and the emergence of international online commerce have contributed to this. In light of these changing preferences, existing penalty rates for Sundays now reduce consumer convenience and product diversity in a way that did not occur when the workplace regulator first introduced penalty rates.

Unlike most other industries, the HERRC industries are also an important source of jobs for young unskilled people, including those who are combining studying and work. Such jobs provide longer-term benefits for young people in integrating them into the labour market by building skills and experience. Barriers to youth employment in entry-level jobs can have adverse lifelong effects for engagement in work, especially for some groups.

Figure 8 **Penalty rates by day and time of the week**

Rate relative to permanent employee on a weekday^a



^a Casual penalty rates are inclusive of any casual loading.

The overall evidence also suggests that employers in the HERRC industries are likely to have a weaker capacity to use bargaining power to depress wages on weekends, and regulated floors to wages should reflect this. For example, in the relevant industries, the frictions from moving from job to job — one indicator of the likely bargaining power of employers — do not appear to be high.

The industrial regulator, unions and businesses have acknowledged that the role of Sundays has changed and they, accordingly, have recognised that one of the original principal objectives of penalty rates — the deterrence of Sunday trading — is anachronistic. Yet that recognition has not been accompanied by sufficient reform of the rates. Indeed, paradoxically, award modernisation raised average penalty rates in some of the HERRC industries.

Some of the broader arguments that might conceivably have justified high regulated penalty rates for Sundays in the HERRC industries are also not compelling. There is little evidence that, in contemporary Australia, the social impacts of work on Sundays are disproportionately higher than Saturdays or other times deemed to be ‘unsociable’, despite this being the strongest rationale for a higher rate on that day:

- Most people working on weekends — Saturdays or Sundays — do not claim any major impacts on their lives. For example, 78, 75 and 70 per cent of people working on Saturdays, Sundays and evenings respectively said that their working patterns only infrequently affected the time they could have with family and friends.

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- Sometimes Sundays seem to pose fewer problems than Saturdays (such as feeling ‘rushed’ or having ‘work life balance’).
 - There is no difference in working on Saturdays or Sundays on subjective wellbeing.
 - People seem to engage in similar activities on Sundays and Saturdays.
 - For many people, weekend work suits their circumstances — which explains the predominance of students in some consumer industries — such as fast food.

Rates for Sundays appear particularly at odds with rates for times that are also important for social activities (evenings), and to an even greater degree for times that pose clearly demonstrated health risks (night shifts and rotating shifts). Evening/afternoon shift penalty rates can be as low as 10 per cent and night shift loadings as low as 15 per cent (figure 8).

Moreover, the returns from working at unsociable hours on Sundays is out of kilter for compensation for other aspects of a job — such as experience, responsibilities, or qualifications. For example, the wage premium from completion of tertiary compared with year 11 education is around 40 per cent, yet the premium for daytime Sunday work is often 100 per cent compared with daytime Monday to Friday work.

Given that the community norms that underpinned the original basis for high Sunday rates have now shifted, and the lack of compelling evidence that work on Sundays poses more social costs than Saturdays, there are few grounds for setting different penalty rates for these two days in the relevant industries. The FWC should change Sunday penalty rates to Saturday rates in the HERRC industries, preferably as part of the current four yearly review. Otherwise, the new WSC should prioritise reform as part of its attention to ‘hotspots of inefficiency’ in the award system.

In the longer run, businesses would not be the beneficiaries of deregulated penalty rates given the high levels of competition in the relevant industries. Survey and other evidence suggests that consumers (including tourists) would benefit from:

- more convenient access to services they value highly (due to longer opening hours and greater numbers of operating businesses)
- improved quality of services because of improved staffing ratios
- lower prices in some cases (for example, through the ending of Sunday surcharges in restaurants and cafes).

Those jobless (either unemployed or not in the labour force) suited to the Sunday labour market will be particularly responsive to the opportunities presented by greater demand for labour on that day. Since joblessness is particularly adverse for people’s wellbeing, any employment gains for this group would be particularly important. There is also likely to be a change in the mix of employment. Many business owners work long hours on weekends because of the costs of employment, and there will be substitution between their (sometimes excessive) workload and that of employees.

Reductions to Sunday penalty rates will particularly reduce the incomes of people who work Sundays only. While there are relatively few such workers in the HERRC industries, the Productivity Commission proposes a lag before any change occurs, allowing people to adjust their lives and working patterns. Regardless, high Sunday penalty rates are not the best or fairest way of assisting households on low incomes (especially as a significant number come from higher-income households).

But what about other industries? Unless the WSC identifies compelling grounds for doing so, the Productivity Commission does not see grounds for extending penalty rates to the 50 per cent of awards that do not have them, nor for closing gaps in occupational coverage in awards that do. In many of the other awards that contain penalty rates — such as essential services — there are no strong grounds for change because the existing rates have few adverse effects and apply in labour markets that are quite different in character to the HERRC industries. Unlike the HERRC industries, penalty rates are not likely to materially reduce service availability (these are often not discretionary services), are unlikely to lead to job losses (the employees concerned are highly skilled), and align with working arrangements that often involve rotating shifts across the whole week, with the attendant risks this involves. Quite simply, unlike the HERRC industries, the basis for penalty rates in these industries has not changed.

Nevertheless, there may be other industries that are similar to the HERRC industries, and where the costs to the community exceed the benefits. There is no basis for immediate changes to their Sunday penalty rates, but based on the improved practices and experience with conducting award assessments, the wage regulator should undertake research and seek proposals from other industries in the medium term, and assess whether a similar case can be made for changes to penalty rates.

4 Protecting employees

Australia has a range of laws that protect employees from discrimination, bullying, unfair treatment and dismissal. While sometimes depicted as onerous, complex and overprotective, objective measures of such employee protection arrangements around the world suggest that Australia has one of the more light-handed suites of arrangements.

Unfair dismissal

Australia's WR system provides remedies for workers who are dismissed in a 'harsh, unjust or unreasonable' manner. The FWC may order the unfairly dismissed employee to be reinstated, or paid compensation where reinstatement is not feasible.

Unfair dismissal arrangements reflect that employees and employers can behave badly. Employees may underperform, be disruptive or act poorly. Firms and labour markets can only function efficiently if managers have the power to demand behavioural change by

poorly performing employees and, absent that, to dismiss or otherwise penalise them. On the other hand, employers may make unreasonable demands (such as requiring employees to work longer without pay or overlooking safety issues) or may dismiss people based on prejudice, whimsy or without due process. Accordingly, there is a need for some balance between the prerogative of businesses to manage and the rights of employees to fair treatment.

The prevalence statistics show that unfair dismissal claims remain relatively small in proportional terms across the Australian labour force and that employers only infrequently encounter unfair dismissal cases (at around 0.2 per cent of employees in 2012-13). It appears that even where employees are dismissed with cause, around 90 per cent make no claims, and of those that do, 80 per cent enter a relatively low-cost conciliation process (with a 60 per cent chance of some compensation). The remaining claims go through a more intensive arbitration process (with about 30 to 40 per cent of total cases that proceed to substantive arbitration resulting in compensation). Compensation is usually modest, but the management and legal costs add to the overall costs associated with dismissals.

Perceptions aside, there is little evidence that unfair dismissal laws are a major obstacle to hiring, especially given the relatively long probationary periods that exempt an employer from any claims (six months for an employer with 15 or more employees and one year for smaller businesses). Conciliation processes may sometimes be ‘rough justice’ in that the full circumstances of a case are not tested meticulously. However, once unfair dismissal claims go to arbitration, the outcomes can be very uncertain (and far more costly than conciliation) and there is some troubling inconsistency in the decisions of different members of the FWC.

The costs of progressing cases through conciliation and arbitration provide incentives for businesses to pay ‘go away’ money to employees who claim employers have unfairly dismissed them. While it no doubt occurs, there is insufficient data about the extent of go away money, and how it can be distinguished from cases where the employer and the employee agree that the justification for dismissal is not clear cut.

The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer. For example, in one case a business dismissed two employees after they assaulted their supervisor.¹ The FWC concluded that their physical assault was a valid reason for dismissal, but that the employer’s failure to follow certain administrative procedures meant that the dismissals were unjust, unreasonable and therefore unfair.

Moderate and incremental reforms can address the current flaws, while leaving much of the existing legislation and its legitimate protections intact:

¹ *Sheng He v Peacock Brothers & Wilson Lac v Peacock Brothers* [2013] FWC 7541 (27 September).

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- The Fair Work Act should be amended so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal. Nevertheless, procedural errors by an employer should, at the discretion of the FWC, lead to either advice to the employer, or where serious or repeated, the potential for the FWC to seek financial penalties through an application to the Federal Circuit Court or Federal Court.
 - There should be an upfront assessment of whether there is a valid reason for dismissal.
 - Non-refundable lodgment fees may also assist at the margin in limiting the automatic recourse to the FWC, and reduce the considerable administrative load that the FWC faces in providing refunds.
 - There should be a two-part fee for applicants for unfair dismissal rulings, with an initial modest fee for accessing conciliation at the FWC, and a further fee for cases where a party takes the matter to arbitration. The FWC should also advise all parties that, based on recent decisions, 60-70 per cent of arbitrated cases do not lead to compensation. These measures should further encourage conciliation as the preferred vehicle for dispute resolution.
 - To reduce some of the present inconsistencies, the governance of the FWC should be reformed along the lines discussed earlier.
 - While reinstatement should not be relinquished as *a* goal of the unfair dismissal provisions, the emphasis on reinstatement as the *primary* goal should be removed. Its realistic attainability depends very much on the context of the employee, the circumstances of the dismissal, and the employer, which requires case-by-case assessment. Reinstatement is rarely achieved, and in many cases would not be desirable for any of the parties.
 - The above reforms, complemented by further targeted provision of information and regulator engagement with small business, will deal with many of the current issues experienced by small businesses. Subject to implementation of these reforms, the Small Business Fair Dismissal Code should be removed. The basic premise of assisting small business to navigate the complexities of unfair dismissal legislation is reasonable, but the Code does not achieve that outcome and provides a false sense of security.

The general protections

The general protections provisions of the Fair Work Act comprise a lengthy (sometimes relatively technical) set of prohibitions, including against conduct by employers and industrial associations that breaches an employee's workplace rights — 'adverse action'. For example, adverse action might comprise discrimination against employees because of their union membership (or in some cases because they are not union members). There are very strong grounds for such protections, as employees should not be subject to disadvantage for reasons unrelated to their actual work performance.

However, there are some deficiencies in the current arrangements.

The General Protections are broad and sometimes ambiguous. Unlike the specific unfair dismissal provisions, they provide uncapped compensation, which provides incentives to use them as a more lucrative avenue for compensation for dismissals. Moreover, an employee dismissed for underperformance or breaching workplace codes of conduct has strong incentives to claim that some other non-permitted reason was the true basis for the dismissal (for example, because they had complained about some aspect of management), even if this claim was confected. These factors may have been one of the accelerants for the very rapid growth of dismissal cases under the General Protections. (Dismissal cases account for nearly 80 per cent of total General Protection cases).

This is not to say that many cases are not genuine. However, a well-functioning system should be designed to limit perverse outcomes, not just because this avoids inefficient and unfair outcomes, but to shore up its integrity. Regulations that lack credibility do not serve the interests of employees with a strong basis for their claims.

In principle, placing a cap on compensation for breaches of the General Protections, or a part of them, would appear to provide a solution. However, this would have a range of unintended consequences, not least because the Protections are a catch-all for a wide range of discriminatory or adverse conduct by employers, unions and other parties, with difficulties in carving out any one element. In some instances, the adverse action is so severe that large compensation amounts should be payable, and failure to provide them would not adequately deter such conduct.

An alternative preferred remedy to vexatious claims is that the Fair Work Act be amended to allow the awarding of costs against an applicant who unsuccessfully pursues a claim in the face of an FWC recommendation that the claim not proceed. This measure is likely to put a break on opportunistic claims, while not throwing the baby out with the bathwater.

Some employers are concerned that unions sometimes use the General Protections to oppose business restructuring (for example, moving to labour hire arrangements or adopting labour-displacing technology) because it can have adverse consequences for existing unionised employees. In practice, this does not seem to have been a major problem, but should be reviewed by the Australian Government in 18 months. However, another issue also related to structural adjustment — the ‘transfer of business’ provisions of the Fair Work Act — are more problematic (see later).

One notable feature of the General Protections is that the onus is on the employer to prove that adverse action has not occurred. Since employees cannot be in a position to acquire the information to prove intent, there is reasonable justification for such a reverse onus. However, some stakeholders claimed that the reverse onus of proof, while of itself unproblematic, can nevertheless trigger a discovery process that allows a union or court to sift through potentially hundreds of thousands of documents in search of intent (and this has occurred). Doing so may not only be costly in its own right, but may disclose many aspects of a business that would be unreasonable to expose to third parties. Moreover, the court processes that accompany adverse action cases are slow (years can pass), creating large administrative and legal costs and frustrating business plans. However, in its Access

to Justice inquiry report, the Productivity Commission found that many superior courts, particularly the Federal Court, have taken significant steps to curtail discovery. This has generally reduced costs and timelines.

Courts are now also successfully addressing a previously identified prime problem. Some key High Court cases have established legal precedents that an adverse action case will not succeed because of some coincident possible breach of a workplace right (such as dismissal of a union official who has performed poorly). To the extent that the precedent is observed in other cases, adverse action would require that such a breach was, on examination of the subjective intentions of the decision maker, the main reason for the dismissal.

Modest reforms can address the other limitations:

- The currently quite uncertain ‘complaint’ trigger for protection of a workplace right needs to be much better defined.
- Consistent with reform in judicial processes in several jurisdictions, the Fair Work Act should be amended to make the discovery process used in adverse action cases proportional to the issue at hand.

Anti-bullying

Bullying can have devastating consequences for people, which is why various laws have attempted to discourage it by penalising those who engage in it or who permit it to happen, and by providing compensation to victims. There are multiple avenues for addressing bullying — such as through various anti-discrimination and workforce health and safety laws, and since January 2014, as an addition to the Fair Work Act.

The Fair Work Act accords a key role to the FWC in overseeing this new jurisdiction. As is the case for unfair dismissal, the FWC is the mediator, conciliator and, as a last resort, adjudicator. The FWC can make any order it considers appropriate to stop the bullying. However, it cannot make orders requiring payment. Workers may be able to seek compensation through other means, including workers’ compensation, workplace health and safety, and common law claims. A failure to comply with FWC orders would expose the employer and/or the relevant bullying party to civil penalties.

Some have questioned whether anti-bullying provisions needed to be incorporated into the Fair Work Act given the other avenues for addressing the issue, and were concerned that it might become the preferred avenue for complaint. The expected barrage of claims has not materialised, though they are increasing rapidly. In 2014-15, the FWC received just under 700 applications for an order to stop bullying (a more than doubling in the caseload over the previous year), with 60 finalised by a decision. Of these, only one application resulted in an order to stop bullying. However, the provision is resource-intensive for the FWC as evidence provided by applicants can be extensive, if not always substantive.

Overall, while the FWC’s current approach appears to be considered and effective, sufficient time has not elapsed to reach a final judgment on the effectiveness of the provision or to assess whether the low probability of success may stem the flow of applications. A post-implementation review is already scheduled, and this would provide a timely opportunity to assess the operation of the jurisdiction.

5 Enterprise bargaining

Following almost one century of centralised conciliation and arbitration, Australia introduced enterprise-level bargaining in 1993. Enterprise bargaining involves employees working together to reach an agreement with their employer over the terms and conditions of their employment. Enterprise bargaining can potentially yield efficiencies through negotiating and using one agreement, rather than many individual arrangements. It is also a vehicle for achieving a delicate balance between the parties’ interests. On the one hand, it provides a counterweight to the bargaining power of the employer (the adversarial aspect to bargaining), and, on the other hand, the scope for cementing cooperation between parties that have a mutual stake in the efficiency and performance of the individual enterprise. Enterprise bargaining provides some flexibility to take into account the special circumstances of any one firm. This contrasts with collective bargaining across multiple enterprises and industries (the arrangements preceding 1993), which did not have a focus on the individual enterprise.

The Fair Work Act has detailed rules around enterprise bargaining. While the bulk of agreements appear to be formed with no difficulty and with benefits for all parties, there are several flaws in the current arrangements.

Where a staple can undo an agreement

Peabody Moorvale Pty Ltd² provided three pages — stapled together — to all of the employees to be covered by a proposed enterprise agreement. Some bargaining ensued, an agreement was struck and the agreement was lodged with the FWC. However, by attaching the three documents together, the employer contravened requirements about the form of notice to be given to employees. The FWC had no real discretion in the matter, and was obliged by the Fair Work Act to reject the agreement. So, absurdly, the employer had to recommence the agreement process. There is a convincing variety of similar examples.

While there are often good reasons for imposing procedural requirements (for example, to prevent employers including extraneous and potentially misleading information in a notice to employees), substance rather than form should prevail, which is a recurring theme in this

² *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042 (2 April 2014).

inquiry. In this type of instance, the solution is that the FWC should have the discretion to overlook a procedural defect (that poses no risks to employees) without requiring an undertaking by the employer.

Good faith bargaining

The good faith bargaining requirements appear to be working relatively well. While some have advocated for time limits on bargaining and then recourse to a decision by the FWC as the workplace umpire, this would reduce the incentives for parties to agree among themselves. A central tenet of the shift to enterprise bargaining was to step away from third party arbitration. The FWC already has sufficient powers to step in, as a matter of last resort, when there are repeated breaches of the requirements.

The better off overall test (BOOT)

The BOOT is intended to avoid circumstances where imbalances in workplaces stemming from employer power or the domination of certain employee bargaining representatives result in agreements where individual employees are not better off in comparison with the relevant award. However, a no-disadvantage test (NDT), which requires that people are not made worse off, can achieve the same outcomes more efficiently.

- The scope for tradeoffs that assure that the BOOT is passed is limited in enterprise agreements that involve employees who are predominantly on the award. This restricts the desirable uptake of enterprise agreements.
- The BOOT requires the FWC to be positively satisfied that an agreement will make all employees better off than the relevant award. This provides a wider scope for the FWC to reject agreements at the approval stage when compared with a NDT, because it changes the onus of proof. Under an NDT, the FWC would need to identify how an agreement makes employees worse off overall in order to reject an agreement.

Merely replacing the BOOT with an NDT does not resolve a further technical issue. There is ambiguity under the Fair Work Act about whether the test applies to every single individual in an agreement or to a class of similar individuals (such as weekend casual employees). Under an NDT, the former would have the unfortunate consequence that the FWC could not approve an agreement even if just one individual was made worse off, say because of idiosyncratic preferences about rostering. It would also make the NDT (or the present BOOT) administratively burdensome. In practice, the FWC has typically used the BOOT in relation to a given class of employees, but there remains a risk that a single employee's complaint might sink an agreement. Statutory change to ensure that the test be for a class of employees would address this problem.

Greenfields agreements pose major dilemmas in regulatory design

The unique circumstances of bargaining for a greenfields agreement warrant a different regulatory approach. Such agreements are struck between a union and a new enterprise that has not yet hired any employees. Since 2011, the use of greenfields agreements has expanded. Greenfields agreements now make up 10 per cent of all enterprise agreements, up from 6.4 per cent in September 2011. Greenfields agreements are most prevalent in construction projects, which make up roughly two-thirds of greenfields agreements. However, they are also currently used in many other contexts, including health and aged care and manufacturing, so they do not always relate to large capital-intensive projects with a given life. However, the problems of the agreement-making processes strike most hard for such projects.

The main concerns are that large capital-intensive projects require some certainty about the start date of the project to secure finance, to plan the project, and to more generally manage risk. Unions' capacity to hold out in their negotiations provides them with potentially excessive bargaining power, and risks stripping some of the needed returns from inherently risky projects. Unlike other enterprise bargaining processes, the usual disciplines for speedy bargaining — the absence of pay increases for an existing workforce — are not present.

There are no easy solutions. Avoiding all uncertainty for employers would shift the balance of power too far in their direction. Allowing the FWC to determine the 'best' outcome would be at odds with the desirability of leaving essentially commercial decisions in the hands of those parties with the greatest information. Given the varying nature of the industries, enterprises and unions that strike greenfields agreements, the Productivity Commission has devised a menu approach, which would allow employers to choose between three options that may suit their particular circumstances. The menu would only be available if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months.

The first and most novel option is for the employer to request that the FWC undertake 'last offer' arbitration of an outcome by choosing between the last offers made by the employer and the union. The FWC would not reopen the matter to make its own judgment, but would merely act as an umpire for the two choices put to it. Knowing this, the parties to the agreement would have strong incentives to make reasonable claims. It would, however, still require that the FWC consider the proposals with a high degree of expected impartiality. The 2012 post-implementation review of the Fair Work Act also recommended that 'last offer' arbitration be used to resolve stalemates in greenfields negotiations.

Second, an employer could submit the proposed greenfields arrangement for approval by the FWC without any need for union agreement, with a 12-month nominal expiry date. At that point, the business would have hired employees, and a normal enterprise bargaining round could occur. The advantage of this option is that the employer would have the

capacity to negotiate tradeoffs with employees that unions might be unwilling to accept. On the other hand, such bargaining could also lawfully trigger industrial action, with the potential to delay a large already committed project. This would give employees and their representatives a potentially high degree of leverage. An employer facing those risks would be unlikely to select this menu option. It would, however, be much more likely to be attractive to non-capital-intensive greenfields arrangements in which an employer wanted to engage positively with its employees (such as an aged care facility).

The third option would be continued negotiation with the union, recognising that sometimes parties may be close to an agreement anyway, or that after the three month limit had elapsed, unions have greater motivation to seek a mutually beneficial outcome. This would only occur if the employer was confident that a reasonable agreement could be reached, and that the cost of waiting was not prohibitive. It is nevertheless likely that constructive dialogue between the parties — not always guaranteed by the instinctive culture of the two parties — may go a long way.

Regardless of the agreement making process chosen by the employer, the ensuing greenfields arrangement would have to pass the proposed no-disadvantage test.

Another complementary mechanism that would also reduce the hold-up problem and uncertainty for construction greenfields projects would be the capacity for an employer to form an agreement whose duration matched the life of the construction project (with approval from the FWC if that duration exceeded five years).

The content of enterprise agreements

While all enterprise agreements must include a flexibility term that allows parties to make an individual flexibility arrangement to vary the conditions of an enterprise agreement (see later), the range of matters over which such individual arrangements may be made can be whittled down during the bargaining process. Such a narrowing of options should not be permitted.

The range of matters that should be permitted in an enterprise agreement is an area of fierce contention. Employers generally wish to reduce the range of matters over which bargaining can occur, based on the primacy they give to managerial prerogative, while employees seek a more expansive range of matters. Sometimes it is not straightforward to determine the appropriate content of enterprise agreements. However, in one area, there is no basis for restrictive clauses. So-called ‘jump-up’ clauses that require businesses to engage subcontractors on the same terms as employees, or that limit the employment of casual and labour hire employees are, in spirit, contrary to the *Competition and Consumer Act 2010* (Cth). Employers should be able to use subcontractors and casual and labour hire employees, as suits their business operations and the workers themselves. The Fair Work Act should be amended to prohibit restrictions on such employment arrangements in enterprise agreements.

In terms of permitted matters more broadly, the Fair Work Act deliberately moved away from the legislative prescription in previous regimes to a reliance on jurisprudence about ‘matters pertaining’. There are several disadvantages of the various statutory alternatives.

‘Black lists’ — as in many other prescriptive regulations — can include matters that might, on closer examination, legitimately be included in an agreement. One employer’s bad practice may be another’s effective reform. Barring ‘consultation’ is an example.

White lists that stipulate exhaustively the only matters that can go in agreements are equally, if not more, problematic because they fail to take into account future developments in labour relations that expand the matters that might reasonably be covered by the employer-employee relationship.

One of the benefits of collective agreement making is that it establishes conditions that are not frozen in time, and can take account of the different issues that could affect workplaces of the future. Context and detail matter a great deal. Moreover, a body of developing case law has clarified some key aspects of agreements that are not permitted matters, but in a more nuanced fashion than might occur through legislative dictate. That jurisprudence will evolve further over time.

That said, there is little basis for permitted matters in enterprise agreements to extend to matters pertaining to the relationship between an employer and employee organisations and that extension should be removed.

Despite calls for the introduction of mandatory productivity clauses within all enterprise agreements, this might perversely generate outcomes inimical to productivity and be counter to managerial prerogative. Most employers constantly look for ways to improve productivity in ways that do not require any quid pro quo in terms of increased wages and conditions (for example, if the business invests in more productive equipment or innovates). Where there are gains from cooperation, employers, employees and their representatives already have strong incentives to voluntarily commit to productivity improvements and, where possible, to specify ways in which this might be achieved through enterprise agreements without resorting to new regulation. Some employers noted the incentive this may create for employee representatives to frustrate productivity enhancements until the next bargaining round.

Bargaining representatives must represent more than a trivial share of the workforce

Multiple non-union bargaining representatives who represent a very small number of employees may add considerably to the cost and smooth progression of bargaining. There should be a requirement that a non-union party can only act as a bargaining representative if they have secured sufficient support of the workforce. (The Productivity Commission has proposed 5 per cent or 20 employees, whichever is the smaller.)

Transfer of business

Business exits — whether arising from failure, restructuring or the sale of a going concern — result in movements of people, capabilities and capital around an economy. The potential for businesses to be purchased and/or to transfer work to new businesses, is important for productivity, innovation and structural change. Equally, however, employees of transferred businesses are concerned not to lose the conditions they had negotiated with the previous employer. The Fair Work Act requires that the conditions of the enterprise agreement in the business-of-origin transfer to the new enterprise (potentially in perpetuity). While this requirement prevents an employer from strategically restructuring their business to escape a previously negotiated agreement, it can also stymie genuine structural change and lead to significant job losses.

To reduce that risk, the Fair Work Act should be changed so that the Fair Work Commission must take into account the employment risks of any decision it makes about the arrangements for transfer of business. Moreover, the conditions inherited from the business-of-origin should lapse after 12 months, with the relevant employees then covered by whatever arrangement is in place in the new enterprise. There should also be no regulated limitations on the voluntary decision by an employee to move to the new enterprise and be immediately covered by its employment arrangements.

6 Individual arrangements

Even when part of an enterprise agreement, all employment contracts are, in law, individual arrangements. The WR system merely provides different ways in which such contracts can be packaged, weighing up the advantages and disadvantages of individual flexibility, the costs of contract variations across workers in the same enterprise, and the risks of power imbalances that arise from different contractual arrangements.

While most employees are paid at rates determined by an enterprise agreement or stipulated in an award (figure 1), a sizeable minority are paid on an individual basis at above-award rates. A relatively few — around 2 per cent of all employees covered by the Fair Work Act — have formed so-called ‘individual flexibility arrangements’ (IFAs) under the Act.

In principle, IFAs allow an employee and employer to negotiate terms and conditions that suit their personal and business circumstances. For example, an IFA may change rostering arrangements to suit an employee and an employer. An IFA may allow, but does not require, an employee to forgo some award or enterprise agreement conditions so long as they pass a better off overall test as described above. (The BOOT is benchmarked against the enterprise agreement if an employee is opting out of the agreement, but otherwise against the pre-existing award or award-based arrangement.) No agreement can trade off conditions specified under the NES.

IFAs represent a new marque of statutory individual arrangements, and supersede several variants of Australian Workplace Agreements (AWAs). Under WorkChoices, AWAs were not subject to a no-disadvantage test, and were contentious because some employees who lacked bargaining power had their entitlements reduced. Such AWAs were offered as a condition of employment ('take it or leave it') and had a low safety net threshold. Available data suggest the take-up of AWAs was around 3 per cent of employees. Prior to WorkChoices, AWAs had stronger protections and were less controversial.

It is surprising that employees and employers have not used IFAs more frequently, as they offer considerable flexibility, provide protections for employees, and are not hard to make. One immediate and easily implemented reform would be for the Fair Work Ombudsman to better advertise the option of an individual flexibility arrangement to employees and employers. Many have not even heard of them.

Some of the other obstacles to their use are more perceived than substantive, but are still worth remedying.

For example, employer groups argue that the ambiguity about the BOOT makes employers reluctant to form an agreement lest subsequently the Fair Work Ombudsman finds that they breached the test. This concern arises because IFAs are not vetted against the BOOT by the Fair Work Ombudsman when they are made (to avoid the large transactions costs of doing so). However, unless there has been egregious conduct (such as coercion to make an agreement), the most likely outcome of a breach of the BOOT would be immediate termination of the agreement and reversion to the award, enterprise agreement or other pre-existing arrangement. There have been very few instances where the Fair Work Ombudsman has acted against an employer in respect of an IFA. And surveys of employers (as opposed to the views of employer groups) suggest that fear of failing the BOOT at some future date is not a major obstacle. Nevertheless, there appears to be no harm in eliminating any perceived risks where they do not undermine the protection of employees. The switch to a no-disadvantage test as discussed above would represent a straightforward remedy, as would guidance to businesses and the development of example agreements that would be compliant.

Another potential deficiency is that employers can be reluctant to invest in flexible arrangements because an employee on an enterprise agreement can terminate an individual flexibility arrangement with 28 days' notice and IFAs can only be offered to existing employees, rather than as a condition of employment. Short notice can expose businesses to financial and operational risks. As a concrete illustration, a business might set up rostering arrangements underpinned by commitments by employees set down in IFAs, only to find that the termination by several employees made the arrangements untenable. By reducing their expected return, the risk that IFAs may be terminated soon after their formation may undermine the incentives for managerial innovations. Likewise, rapid termination by an employer can adversely affect employees who may have made flexible home arrangements (for instance, to coordinate childcare with working times) only to find them vanish.

The evidence about the severity of these problems is weak but, as in the previous case, there is a remedy that has few downsides. The Australian Government should amend the Fair Work Act so that the minimum termination period should be 13 weeks (as proposed in the 2012 post-implementation review of the Act), but with the capacity of employers and employees to agree at the formation of the agreement to a one year minimum period.

A possible new type of arrangement that spans individual and enterprise agreements — the enterprise contract

However, even with these changes, it is unlikely that the prevalence of truly bespoke individual arrangements would ever be high, simply because of the high transaction costs of their negotiation. This is especially so for businesses with high staff turnover or that are rapidly expanding. The scope of IFAs is determined by particular clauses (the flexibility term) in the overarching award or enterprise agreement, which can be quite restrictive.

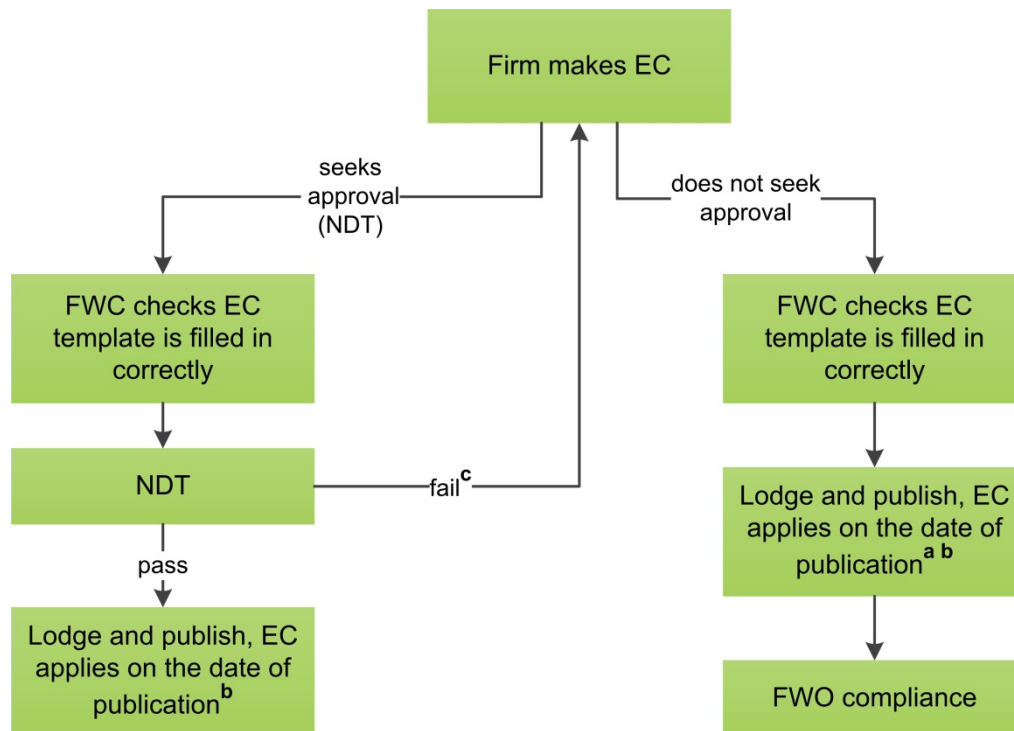
Businesses could still achieve flexible arrangements across their operations by negotiating enterprise agreements but, as discussed later, such agreement making is still rare amongst small and medium-sized businesses. This is because the procedural aspects of such bargaining can be daunting (though the perceptions are probably worse than the reality).

To meet the needs of such businesses, the Productivity Commission recommends the adoption of a new type of arrangement — the enterprise contract (EC) (figure 9). An EC would see employers vary awards for classes of employees (for example, casual employees or weekend employees), and this would allow employers to innovate at the firm-specific level in a way not otherwise available under awards. As with enterprise agreements, the EC could not include terms that disadvantaged employees relative to the award. Employees would be covered by the NES, and their rights to take actions under unfair dismissal and the General Protections of the Fair Work Act would not be diluted. An EC could not go below the minimum wage.

Employers could offer it to all prospective employees as a condition of employment (a process no different from that of engaging a new employee under the set terms of an award or an enterprise agreement). No negotiation or employee ballot would be required for the adoption of an EC, nor would any employee group be involved in its preparation and agreement unless the employer wished this to be the case. Employers and individual employees could still negotiate IFAs as carve outs from the EC if they mutually agreed.

Existing employees would be able to choose whether to sign on or stay with their existing employment contract, but it would be unlawful to coerce them to do so. Employers and employees would need to sign the EC, and would be informed about any tradeoffs against the award (for example, a \$1.50 increase in hourly wages in exchange for a new type of rostering arrangement). Tradeoffs that relate to the preferences of an individual employee should be addressed through an IFA.

Figure 9 The enterprise contract



- a Risk of compliance resides with the employer, penalties for non-compliance with the NDT will apply.
- b Unless otherwise specified
- c An EC that fails the NDT cannot be lodged and published in its current form (through the non-approval route), but the firm could seek subsequent approval for a modified EC.

Employers could select between two options for proceeding with an EC:

- they could request that the FWC undertake a no-disadvantage test prior to the adoption of the EC. This would provide certainty, but would not occur immediately
- they could merely lodge the EC without an ex ante no-disadvantage test, but would be liable to repay affected employees any deficit in effective wages if later it was discovered that the contract fails the test.

Employers could also use ECs to vary award wages and conditions by providing non-cash benefits. For example, an employer in tropical Queensland might want to shift its ordinary hours of work so that work commenced in the cooler hours — to the benefit of itself and its employees — without having to pay a loading for the earlier commencement. While on face value that seems reasonable, there would be a risk that some businesses might include questionable tradeoffs in an EC (such as relinquishing overtime or penalty rates in exchange for subsidised low quality accommodation). Accordingly, where an EC relies on

non-cash benefits to meet the NDT, the business would need to go to the FWC for pre-approval.

For transparency, ECs should be open to third party scrutiny. All EC templates would have to be lodged with the FWC and published on its website, and the FWC would provide all ECs to the Fair Work Ombudsman for compliance and audit purposes. The publication of the template would have the advantage that other employers could use others' ECs as models for their own arrangements. The Fair Work Ombudsman and the FWC would highlight approved clauses that pass the NDT on its website. Employer associations may run test case ECs on behalf of a single firm, in order to establish a model capable of wider adoption by similar firms with the same employee classes.

The EC would operate for a nominal term of three years, but could not be rolled over automatically after that period. Employees should be able to opt out and fall back to the relevant modern award after 12 months on the EC as an additional protection. All employees would retain the right to commence bargaining (and after commencing bargaining, take protected industrial action in making an enterprise agreement). An employer could not unilaterally switch from an existing enterprise agreement to an EC unless that agreement had been lawfully terminated. The intention of the contract is not to undermine collective bargaining, but to act as a more flexible firm-specific arrangement.

There will be employers that attempt to engage in wilful misconduct in using non-approved ECs or that use coercion. Complaints by either the employee or any third party could be made to the Fair Work Ombudsman. In addition to penalties for coercion, the Act would specify penalties for firms for wilful misconduct in relation to the use of ECs. And businesses that misused ECs could be barred from their future usage for some period.

Since the EC is a new type of employment arrangement, the Fair Work Ombudsman should provide information about it and the compliance regime six months in advance of its commencement.

7 Industrial disputes and right of entry

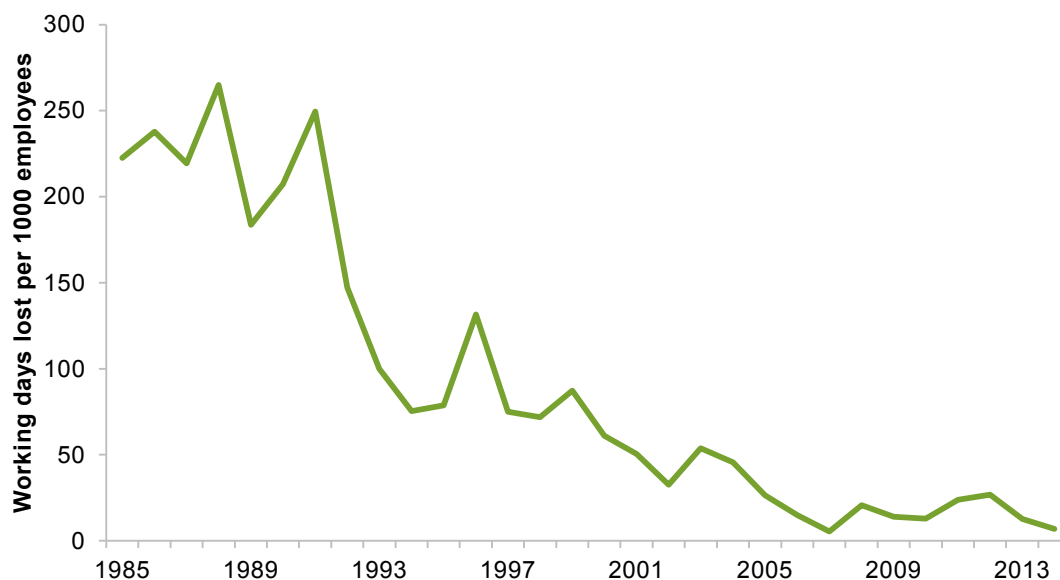
The credible threat of industrial action by both employees and employers is an important negotiating tool for parties engaging in enterprise bargaining, helping to reduce asymmetries in information and bargaining power. Nevertheless, there needs to be rules that ensure that neither employers nor employees hold too much power and that take account of the economywide effects of major disputes. This is an area of considerable contention and partisan representation by employers and unions as they jockey to seek rule changes that give them greater negotiating power.

The existing provisions outlined in the Fair Work Act governing industrial action are extensive and complex. Numerous conditions and procedural steps must be satisfied by

employees to obtain authorisation to undertake lawful ('protected') industrial action during enterprise bargaining. (Industrial action is unlawful outside the bargaining period.) Employers are provided notice in advance of protected industrial action and have the ability to respond with contingency plans or by lockout. Employees are not paid while engaging in any action (and indeed, it is unlawful for an employer to do so). There are also multiple avenues through which protected industrial action can be challenged by employers, or suspended or terminated by the FWC or the Minister for Employment (with the latter only possible in special 'public interest' circumstances). Penalties are in place for parties that engage in unprotected industrial action.

Strike activity is currently not a major problem in Australia. The measured prevalence of industrial action has declined substantially over the past three decades, and has remained relatively low in recent years (figure 10). The average number of days lost over the past five years was less than one tenth of the days lost on average from 1985 to 1990. Moreover, despite the views of some employer groups, the level of disputation does not appear to have meaningfully increased following recent changes to the WR framework. Indeed the biggest contributor to some recent spikes have related to public sector disputes that are outside the scope of the Fair Work Act. Nevertheless, some forms of industrial action — for example, work bans — creep below the statistical radar.

Figure 10 **Strike activity has fallen**
1985 to 2014



Regardless, there are several shortcomings in current arrangements that allow the excessive strategic use of industrial action.

- Aborted strikes and brief stoppages can involve low costs for employees, but impose disproportionate transaction costs on employers (and customers). For example, a

one-minute stoppage would legally obligate the employer to suspend pay to employees for that duration, despite there being considerable administrative costs in doing so. It is ironic that the ‘no strike pay’ measure, which was intended to reduce coercion, can be used to strengthen the bargaining power of the striking party. Similarly, a business may be advised of a strike and implement costly measures to address the disruption that it expects to ensue (for example, rescheduling deliveries or carriage of passengers), and yet the strike may then be called off. To reduce the use of this strategic ploy, employers that have engaged in a reasonable contingency response to what ultimately was an aborted industrial action should be given the capacity to stand down the relevant employees for the duration of that response. Where employees engage in protected industrial action that lasts less than 15 minutes, the employer should be permitted to choose to either deduct a 15 minute increment from employee wages, or pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay.

- Secret ballots are an essential part of industrial dispute regulations since they reduce risks of coercion by employers or employee representatives, prevent hollow threats of disputes that do not actually have employee consent, and provide a clear point at which the FWC can intervene in circumstances where the parties have not genuinely been trying to reach an agreement. However, there are questions about the span of time that permits protected industrial action after a ballot decision, as well as the scope of the questions that can be put to employees. A few minor changes would simplify the process — increasing the efficiency of bargaining.
- Employers should have more graduated options for retaliatory industrial action, such as bans on overtime, than the ‘nuclear’ lock-out option.
- The penalties for unlawful industrial action (by any party) should be increased by a factor of three, as this would allow the FWC and the Federal Court more scope to apply penalties commensurate with the harm associated with such action.

There are also areas where employers have called for changes to industrial dispute regulations, but that are not warranted by the evidence.

- There should be no legislative requirement that protected industrial action can only proceed after an FWC assessment confirms that employee’s claims are not ‘excessive’, or will not have an adverse impact on the enterprise’s productivity. A test of this kind is both asymmetric (favouring employers over employees), but could run into a definitional quagmire about what was ‘excessive’ in the context of a particular enterprise’s commercial environment. It is inherently undesirable to have an industrial regulator effectively act as a commercial arbiter between two parties. The circumstances in which it exercises any such role should be minimised. *This is a broad principle that should inform any future development of the Fair Work Act.*
- There should be no restriction on industrial action by high-income employees. Incidentally, were it introduced, it would place Australia in an unusual position among most other countries, where no such restrictions apply.

-
- There is not a strong case for adding further criteria to the test for whether employees are ‘genuinely trying to reach agreement’, not least because there is little substantive evidence that this is a significant problem, and because it would shift the balance of bargaining power greatly in favour of employers.

In the debates about regulation of industrial disputes, there is often a mantra that disputes are harmful to productivity and efficiency, and that there should therefore be more binding constraints on their use. Disputes may have such effects, although in aggregate there is little evidence that the effects are material. Many disputes are about who gets what portion of a cake, not the quantum of the cake. In fact, a missing story is that the toxic relationships that can surface between employers and employees are sometimes the result of poor relationship management — a key skill for both employers and employee representatives — not a fault of the WR system.

The provisions providing rights of entry by union officials to worksites are mostly sound, though at times both sides play games with each other. That said, the Fair Work Act should be amended to require the FWC to examine the impacts on employers and employees more closely before making any orders concerning disputes about the frequency of right of entry requests.

8 Sham contracting

Independent contractors comprise an important share of the workforce (figure 1). This employment form provides workers with much more autonomy in their working arrangements, and enables them to change their wage rates to maximise their returns (including by decreasing the likelihood of unemployment in weaker labour markets). Employers often choose to use these employment forms because, in some circumstances, they can improve productivity or lower costs. They can act as more flexible sources of labour than ongoing employees, especially where skills are intermittently required.

Contractors generally receive different pay and entitlements to ongoing workers. This generally reflects the degree to which each employment form is regulated by the Fair Work Act. There is some concern that the differential application of the Fair Work Act creates incentives to misclassify employees as independent contractors (sham contracting). This can occur with a worker’s consent, or through misrepresentation or coercion. It is most prevalent in the construction, cleaning services, hair and beauty and call centre industries.

Some have argued that the current common law approach to determining whether a worker is an employee or an independent contractor lacks clarity. The lack of clarity associated with this approach — which balances multiple factors including the length of employment as well as the choice of work, manner of work, hours of work and payment for work rather than relying on a single indicator — makes it hard to identify the genuine status of employment arrangements, makes enforcement difficult and leads to inadvertent errors.

While the existing common law definition of a subcontractor may not always be easy to apply, it is hard to develop a better legislative definition or test.

The requirement that an employer must have been ‘reckless’ for them to be prosecuted for misrepresenting the nature of an employment contract appears to be a high hurdle for legal action. Changing from a test of ‘recklessness’ to a test of ‘reasonableness’ would help discourage sham contracting, including through the regulators’ out-of-court actions. Such a change is also an important measure to limit the greater incentives for sham contracting that would arise when terms in enterprise agreements that excluded subcontractors were prohibited (as recommended by the Productivity Commission).

9 Public sector bargaining

The circumstances of public sector bargaining often differ from bargaining in the private sector. The most obvious of these is that there are relatively few employers, but public sector employees account for a substantial amount — around 16 per cent — of the total workforce. Moreover, in some cases, government is also a legislator and a regulator — effectively making and enforcing the laws it uses to hire workers.

Governments may have market power because while individual agencies negotiate with their employees, the government can set rules for such agreement making, and close off certain bargaining options by simply tightening the purse strings. In some instances, governments are also the dominant hirer or funder of people performing certain jobs (teaching, nursing, emergency services, disability and aged care). Nevertheless, there is limited evidence that governments have systematically exercised any such power, though there may be exceptions for particular professions.

There are also many challenges in bargaining in the public sector that are less evident for private employers:

- One major difficulty is that the products of the public sector are not priced in markets and have quality dimensions that are hard to define clearly, with the result that productivity is hard to measure well. Notwithstanding this, linkages between pay rises and stated ‘productivity’ in enterprise agreements are far more common in public sector than private sector agreements.
- The agreements set by agencies also often involve what one public service commissioner referred to as the ‘adoption of interminable or excessively bureaucratic processes’ for managing underperformance.

There are no easy fixes for these challenges — and probably the best solutions need to be developed at the agency level.

10 Migrant workers in Australia

Although covered under the Fair Work Act, permanent and temporary migrant workers face higher risks of exploitation. This can reflect lower proficiency in English skills, lack of awareness of their rights in the workplace and a reluctance to reveal exploitation in circumstances where the migrant is working in breach of the *Migration Act 1958* (Cth), for example, by exceeding the prescribed limit on hours. Revealing such exploitation could result in deportation.

Beyond improving information provision to migrant employees and increasing enforcement resources, there are several new approaches that should reduce exploitation:

- Subject to arrangements that ensure that it is lawful, the Fair Work Ombudsman should not share any identifying information with the Department of Immigration and Border Protection about a migrant who has only breached their employment-related visa conditions. To complement this, the Department should continue considering a migrant's circumstances when deciding whether to cancel their visa.
- There is confusion about whether the Fair Work Act covers an unlawfully working migrant. The Act should be changed to clarify that they are covered and could seek compensation if underpaid.
- Penalties for employees that keep false or misleading documents should be increased, since such conduct can be an effective strategy for escaping redress.
- There should be greater scope to pursue compensation from company directors of phoenix businesses that have engaged in exploitation, for example through the use of a Director's Identification Number (as recommended in the Productivity Commission's inquiry into Business Set-Up, Transfer and Closure). (This would assist any employees affected by phoenixing — migrant or otherwise.)

Recommendations and findings

All recommendations are detailed in the chapters, and readers are advised to read them in context. Accordingly, recommendations include a reference to the relevant section of the report in which they are located.

OVERALL REPORT FINDING

Despite sometimes significant problems and an assortment of peculiarities, Australia's workplace relations system is not systematically dysfunctional. It needs repair not replacement.

Chapter 3 Institutions

RECOMMENDATION 3.1

(SECTION 3.3)

The Australian Government should establish new institutional arrangements for the regulation of minimum wages and modern awards.

- It should create a statutorily independent Workplace Standards Commission with responsibility for reviewing and varying the national minimum wage and modern awards (including the making of equal remuneration orders).
- As a less preferred alternative, the Australian Government should establish the wage regulator as a Minimum Standards Division within the Fair Work Commission. While this alternative may also work, it would offer more limited scope for early cultural change. Such a division should be established in statute and have clear statutory duties.

Other functions within the workplace relations system should continue to be performed by the Fair Work Commission and the Fair Work Ombudsman in accordance with current arrangements.

RECOMMENDATION 3.2

(SECTION 3.3)

The Australian Government should amend s. 629 of the *Fair Work Act 2009* (Cth) to stipulate that the President, a Vice President, a Deputy President or a Commissioner of the Fair Work Commission, and the appointees of the proposed Workplace Standards Commission hold office until the earliest of the following:

- he or she reaches the tenth anniversary of their appointment;
- he or she attains the age of 70;
- he or she resigns or the appointment is terminated.

RECOMMENDATION 3.3

(SECTION 3.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to change the appointment processes for Members of the Fair Work Commission. The amendments would stipulate that:

- an independent expert appointment panel should be established by the Australian Government and state and territory governments
- the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission
- the Commonwealth Minister for Employment should select Members for the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.

The panel should also be charged with recommending individuals for appointment to the Workplace Standards Commission.

In making appointments to the panel, governments should avoid appointing people who, in the last ten years, have had professional experience displaying a significant involvement representing employees and employers in courts and tribunals, or active participation in public debates regarding workplace relations policy.

Appointments to the panel should be for a period of no longer than seven years.

RECOMMENDATION 3.4

(SECTION 3.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to strengthen the Fair Work Commission President's existing capacity to direct the work of the Fair Work Commission to set standards for its performance, and to oblige members to cooperate in seeking to meet the standards set by the President and the Fair Work Commission's Member Code of Conduct.

RECOMMENDATION 3.5

(SECTION 3.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to allow for greater external scrutiny of the performance and conduct of Fair Work Commission Members. The establishment of a judicial review function for these purposes would provide for greater external oversight of Members and complement the proposed changes in powers of the Fair Work Commission President to direct Members and set standards for their performance.

RECOMMENDATION 3.6

(SECTION 3.3)

The Australian Government should require the Fair Work Commission to publish more detailed information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.

RECOMMENDATION 3.7

(SECTION 3.3)

The Australian Government should commission an external review of the Fair Work Commission's *New Approaches* activity, at the end of the current pilot program. The review should consult widely and consider alternatives, such as the involvement of private conciliators in overcoming obstacles to better agreement making and averting prospective bargaining disputes.

RECOMMENDATION 3.8

(SECTION 3.3)

The Fair Work Commission and the proposed Workplace Standards Commission should ensure that the governance of its research activities gives consideration to the views of all parties, but does not include direct involvement by them in the selection of research topics or modes of research.

Chapter 4 Minimum wages

RECOMMENDATION 4.1

(SECTION 4.4)

In undertaking the annual wage review, the wage regulator should broaden its analytical framework to consider systematically the risks of variations in economic circumstances on employment and on the living standards of low paid employees.

Chapter 5 Variations from uniform minimum wages

RECOMMENDATION 5.1

(SECTION 5.1)

The Australian Government should ensure that the wage regulator can consider claims of incapacity to pay and, if necessary, vary its modern award minimum wage decision (for example, for an individual employer or on an industry, sector or geographical basis) after an annual wage review has been completed.

RECOMMENDATION 5.2

(SECTION 5.3)

The Australian Government should request the Productivity Commission to undertake a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:

- the role of the current system within the broader set of arrangements for skill formation
- the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression
- the appropriate design and level of government assistance to employers and individuals. The design of government assistance should take into account the factors that affect the supply and demand for apprenticeships and traineeships, including the impact of junior pay rates and immigration policy.

Chapter 8 Repairing awards

RECOMMENDATION 8.1

(SECTION 8.1)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to:

- remove the requirement for continued four yearly reviews of modern awards
- add the requirement that the wage regulator review and vary awards as necessary to achieve the revised modern awards objective specified in recommendation 8.3.

In undertaking this role the wage regulator should:

- use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains
- consult widely with the community on reform options.

RECOMMENDATION 8.2

(SECTION 8.3)

The wage regulator should not be constrained by the current requirement to only vary award wages outside of an annual wage review when the change is justified by work value reasons. The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the wage regulator has the same power to adjust award minimum wages in award reviews as the minimum wage panel currently has in annual wage reviews.

RECOMMENDATION 8.3

(SECTION 8.7)

The Australian Government should replace the current modern awards objective in the *Fair Work Act 2009* (Cth) with a new objective requiring the wage regulator to ensure that modern awards, together with the National Employment Standards, provide a minimum safety net of terms and conditions, which promote the overall wellbeing of the community, taking into account:

- a. the needs of the employed; and
- b. the need to increase employment; and
- c. the needs of employers; and
- d. the needs of consumers; and
- e. the need to ensure modern awards are easy to understand.

RECOMMENDATION 8.4

(SECTION 8.7)

The Australian Government should amend Part 2-3 of the *Fair Work Act 2009* (Cth) to allow variations to modern awards if necessary to achieve or improve outcomes according to the revised modern awards objective.

Chapter 15 Policies for weekend penalty rates

RECOMMENDATION 15.1

(SECTION 15.1)

The Fair Work Commission should, as part of its current award review process:

- set Sunday penalty rates that are not part of overtime or shift work at the higher of 125 per cent and the existing Saturday award rate for permanent employees in the hospitality, entertainment, retail, restaurant and cafe industries
- set weekend penalty rates to achieve greater consistency between the above industries, but without the expectation of a single rate across all of them
- investigate whether weekend penalty rates for casuals in these industries should be set so that casual penalty rates on weekends would be the sum of the casual loading and the revised penalty rates applying to permanent employees, with the principle being that there should be a clear rationale for departing from this.

There should be one year's notice before these changes are made.

RECOMMENDATION 15.2

(SECTION 15.2)

In the event that the Australian Government does not modify the modern awards objective in line with recommendation 8.3, it should amend the *Fair Work Act 2009* (Cth) to clarify that in its award decisions, the wage regulator would not be obliged to provide additional remuneration for weekend work, though it would retain the discretion to do so if warranted by industry circumstances.

RECOMMENDATION 15.3

(SECTION 15.2)

The South Australian, Western Australian and Queensland Governments should remove anti-competitive remnant shopping hour restrictions.

RECOMMENDATION 15.4

(SECTION 15.5)

The Fair Work Commission should not reduce penalty rates for existing public holidays.

Chapter 16 National employment standards

RECOMMENDATION 16.1

(SECTION 16.3)

The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the *Fair Work Act 2009* (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards.

RECOMMENDATION 16.2

(SECTION 16.3)

The Australian Government should amend the National Employment Standards so that newly designated state and territory public holidays are not subject to public holiday penalty rates or a paid day of leave.

RECOMMENDATION 16.3

(SECTION 16.3)

Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with a cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated tradeoff between wage increases and extra paid leave.

Chapter 17 Unfair dismissal

RECOMMENDATION 17.1

(SECTION 17.6)

The Australian Government should introduce:

- non-refundable requirements on the fees for lodgment of unfair dismissal claims
- a subsequent fee, also non-refundable, and of an equivalent dollar amount to the upfront lodgment fee, for unfair dismissal cases going to arbitration.

The Fair Work Commission should also advise all parties that, based on recent decisions, a majority of arbitrated cases do not lead to compensation.

RECOMMENDATION 17.2

(SECTION 17.6)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to give the Fair Work Commission clearer powers, in limited circumstances, to deal with unfair dismissal applications before conducting a conference or hearing, and based on forms provided by applicants and respondents (that is, 'on the papers').

RECOMMENDATION 17.3

(SECTION 17.6)

The Australian Government should amend Division 3 of Part 3-2 of the *Fair Work Act 2009* (Cth) to introduce a two-stage test for considering whether a person has been unfairly dismissed. The first stage should determine whether there was a valid reason for the dismissal. If yes, the second stage test should determine whether any of the factors currently listed in s. 387 (b) - (h) result in the dismissal being deemed harsh unjust or unreasonable.

RECOMMENDATION 17.4

(SECTION 17.6)

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- employees can only receive compensation when they have been dismissed without reasonable evidence of persistent significant underperformance or serious misconduct
- procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or penalties. In repeated or serious cases, the Fair Work Commission could seek penalties by making an application to the Federal Court or Federal Circuit Court.

RECOMMENDATION 17.5

(SECTION 17.6)

The Australian Government should remove the emphasis on reinstatement as the *primary* goal of the unfair dismissal provisions in the *Fair Work Act 2009* (Cth).

RECOMMENDATION 17.6

(SECTION 17.6)

Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the *Fair Work Act 2009* (Cth).

Chapter 18 General protections

RECOMMENDATION 18.1

(SECTION 18.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to formally align the discovery processes used in general protection cases with those provided in the Federal Court's Rules and Practice Note 5 CM5.

RECOMMENDATION 18.2

(SECTION 18.3)

The Australian Government should amend s. 341 of the *Fair Work Act 2009* (Cth) and related explanatory material to more clearly define the meaning and application of workplace rights.

- Modified provisions should indicate that the exercise of a workplace right in instances where a complaint or inquiry has resulted in alleged adverse action must involve instances bearing a direct and tangible relation to a person's employment.
- In this regard, consideration should also be given to a standard 'test' formulation, such as applies in Part 3-1 with regard to dismissals being 'harsh, unjust or unreasonable'.

RECOMMENDATION 18.3

(SECTION 18.3)

The Australian Government should introduce a provision within the *Fair Work Act 2009* (Cth) to allow the awarding of costs against an applicant who unsuccessfully pursues a dismissal claim under Part 3-1 in the face of a Fair Work Commission recommendation that the claim not proceed.

RECOMMENDATION 18.4**(SECTION 18.3)**

The Australian Government should amend Schedule 5.2 of the Fair Work Regulations 2009 (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and reporting processes in this area.

RECOMMENDATION 18.5**(SECTION 18.3)**

If there is continuing growth in general protections case numbers reported by the Fair Work Commission, the Australian Government should further review the operation of the general protections within 18 months of the implementation of recommendations 18.1 to 18.4.

Chapter 20 Enterprise bargaining

FINDING 20.1**(SECTION 20.4)**

The case for imposing statutory requirements on employers and employees to discuss productivity improvements as part of the bargaining process, or for the mandatory inclusion of productivity clauses in agreements, is not strong. Voluntary agreements that promote productivity are highly desirable, but such agreements, and the gains they deliver, should arise from better management, not from a regulated requirement, which is likely to have perverse effects.

RECOMMENDATION 20.1**(SECTION 20.4)**

The Australian Government should amend the *Fair Work Act 2009* (Cth) to:

- allow the Fair Work Commission wider discretion to overlook minor procedural or technical errors when approving an agreement, as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of an unmet procedural requirement.
- extend the scope of this discretion to include minor errors or defects relating to the issuing or content of a notice of employee representational rights.

RECOMMENDATION 20.2

(SECTION 20.4)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to:

- remove matters pertaining to the relationship between employer and employee organisations from the list of permitted matters in enterprise agreements
- specify that an enterprise agreement may only contain terms about permitted matters.

RECOMMENDATION 20.3

(SECTION 20.4)

The Australian Government should amend s. 203 of the *Fair Work Act 2009* (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties.

RECOMMENDATION 20.4

(SECTION 20.4)

The Australian Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- can be up to five years after the day on which the Fair Work Commission approves the agreement, or
- matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where it does so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

RECOMMENDATION 20.5

(SECTION 20.4)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test.

The no-disadvantage test would be conducted by the Fair Work Commission. It would assess that, at the test time, each class of employee, and each prospective class of employee, would not be placed at a net disadvantage overall by the agreement, compared with the relevant modern award(s).

RECOMMENDATION 20.6

(SECTION 20.4)

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that a person could only be an employee bargaining representative if:

- they represent a registered employee organisation with at least one member covered by the proposed agreement, or
- they were able to demonstrate that they were nominated as a representative by a prescribed minimum number of employees (say, 20 employees) or 5 per cent of the employees to be covered by the agreement (whichever is smaller), or
- the employer agrees to recognise them as a bargaining representative.

Chapter 21 Greenfields agreements

RECOMMENDATION 21.1

(SECTION 21.2)

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may:

- continue negotiating with the union
- request that the Fair Work Commission undertake 'last offer' arbitration by choosing between the last offers made by the employer and the union
- submit the employer's proposed greenfields arrangement for approval with a 12 month nominal expiry date.

Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the no-disadvantage test specified in recommendation 20.5.

RECOMMENDATION 21.2

(SECTION 21.2)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to allow for the establishment of project proponent greenfields agreements.

When seeking approval of a greenfields agreement, a project proponent (such as a head contractor) could seek to have its agreement recognised as a project proponent greenfields agreement.

Once a project proponent greenfields agreement is in place for a project, subcontractors that subsequently join the project, and that do not have a current enterprise agreement covering their employees on the project, should have the option of applying to the Fair Work Commission to also be covered by the project proponent greenfields agreement. To approve the application, the Fair Work Commission must be satisfied that:

- the subcontractor does not have an existing enterprise agreement that covers its employees on the project
- the subcontractor was not coerced by any party into joining the project proponent greenfields agreement
- the project proponent greenfields agreement would pass a no-disadvantage test for the employees of the subcontractor against the relevant award.

The Fair Work Ombudsman and Fair Work Building and Construction should periodically carry out investigations to audit compliance and ensure that parties are not being coerced into signing on to project proponent agreements. Sanctions should be put in place for parties found to be engaging in coercion, including financial penalties and exclusion from having future access to project proponent arrangements for a specified period of time.

Chapter 22 Individual arrangements

RECOMMENDATION 22.1

(SECTION 22.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year if agreed by the employee and employer. The Act should specify that the default termination notice period should be 13 weeks.

RECOMMENDATION 22.2

(SECTION 22.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to introduce a new no-disadvantage test to replace the better off overall test for the assessment of individual flexibility arrangements.

To encourage compliance the Fair Work Ombudsman should:

- provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new no-disadvantage test, including template arrangements
- investigate the desirability of upgrading its website to provide a platform to assist employers and employees to assess whether the terms proposed in an individual flexibility arrangement satisfy a no-disadvantage test including non-monetary terms.

RECOMMENDATION 22.3

(SECTION 22.3)

The Fair Work Ombudsman should develop an information package on individual flexibility arrangements and distribute it to employers, particularly small businesses, with the objective of increasing employer and employee awareness of individual flexibility arrangements. It should also distribute the package to the Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives.

Chapter 23 Enterprise contract

RECOMMENDATION 23.1

(SECTION 23.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to create a new employment instrument, the enterprise contract (EC) that would allow businesses the flexibility to vary an award or awards for a class of employees (as nominated by the employer) to suit their business operations.

The employer would be able to offer the EC as a condition of employment for new employees, with existing employees able to join the EC if they choose (coercion would be unlawful). The EC could not be offered to existing employees who are, or new employees who would be, covered by an enterprise agreement.

The Australian Government should also amend the Act to provide the following protections to employers and safeguards to employees so that the employee's wages and conditions under the EC are not below those set out in the relevant award or awards in net terms:

- there would be a requirement that no employee is disadvantaged, in net terms, under the EC when compared with the award (the no-disadvantage test (NDT)) and that the EC cannot set a standard below the National Employment Standards or minimum wage
- employees to be covered by an EC would each be provided with a personal statement about how the EC meets the NDT compared with the award. The employee covered by the EC would sign the personal statement
- a personal statement from any incumbent employee joining an EC must accompany the EC template provided to the Fair Work Commission. The Fair Work Commission would apply the NDT, but only if the employer sought pre-approval or if the tradeoff to pass the NDT depends on non-cash benefits
- employers that use the EC, but choose not to have it approved against the NDT, must retain a list of all employees covered by the EC, for its full term. Failure to provide this list, on request, to the Fair Work Ombudsman would be an offence
- employers would be liable to pay an affected employee or employees the full amount of their lost wages, where the employer does not seek approval for the EC and is later found to have breached the NDT
- all ECs (approved and non-approved) would be available for scrutiny by the Fair Work Ombudsman and third parties, through the lodgment of all EC templates with the Fair Work Commission and publication on its website.

The Australian Government should also introduce penalties in the Act that may apply where there is wilful misconduct in the use of the new EC provisions.

ECs should operate for a nominal period of three years, although employees should be able to opt out and fall back to the relevant modern award after 12 months of joining the EC, as an additional protection.

Future use by an employer of an EC should depend on their proper use of any previous ECs.

RECOMMENDATION 23.2

(SECTION 23.3)

The Fair Work Commission and the Fair Work Ombudsman should have joint responsibility for the enterprise contract. The Fair Work Commission should be responsible for developing and maintaining a lodgment and optional approval system for the enterprise contract. The Fair Work Ombudsman should be responsible for education, compliance, auditing of and monitoring enterprise contracts.

To assist employer compliance and employee awareness, the Fair Work Ombudsman should conduct a six-month information campaign prior to the enterprise contract system coming into force.

The Australian Government should provide additional resourcing to the Fair Work Commission and Fair Work Ombudsman to undertake these functions.

Chapter 25 Alternative forms of employment

RECOMMENDATION 25.1

(SECTION 25.2)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement (under s. 357) where the employer could be reasonably expected to know otherwise.

RECOMMENDATION 25.2

(SECTION 25.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that enterprise agreement terms that restrict the:

- (a) engagement of independent contractors and labour hire workers, or regulate the terms of their engagement, should constitute unlawful terms under s. 194 of the Act
- (b) engagement of casual workers should constitute unlawful terms under s. 194 of the Act.

The Australian Government should also specify in the Act that enterprise agreement terms could not restrict an employer's prerogative to choose an employment mix suited to their business — for example by deterring or discouraging the use of casual workers by restricting their hours of work.

Chapter 26 Transfer of business

RECOMMENDATION 26.1

(SECTION 26.3)

The Australian Government should give the Fair Work Commission more discretion to order that an employment arrangement (such as an enterprise agreement) of the old employer does not transfer to the new employer, where that improves the prospects of employees gaining employment with the new employer. This should be achieved by amending the object (at s. 309) of the transfer of business rules in the *Fair Work Act 2009* (Cth) to include the interests of continuing employment for employees of the old employer. Consideration should also be given to whether this should be echoed in the list of factors the Fair Work Commission must take into account in ss. 318 and 320.

RECOMMENDATION 26.2

(SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) to make clear that a new employer can make an offer of employment to an employee of the old employer conditional on the Fair Work Commission granting an order under s. 318 that the employee's employment arrangement would not transfer to the new employer.

RECOMMENDATION 26.3

(SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) to provide that a transferring employment arrangement automatically terminates 12 months after the transfer, except in transfers between associated entities. The transferring employees should be permitted to commence bargaining for a replacement enterprise agreement nine months after the transfer. If a replacement agreement has not been approved by the 12 month date, the transferring employees would automatically be covered by any other instrument covering the new employer, including the relevant modern award.

RECOMMENDATION 26.4

(SECTION 26.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer.

RECOMMENDATION 26.5

(SECTION 26.3)

The Australian Government should amend Part 2-8 of the *Fair Work Act 2009* (Cth) so that an employment arrangement does not transfer between associated entities in situations where the employee is redeployed to avoid being made redundant.

RECOMMENDATION 26.6

(SECTION 26.4)

The Australian Government should monitor and evaluate the impact of the transfer of business provisions in Part 2-8 of the *Fair Work Act 2009* (Cth), including the collection of evidence on whether there is any noticeable change in the type of orders made, the degree to which restructuring occurs, employment movements and changes in employee conditions associated with transfers.

Chapter 27 Industrial disputes

RECOMMENDATION 27.1

(SECTION 27.3)

The Australian Government should amend Part 3-3 of the *Fair Work Act 2009* (Cth) to:

- allow a protected action ballot to contain a single question authorising all forms of protected industrial action without specifying each type of action. Bargaining representatives would be permitted to voluntarily include ballot questions on specific types of action
- remove the requirement that industrial action be taken within 30 days (or 60 days with an extension) for a protected action ballot result to continue to be valid
- apply a 120 day expiry period to a successful protected action ballot result, regardless of whether protected industrial action is taken during the period, after which a new ballot must be held if further protected industrial action is to be authorised.

RECOMMENDATION 27.2

(SECTION 27.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to clarify that when determining whether to suspend or terminate industrial action under s. 423 or s. 426, the Fair Work Commission should interpret the word 'significant' as 'important or of consequence', subject to the relevant factors for consideration under s. 423(4) or s. 426(4).

RECOMMENDATION 27.3

(SECTION 27.3)

The Australian Government should amend s. 423(2) of the *Fair Work Act 2009* (Cth) such that the Fair Work Commission may suspend or terminate protected industrial action where it is causing, or threatening to cause, significant economic harm to the employer or the employees who will be covered by the agreement, rather than harm to both parties (as is currently the case).

A party engaged in protected industrial action would not be able to seek to have its own industrial action suspended or terminated on the basis of significant economic harm to itself.

RECOMMENDATION 27.4

(SECTION 27.3)

The Australia Government should amend s. 424(1)(c) of the *Fair Work Act 2009* (Cth) to remove a threat to 'welfare' as grounds for suspending or terminating protected industrial action, while retaining the protections relating to life, personal safety or health.

RECOMMENDATION 27.5

(SECTION 27.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer's contingency response.

RECOMMENDATION 27.6

(SECTION 27.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that where employees engage in protected industrial action that last less than 15 minutes, the employer should be permitted to choose to either:

- deduct a 15 minute increment from employee wages, or
- pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay.

It should remain unlawful for employees or employee representatives to ask an employer to pay them for any period of industrial action.

RECOMMENDATION 27.7

(SECTION 27.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to more explicitly allow employers to engage in more graduated forms of protected industrial action in response to employee industrial action.

Forms of employer response action that should be permitted include:

- instituting limits or bans on overtime (analogous to employee overtime bans)
- directing employees to only perform a particular subset of their normal work functions and adjusting their wages accordingly (analogous to employee partial work bans)
- reducing hours of work (analogous to employee work stoppages).

Where an employer restricts employees' work duties or hours of work, employees should be permitted in response to refuse to perform any work (as is currently the case for employers with respect to employee partial work bans).

Graduated forms of protected industrial action by an employer would still count as employer response action and be subject to employee response action and potential suspension or termination by the Fair Work Commission.

RECOMMENDATION 27.8

(SECTION 27.3)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to increase the maximum penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community. A level of three times current penalties would be likely to fulfil that purpose.

Chapter 28 Right of entry

RECOMMENDATION 28.1

(SECTION 28.3)

The Australian Government should amend s. 505A of the *Fair Work Act 2009* (Cth) for determining when the Fair Work Commission may make an order to deal with a dispute about frequency of entry by an employee representative to:

- repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier's critical resources
- require the Fair Work Commission to take into account:
 - the cumulative impact on an employer's operations of entries onto the premises
 - the likely benefit to employees of further entries onto the premises
 - the employee representative's reason(s) for the frequency of entries.

Chapter 29 Migrant workers

RECOMMENDATION 29.1

(SECTION 29.3)

The Department of Immigration and Border Protection and the Fair Work Ombudsman should improve the information available on their websites about migrant workers' workplace rights and conditions. They should also explore other ways of providing migrants with this information, ensuring that it is in easily accessible languages and formats.

RECOMMENDATION 29.2

(SECTION 29.3)

The Australian Government should give the Fair Work Ombudsman additional resources to identify, investigate, and carry out enforcement activities against employers that are underpaying workers, particularly migrant workers.

RECOMMENDATION 29.3

(SECTION 29.3)

Penalties for breaching Reg. 3.44 of the Fair Work Regulations 2009 (Cth) by keeping false or misleading documents as required under the Regulations and the *Fair Work Act 2009* (Cth) should be increased to be aligned with similar penalties under s. 234 of the *Migration Act 1958* (Cth).

RECOMMENDATION 29.4

(SECTION 29.4)

The Australian Government should amend the *Fair Work Act 2009* (Cth) to clarify that, in instances where migrants have breached the *Migration Act 1958* (Cth), their employment contract is valid and the *Fair Work Act 2009* (Cth) applies.

RECOMMENDATION 29.5

(SECTION 29.4)

Subject to arrangements that ensure that this is lawful, the Fair Work Ombudsman should not share any identifying information with the Department of Immigration and Border Protection about a migrant who has only breached their employment-related visa conditions.

The Department of Immigration and Border Protection should share any information with the Fair Work Ombudsman about a migrant and their employer, when they suspect an employer has underpaid a migrant.

Chapter 31 Competition policy

RECOMMENDATION 31.1

(SECTION 31.4)

The Australian Government should grant Fair Work Building and Construction shared jurisdiction with the Australian Competition and Consumer Commission to investigate and enforce the secondary boycott prohibitions of the *Competition and Consumer Act 2010* (Cth) in the building and construction industry.